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September 12, 1985

The Honorable Ramon Schwartz, Jr.
Speaker, S.C. House of Representatives
Law Range
Sumter, South Carolina 29150

RE: Opinion Request Concerning R7-92, South Carolina Alcoholic Beverage Control Commission Regulations

Dear Mr. Speaker:

Thank you for your letter of August 15, 1985, wherein you request the opinion of this Office whether R7-92, Alcoholic Beverage Control Commission Regulations, prohibits the transfer of beer between licensed retail locations owned by the same person or corporation. 1/

You identify the problem as follows:

> My concern is that some of these huge chain stores feel that they should be treated as one permittee even though they may hold numerous licenses. For example: a giant supermarket chain has beer delivered to one of their licensed locations and then transfers the beer into their other stores throughout the state. I am concerned that this defeats the purpose of territorial assignments

1/ The ABC Act does not limit the number of retail beer and wine permits owned or held by a person. Parenthetically, beer and wine permits are only issued to individuals, although the permit may be held for the benefit of a corporation or partnership. § 61-9-320, CODE OF LAWS OF SOUTH CAROLINA (1984 Cum. Supp.); R7-76; R7-78.

and runs afoul of Regulation R7-92 of the S.C. Beer and Wine Law.

We first address whether § 61-9-1100, CODE OF LAWS OF SOUTH CAROLINA, 1976 (1984 Cum. Supp.) [Territorial Assignment Law] prohibits the type of transfers you have identified. Of course, in the construction of a statutory enactment, the primary goal is to ascertain and give effect to the intention of the Legislature. Anders v. S.C. Parole and Community Corrections, 279 S.C. 206, 305 S.E.2d 229 (1983). In ascertaining this intent, the best guidance comes from the language of the statute itself, and the words used therein should be given their usual and ordinary meaning. Bouie v. City of Columbia, 378 U.S. 347 (1964); Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 99 (1955). Moreover, where the statute is plain and unambiguous, it must be applied literally since the Legislative design is unmistakeable. Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978); Lail v. Richland Wrecking Company, Inc., ____ S.C. ____, 313 S.E.2d 342 (S.C. Appeals 1984). And in particular, a statute cannot be extended to cover areas that are not among those covered by the language the Legislature has chosen to use. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942).

Applying these well settled rules to the question at hand, we conclude that § 61-9-1100 does not proscribe the transfer of beer between retailers. While it is clear, and you have so recognized, that the General Assembly was concerned with promoting the fair and efficient distribution of beer throughout the state in the enactment of § 61-9-1100, and in providing for the regulation of that distribution, it is equally clear that the General Assembly did not choose to accomplish this identified purpose by regulating the transfer or sale of beer by retail outlets. Nothing in the identified legislation provides a regulatory scheme that restricts the distribution of beer by retailers or, in particular, prohibits a retailer from selling or transferring beer or wine to another retail location. Thus, if there exists a proscription upon such activity, it must be found elsewhere.

You have identified R7-92, Alcoholic Beverage Control Commission Regulations, as possibly addressing this problem. Again, since we have located no statutory proscription upon the activity identified, whether such activity is prohibited,

becomes a question controlled by the intent of the regulation. R7-92 provides in part:

> It shall be unlawful for a person who holds a retail beer and wine permit or a retail beer permit to sell to any other holder of a retail beer and wine permit or retail beer permit for the purpose of resale of beer and/or wine unless such a retail permit holder also has a wholesale permit to sell beer and/or wine for wholesale purposes.

While there are certain similarities in the rules governing the construction of regulations and statutes, the respective rules of construction are significantly dissimilar as well. The courts have held that if the question "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of a controlling weight unless it is plainly erroneous or inconsistent with the regulation ... Our only tools, therefore, are the plain words of the regulation and any relevant interpretation of the Administrator." [emphasis added] Bowles v. Seminole Rock Company, 325 U.S. 410, 413 & 414 (1945); see also, U.S. v. Larionoff, 431 U.S. 864 (1977); 2 Davis Administrative Law Second Ed. (1982 Cum. Supp.). Furthermore, courts must respect an agency's interpretation of its own regulation even if there may be more than one reasonable interpretation [Udall v. Tillman, 384 U.S. 1 (1965)], and even if the construction is not the one that the court would adopt in the first instance. Belco Petroleum Corporation v. Federal Energy Regulatory Commission, 589 F.2d 680 (D.C.Cir. 1978). Thus, when there exists an administrative interpretation of an agency regulation, this Office is not free to choose a different construction of that regulation even if we believe a different construction to be more reasonable than that chosen by the agency. This Office must defer to any reasonable construction applied by the agency.

With regard to R7-92 and the question presented, we have the benefit of an administrative interpretation. [See attached letter of July 11, 1985, from Nicholas P. Sipe,

Executive Director of ABC Commission, to Dwight Drake.] 2/ The Executive Director, acting at the behest of the Commission, construed R7-92 as being inapplicable to transfers of beer between retail beer and wine locations, if the locations are owned by the same person or permit holder. In reaching this interpretation, the Director noted that R7-92 had never been interpreted to prohibit such transfers. In addition, the administrative interpretation relied heavily upon the use of the terms "other holder" as used within the regulation.

This Office cannot conclude that the agency's interpretation of its own regulation is contrary to the language of the regulation and thus an unreasonable interpretation. On the contrary, the language of R7-92 supports the agency's position that R7-92 is inapplicable to transfers of beer between retail locations owned by the same person. 3/ First, we recognize that the regulation is limited in its proscriptive scope to the "sale" of beer and wine by a retail dealer. The word "sale" or "sell" as used in enactments involving alcoholic beverages ordinarily means "the transfer of title to the liquor from one person to another." Anno. 89 ALR 3rd 551 "What constitutes 'sale' of

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2/ The weighted deference to an agency's interpretation of its own regulation is not lessened where the construction originates from an authorized staff member as opposed to the Commission itself. Thorpe v. Housing Authority, 393 U.S. 268 (1969); Borelli v. Reconstruction Finance Corporation, 196 F.2d 730 (Em. App. 1952); California Molasses Company v. California and Hawaiian Sugar Company, 551 F.2d 1230 (T.E.C.A. 1977); Virginia Hospital Association v. Kenley, 427 F. Supp. 781 (E.D. Va. 1977).

3/ In reaching this conclusion, we emphasize that the agency's interpretation may well not have been our choice if we were construing this provision in the first instance, but again such is irrelevant. We also point out that the regulation is ambiguous primarily because the word "holder" has various usages in other ABC regulations and in the ABC statutes; the word holder is used on occasion to mean "location" and on other occasions it appears to mean the person who possesses the permit.

Liquor." And ordinarily there must be a distinct "seller" and a distinct "purchaser." Scoggin v. Morrilton 124 Ark. 585, 187 S.W. 445 (1916); see also, 48 C.J.S. "Intoxicating Liquor" § 244. Thus, an application of R7-92 consistent with the use of the word "sale" in its ordinary significance would not proscribe transfers of beer between retail locations owned by the same person. By comparison, the Commission in R7-35 uses the broader term "transfer" in prohibiting transfers from one retail liquor outlet to another. But, however, the Commission provides that a transfer between distinct outlets is not prohibited if the outlets are owned by the same person. Surely, the Commission would have drafted R7-92 in similar language if it intended to make it applicable to all transfers of beer and wine and not just sales. These considerations are addressed solely to demonstrate that the agency's interpretation of its own regulation is not inconsistent with the language and thus not an unreasonable construction.

Accordingly, we construe neither § 61-9-1100 of the SOUTH CAROLINA CODE nor R7-92 (as construed by the South Carolina Alcoholic Beverage Control Commission) as prohibiting the transfer of beer from one retail outlet to another owned by the same permit holder.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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Attachment
REVIEWED AND APPROVED BY:

ROBERT D. COOK
Executive Assistant for Opinions