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The State of South Carolina

Opinion No 87-5
P25

Office of the Attorney General

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January 21, 1987

F. Earle Gaulden, Chairman
South Carolina State Board
of Architectural Examiners
Suite 244, 2221 Devine Street
Columbia, South Carolina 29205-2470

Dear Mr. Gaulden:

You have asked that we review a prior opinion of this Office issued August 30, 1978 and reaffirmed on June 28, 1983. The 1978 opinion concluded that a regulation promulgated by the Board of Architectural Examiners which forbids competitive bidding among architects is not entitled to the "state action" exemption first recognized by the United States Supreme Court in Parker v. Brown, 317 U.S. 341 (1943). In your letter, you have requested that this Office review the opinion in light of two recent cases by the United States Supreme Court. See, Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L.Ed.2d 24 (1985) and Southern Motor Carriers Rate Conference, Inc. v. U. S., 471 U.S. 48, 85 L.Ed.2d 36 (1985). You also seek review of the opinions on the basis that the regulation in question has now been affirmatively approved by the General Assembly in the form of the enactment of a joint resolution. See Act No. 218 of 1985. For the reasons set forth more fully below, it is our opinion that a court would most likely conclude that the regulation in question is now entitled to the "state action" exemption.

The regulation in question (R11-17) provides as follows:

> Architects shall not enter into a contract for professional services on any basis other than direct negotiation thereby precluding

> participation in any system requiring a comparison of compensation.

The foregoing regulation was promulgated in 1985 pursuant to the authority delegated to the Board pursuant to § 40-3-50 (to make rules and regulations) and pursuant to the Administrative Procedures Act, Section 1-23-10 et seq., and was approved by the General Assembly in 1985 as part of a "package" of regulations submitted by the Board of Architectural Examiners. See Act No. 218 of 1985. Act No. 218 was entitled "A Joint Resolution To Approve Regulations Of The Board Of Architectural Examiners Relating To Practice Of Architecture, Designated As Regulation Document Number 431, Pursuant To The Provisions Of Act 176 Of 1977." Section 1 of Act No. 218 provided as follows:

> SECTION 1. The regulations of the Board of Architectural Examiners, relating to Practice of Architecture, designated as Regulation Document Number 431, and submitted to the General Assembly pursuant to Act 176 of 1977, are approved.

It is undisputed that R11-17 was included within Regulation Document Number 431. The aforesaid joint resolution was signed by the Governor and became effective on the 13th day of May, 1985.

The United States Supreme Court first enunciated the doctrine of "state action" immunity in Parker v. Brown, supra. In Parker, the Court interpreted the Sherman Antitrust Act as inapplicable to the anticompetitive conduct of a state acting through its legislature. 317 U.S. at 350-351. The Court held that the Sherman Act was instead intended to prohibit private restraints on trade, concluding that Congress did not intend to "nullify a state's control over its officers and agents" in activities directed by a state legislature. Id. Based upon the doctrine of federalism, the court reasoned that in contrast to individual or private agreements, Congress intended that deference must be given to the "legislative command of the state...." Id. Numerous other cases since Parker have reaffirmed the basic doctrine of state action immunity. See, City of Lafayette v. Louisiana Power and Light Company, 435 U.S. 389 (1978); Community Communications Company v. City of Boulder, 455 U.S. 40 (1982); New Motor Vehicle Board v. Orrin W. Fox Company, 439 U.S. 96 (1978); Cantor v. Detroit Edison Company, 428 U.S. 579 (1976);

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Hoover v. Ronwin, 466 U.S. 558 (1984).

Recently, the Supreme Court clarified certain ambiguities in the application of the "state action" doctrine. In Town of Hallie v. City of Eau Claire, supra, the Court reiterated that in order for a municipality or other governmental entity to qualify for the state action exemption from the antitrust laws, it must demonstrate "that it is engaging in the challenged activity pursuant to a clearly expressed state policy." More specifically, the statute or enactment in question must "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition. ..." 85 L.Ed. 2d at 32. The Court further concluded, however, that while there must be a "clear articulation" of state policy to displace competition, such does not mean that the state must have "compelled" the particular governmental entity to have acted in this way. In eliminating any requirement of state compulsion, the Court noted that

> [n]one of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown.... This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy.

The Court also held that where a municipality is involved, there is no requirement of active state supervision to qualify for the "state action" exemption, such as there is with private parties.

> Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further

> purely parochial public interest at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the state to supervise actively the municipality's execution of what is a properly delegated function. 85 L.Ed.2d at 34.

Based upon the test articulated in Town of Hallie, it would appear that the policy of the State Board of Architectural Examiners regarding competitive bidding as expressed in R11-17 is now entitled to the "state action" exemption created in Parker v. Brown and most recently articulated in Town of Hallie. There are several reasons for this conclusion. First, it is evident that in this situation there has been affirmative approval of an agency regulation by the General Assembly and thus such action constitutes action in a purely legislative sense. This is unlike the situation where the legislature as a body does not affirmatively act upon rules and regulations submitted by an administrative agency, see Clark v. Valeo, 559 F.2d 642 (D. C. Cir. 1977), but merely silently "approves" such regulations; arguably, such is not action in the true legislative sense of the word. See, Op. Atty. Gen., March 19, 1986. Where as here, however, both houses of the legislature have affirmatively approved administrative action, such clearly constitutes legislative action by the entire General Assembly. See Clark, supra, 559 F.2d at 687 (MacKinnon, J. concurring). See also, Opinion of the Justices, 431 A.2d 783, 788 (N. H. 1981) ["the approval ... of the proposed rules ... is undoubtedly an exercise of legislative power."].

Moreover, the precise manner by which the General Assembly approved the regulation in question in this instance is significant. Such approval was accomplished by the enactment of a joint resolution. Our Supreme Court has stated that a joint resolution "is as potent to declare the legislative will" as an enactment. Smith v. Jennings, 67 S.C. 324, 330 (1903). See also, Rule 10.31(c), Rules of the House (1986 Legislative Manual). The Court further noted that "[w]henever a joint resolution does undertake to lay down a rule of conduct for any portion of the

people of the state it becomes a law and will take effect as such...." 67 S.C. at 330-331. Moreover, this Office has recently concluded that where the General Assembly enacts a joint resolution as contemplated in the Administrative Procedures Act for the approval of proposed regulations, "the Joint Resolution must undergo the three readings required by Article III, Section 18." Op. Atty. Gen., March 19, 1986. And, in this instance, Act No. 218 was signed by the Governor as any other statute. Thus, the method of approval of the regulation by Act No. 218 does not differ substantively from the enactment of any other statute. Accordingly, there has been an express articulation of public policy by the "supreme legislative power of the state." Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946).

Perhaps it could be argued that the General Assembly did not fully appreciate or recognize its approval of R11-17 because, in contrast to other regulations which were submitted for the first time, it was noted in the submission to the legislature that R11-17 "remains the same." The argument would thus be that the General Assembly simply "approved" this regulation without thought or careful study; the argument would run that because it was submitted as part of a larger package of regulations and apparently a more complete synopsis of this specific regulation's purpose was not submitted to the legislature, in contrast to other regulations, the General Assembly did not really appreciate or understand its approval of R11-17.

We cannot agree that the legislature approved R11-17 in this fashion. The General Assembly is presumed to have fully understood the import of words used in a statute. Powers v. Fidelity and Deposit Company of Maryland, 180 S.C. 501, 186 S.E. 523 (1936). It is not for the courts to inquire into the motives of the legislature or what may have motivated the General Assembly. Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939). The legislature is presumed to know the law and not to do a futile thing. Graham v. State, 109 S.C. 301, 96 S.E. 138 (1918); Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). See also S. C. State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938). It must be presumed that the legislature knew its own intention and that when such intention is couched in unambiguous terms, the act expresses that intention.

In enacting a statute or resolution, it must be presumed that the legislature acted with deliberation and with full knowledge of the effect of the act and with full information as to the subject matter and existing conditions and relevant facts. 82 C.J.S., Statutes § 316; See also, 73 Am.Jur.2d, Statutes, § 28 [incorporation by reference].

Thus, when the General Assembly stated in Act No. 218 of 1985 that the "regulations of the Board of Architectural Examiners, relating to practice of architecture, designated as Regulation Document Number 431 and submitted to the General Assembly pursuant to Act 176 of 1977, are approved ..." [and, as noted above, it is recognized that Regulation Document Number 431 included R11-17], we must conclude that R11-17 was approved by the General Assembly acting in its full legislative capacity. Such approval must thus be deemed to express and articulate the policy of the State.

Thus, we conclude that Hallie and previous decisions of the United States Supreme Court mandate that R11-17 is entitled to the "state action" antitrust exemption. We believe that approval of R11-17 by both houses of the General Assembly (subject to the three reading requirement) and by the Governor would fully meet the test articulated in Town of Hallie. In our view, approval of the regulation by a joint resolution of the General Assembly, which is equivalent to a statutory enactment, would constitute a "'clearly articulated and affirmatively expressed' state policy to displace competition." Hallie, 85 L.Ed.2d at 32. 1/

1/ Since the State Board of Architectural Examiners is clearly a state agency and there is no requirement for "active supervision" with respect to state agencies, Hallie, supra at p. 4421 note 10; Gold Cross Ambulance and Transportation v. City of Kansas City, 705 F.2d 1005, 1013 (8th Cir. 1983); Brazil v. Arkansas Board of Dental Examiners, 593 F.Supp. 1354 (E. D. Ark. 1984), no further inquiry is necessary as to whether the "state action" exemption has been met.

Accordingly, it is our opinion that R11-17 is entitled to state action immunity. 2/ If we can be of further assistance, please let us know. With kindest regards, I remain

Very truly yours,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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2/ Previous opinions of this Office (dated August 30, 1978 and June 28, 1983) reaching a different conclusion, are distinguishable because they were based upon different circumstances, i.e. the fact that the General Assembly had not affirmatively approved R11-17 and the fact that Hallie had not yet been decided.

We would further point out that Hallie made clear that it is "not necessary ... for the state legislature to have stated explicitly that it expected [the political subdivision] to engage in conduct that would have anticompetitive effects...." It is instead "sufficient that the statutes authorize the [political subdivision] ... to provide the services in question and "'clearly contemplate that a [political subdivision] ... may engage in anticompetitive conduct.'" Savage v. Waste Management Inc., 623 F.Supp. 1505, 1509 (D. S. C. 1985), quoting Hallie, 105 S.Ct. at 1718. The Board of Architectural Examiners is given the express authority by § 40-3-50 to "promulgate regulations governing the practice of architecture and architects not inconsistent with the provisions of this chapter or other existing law and which do not infringe upon the practice of any other profession." Moreover, § 40-3-140 authorizes the Board to seek an injunction if one of its regulations is violated. Strong arguments can thus be made that the General Assembly contemplated by these provisions that the Board might engage in anticompetitive conduct. Thus, there is now considerable authority permitting application of the Parker rationale to this situation, even if the General Assembly had not been affirmatively approved by joint resolution the regulation in question.