1979 WL 42882 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 23, 1979

***1** The Honorable John M. Rucker
Representative—District No. 40
1219 Boyce Street
Newberry, South Carolina 29108

Dear Representative Rucker:
You have requested an opinion on the constitutionality of a statute which would be state-wide in its applicability, but which would allow a county by referendum to remove itself from the provisions of that law. Presumably this would be a criminal statute regulating Sunday business closings. It is my opinion that a statute in that form would probably violate the State Constitution.

Previous local-option civil statutes have been upheld under our State Constitution. Amerker v. Taylor, 81 S.C. 163, 62 S.E. 7 (1908) (liquor sales); Gaud v. Walker, 214 S.C. 451, 478, 53 S.E.2d 316, 329 (1948) (selection of plan of local government); see, Duncan v. York, 267 S.C. 327, 228 S.E.2d 92 (1976) (selection of Home Rule form of government, etc.). However, the statute under consideration raises constitutional questions which go beyond the above-cited cases.

First, Article 1, § 3, S.C.CONST., provides that '. . . [no] person [shall] be denied the equal protection of the laws.' The Supreme Court has held that the equal protection clause of the State Constitution prohibits the enactment of '. . . a statute that varies the punishment for an offense according to the county or district in which it is committed . . ..' Thompson v. S.C. Commission on Alcohol and Drug Abuse, 267 S.C. at 473, 229 S.E.2d 718 (1976) quoting 21 Am.Jur.2d, Criminal Law, § 582. The statute considered in that case provided that acts constituting public drunkenness would not be considered a criminal offense in any county in which the local governing body had approved that county's participation in an alcohol and intoxication treatment program. In counties that did not participate, such acts would constitute a criminal offense. That statute was declared unconstitutional. Presumably the statute now under consideration would impose criminal liability under state law in one county for certain conduct and no criminal liability in other counties for the same conduct, based on the outcome of a county referendum. Such a statute would most likely violate the equal protection guarantee of the State Constitution by varying criminal liability from one county to another.

Furthermore, the equal protection clause requires a legislative act to apply equally to all persons within an appropriate class. Thompson v. S.C. Commission on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976). The appropriate class, in this instance, would probably be comprised of all business establishments in the State. Some might argue that each county should constitute a separate class, because local attitudes toward Sunday closings may vary from county to county. However, the reasons underlying Sunday closings statutes are largely secular, intending to provide a uniform day of rest for the citizens of the State. State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965). Since such reasons are of statewide applicability, going beyond local attitudes toward Sunday business activity, the proper class in this instance should consist of all businesses within the State rather than making a separate class for each county. Therefore, the equal protection guarantee of the State Constitution would probably prohibit businesses in one county from being treated differently than businesses in another.

***2** Second, the Home Rule Amendment to the Constitution provides that 'no county shall be exempted from the general laws . . ..' Article VIII, § 7, S.C.CONST. (as amended). This clause in the Constitution has not yet been definitively construed by our Supreme Court. While this provision was undoubtedly intended to prohibit special acts of the legislature exempting specific counties from the general law, it quite likely would also prohibit any legislative plan whereby general law would be applicable in some counties while not in others. See, Duncan v. York, 267 S.C. 327, 228 S.E.2d 92 (1976); see also, 16

Am.Jur.2d Constitutional Law, § 510. Furthermore, Article VIII, § 14 provides that 'in enacting provisions . . . authorized by this article [i.e., Home Rule], general law provisions applicable to the following matters shall not be set aside; . . . (5) criminal laws and the penalties and sanctions for the transgression thereof . . ..' This would seem to reinforce the conclusion that no county can be exempted from general criminal statutes.

Third, the statute under consideration would permit the voters of a county to suspend within that county the operation of the state criminal law concerning Sunday closings. The Constitution provides, however, that '. . . the power to suspend the laws shall be exercised only by the General Assembly . . ..' Article 1, § 7, S.C.CONST. Although this provision has not been applied by our Supreme Court, other state courts have held that similar provisions of their constitutions prohibit local-option legislation which permits exceptions to general state law based on county referendums. Ex parte Mitchell, 177 S.W. 953 (Tex. 1915) (regulation of billiard rooms). Therefore, this is a potential constitutional problem.

For the above reasons, it is my opinion that a statute such as the one under consideration would not be proper under the State Constitution. One alternative, however, that may be constitutionally permissible would be a statute which would grant counties the exclusive power to regulate Sunday closings. The exercise of such power by the counties could even be made subject to a county-wide referendum. In any event, if counties were lawfully to permit Sunday business activity by ordinance, it would be necessary that there be no state-wide criminal law prohibiting any business activity otherwise permitted by the local ordinance.
Sincerely yours,

Daniel R. McLeod
Attorney General

1979 WL 42882 (S.C.A.G.)

End of Document