1974 S.C. Op. Atty. Gen. 22 (S.C.A.G.), 1974 S.C. Op. Atty. Gen. No. 3685, 1974 WL 22423

Office of the Attorney General

State of South Carolina
Opinion No. 3685
January 4, 1974

***1** Possession and consumption of alcoholic beverages in apartment complex clubhouses is regulated by Section 4–29, South Carolina Code of Laws (1962), as amended, which specifically sets forth the circumstances in which it is lawful for persons twenty-one years of age or older to transport, possess and consume lawfully acquired alcoholic liquors.

Director
South Carolina Alcoholic Beverage Control Commission

This letter is in response to your request for an opinion from this office delineating the ways in which possession and consumption of alcoholic beverages in apartment complex clubhouses are affected by the recently enacted "mini-bottle" legislation. Inasmuch as most beers and wines are classified under Section 4–201, South Carolina Code of Laws (1962), as nonalcoholic and nonintoxicating, the following information is not intended to express any opinion on the usage of those beverages on the above-mentioned premises.

Section 4–29, South Carolina Code of Laws (1962), as amended, specifically sets forth the circumstances in which it is lawful for persons twenty-one (21) years of age or older to transport, possess and consume lawfully acquired alcoholic liquors:

....
(2) Any person may possess or consume alcoholic liquors:
(a) In a private residence, hotel room or motel room;

(b) Or on any other property not engaged in any business or commercial activity, at private gatherings, receptions, or occasions of a single and isolated nature, and not on any repetitive or continuous basis, with the express permission of the owner and any other person in possession of such property, and to which the general public is not invited;

(c) In separate and private areas of an establishment whether or not such establishment includes premises which are licensed pursuant to subsections (3) and (4) of this section, where specific individuals have leased such areas for a function not open to the general public.

Possession and consumption of alcoholic beverages except as expressly authorized in Section 4–29(2) constitutes a violation of law:
Any person who transports, possesses or consumes alcoholic liquors except in a manner permitted by this article and any person who violates any of the provisions thereof shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one hundred dollars or be imprisoned for more than thirty days. Section 4–29.10, South Carolina Code of Laws (1962), as amended. (Emphasis added.)

Liability to criminal prosecution for noncompliance with statutory prerequisites is a common feature of alcoholic beverage legislation. 48 C.J.S. Intoxicating Liquors § 222.

The question thus becomes one of applying the conditions of Section 4–29 to the apartment clubhouse situation. Section 4–29(2)(a) allows possession and consumption in private residences, hotel rooms and motel rooms. It is only applicable here if, as some apartment managers maintain, "the clubhouse is an extension of the tenant's residence." This theory is not grounded upon either statutory or common law. To the contrary, in the area of alcoholic beverage regulation, the term "private residence" has been narrowly construed to include only the actual dwelling quarters and not other outbuildings within the curtilage. People v. Vail, 202 Mich. 513, 168 N.W. 451; see generally 33A Words and Phrases, p. 463–466. As a result subsection (2)(a) is not relevant to the immediate inquiry.

***2** Section 4–29(2)(b) does permit individual possession and consumption in clubhouse type facilities provided that each of its conditions is met:

(1) The property must not be "engaged in any business or commercial activity." Obviously this section contemplates more in the way of business activity than the mere fact that some portion of each tenant's rent is devoted to meeting the management's costs in providing and maintaining the clubhouse. Essentially the question is one of fact rather than law. "Commercial activity" is broadly defined to include "any type of business or activity which is carried on for a profit." 15A C.J.S. Commercial § 1. The actual realization of a profit is not the determinative factor, it is the intent or objective of those in charge of the operation as manifested by their words and conduct. Generally speaking, a gathering of apartment residents and invited guests hosted by the management at which an assessment is charged to defray the cost of entertainment and set-ups is not a "commercial activity". Payment of an admission tax under South Carolina Tax Commission Amusement Tax Regulations does not, in and of itself, make the activity "commercial", but may have a bearing when considered in conjunction with other facts. The realization of a profit and/or the indiscriminate admission of members of the general public would be two factors indicating a "commercial activity". Likewise, the use of a cover charge to defray the cost of "free" beer or "free" liquor is a suspect practice which has been viewed in the past by the courts as a subterfuge intended to evade licensing requirements. Winter v. Pratt, 258 S.C. 397, 189 S.E.2d 7 (1972).

(2) The possession and consumption of alcoholic beverages must be "at private gatherings, receptions, or occasions by a single and isolated nature, and not on any repetitive or continuous basis...." No statutory guidelines have been provided which indicate what frequency of use is sufficient to show repetitive and continuous use. This, too, becomes a question of fact. As a matter of practical application, the words "single and isolated" are usually interpreted as meaning unique, occurring alone, sporadic and not likely to recur. Besser Co. v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141; see generally 22A Words and Phrases, p. 522.

(3) Members of the general public cannot be invited to such gatherings. Only the apartment residents and their invited guests may attend.

(4) The use of the club house must be with the express permission of either the owner or any other person actually in possession of the facility.

Finally, Section 4–29(2)(c) provides for the leasing by designated persons of separate and private areas of an "establishment" for a function not open to the general public. While it may fairly well be assumed that "establishment" was intended to refer to business operations, its usage is not limited in subsection (c) and, thus, could possibly be applied to the leasing of non-public facilities. The statutory requirements are obvious: 1) a specific individual must 2) lease 3) a separate and private area 4) for a function not open to the general public. Any such lease, however, will also have to comply with S.C. Regulation 15 providing further that: 1) the lease must be in writing; 2) the host or sponsor must purchase and deliver all alcoholic beverages; and 3) the lease automatically terminates at two o'clock in the morning. (A copy of this regulation should be attached to any distributions of this opinion.)

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