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September 29, 1988

Thomas S. Linton, Director
Legislative Council of the
General Assembly
State of South Carolina
P. O. Box 11489
Columbia, SC 29211

Dear Mr. Linton:

This letter is in response to your July 26, 1988, letter to this office concerning the effect of a 1980 amendment, Act 442, to the South Carolina Administrative Procedures Act, Act 176 of 1977. Specifically, your question is the effect the 1980 amendment had on the notice and hearing requirements for agencies as set forth in Act 176 of 1977.

In interpreting a statute, it is the primary obligation of both a court and this Office to determine legislative intent and give it effect if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Words of a statute are generally given their plain and ordinary meanings. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). Where the language is plain and unambiguous, it must be applied literally. Martin v. Ellisor, 266 S.C. 377, 223 S.E.2d 415 (1976).

Applying the rules of statutory construction in interpreting Act 176 of 1977 and Act of 442 of 1980, it is clear that the General Assembly intended by the 1980 amendment to change the requirement of the public hearing in agencies promulgating regulations from mandatory to certain specified requirements.

Section 11 of Act 176 of 1977 addressed the content of the notice requirements for proposed regulations by a state agency. Section 11 stated that:

September 29, 1988

Notice of rules to be published

Section 11. (a) This section applies only to the promulgation of regulations as defined in item (4) of Section 1 of this article and is subject to the additional requirements of Section 12 of this article.

(b) General notice of proposed promulgation of regulations shall be published in the State Register at least two weeks prior to promulgation of the regulation, unless persons subject thereto are personally served or otherwise have actual notice thereof in accordance with law. The notice shall include:

(1) A Statement of the time, place and nature of the public hearing at which the proposed regulation shall be considered. (Emphasis added).

(2) Reference to the legal authority under which the regulation is proposed.

(3) Either the provisions of or a synopsis of the proposed regulation.

(c) After notice required by this section, the agency shall give interested persons an opportunity to be heard through submission of written data, views of arguments with or without opportunity for oral presentation.

There is no question that one of the purposes of the 1980 amendments to the Administrative Procedures Act was to change the notice requirement as to the promulgation of regulations by state agencies. The heading of Act 442 of 1980 stated in part that:

An Act To Amend Act 176 of 1977, As Amended, The Administrative Procedures Act, So As To More Specifically Define The Responsibilities Of State Agencies To Give Notice Of Proposed Promulgation Of Regulations And Receive Public Comment Thereon,... (Emphasis added).

Additionally, section 1 of Act 442 amended section 11 of Act 176 of 1977 as follows:

"Section 11. (a) This section applies only to the promulgation of regulations as defined in item (4), Section 1, of this article

and is subject to the additional requirements of Section 12 of this article.

(b) Prior to the promulgation, amendment, or repeal of any regulation, an agency shall:

(1) Give at least thirty days' notice of intended action by publication of a notice in the State Register. The notice shall include either the text or a synopsis of the proposed regulation, the statutory authority for its promulgation, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely requests of the agency for advance notice of proposed promulgation of regulations.

(2) Afford all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing. Opportunity for oral hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. The agency shall fully consider all written and oral submissions respecting the proposed regulation. (Emphasis added).

(c) A proceeding to contest any regulation on the ground of noncompliance with the procedural requirements of this section must be commenced within one year from the effective date of the regulation."

Therefore, the 1980 amendment removed from the general notice to be published by agencies in the State Register the requirement of a public hearing that had previously been necessary on all occasions as stated in section 11(b)(1) of the 1977 Act to the requirement of having an oral hearing only when the requirements of section 11(b)(2) of the 1980 amendment were met; i.e., "[o]pportunity for oral hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency or by an association having not less than twenty-five members."

As you are aware, there have been two amendments since the 1980 amendment to the Administrative Procedures Act, Act 190 of 1985 and Act 605 of 1988. A review of these Acts does not reflect

any change in the public hearing requirement as set forth above by Act 441 of 1980.

You have additionally requested an opinion as to the notice requirements necessary by an agency promulgating regulations pursuant to the Administrative Procedures Act. The current notice requirements are set forth in section 1 of Act 605 of 1988. Section 1 of 605 of 1988 amends South Carolina Code section 1-23-110(b) to state as follows:

"(b) Prior to the promulgation, amendment, or repeal of any regulation, an agency shall:

(1) Give notice of a drafting period by publication of a notice in the State Register. The Notice shall include the time when, the place where, and the manner in which interested persons may present their views during the initial drafting procedures before the regulations and submitted as proposed.

(2) Give at least thirty days' notice of intended action by publication of a notice in the State Register. The notice shall include either the text or a synopsis of the proposed regulation, the statutory authority for its promulgation, the time when, the place where, and the manner in which interested persons may present their views on it and a preliminary fiscal impact statement prepared by the agency reflecting estimates of costs incurred by the State and its political subdivisions in complying with the proposed regulation; provided, however, this requirement of a preliminary fiscal impact statement shall not apply to those regulations which are not subject to general assembly review under the provisions of Section 1-23-120. The notice must be mailed to all persons who have made timely requests of the agency for advance notice of proposed promulgation of regulations.

(3) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. Opportunity for oral hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not

less than twenty-five members. The agency shall fully consider all written and oral submissions respecting the proposed regulation."

Therefore, amended section 1-23-110(b)(1) sets forth the notice requirements to be published in the State Register by an agency to promulgate regulations pursuant to the Administrative Procedures Act as a notice of drafting period, section 1-23-110 (b)(1), and a notice of intended action section 1-23-110 (b)(2). The content of those notices to be published in the State Register are also spelled out in sections 1-23-110(b)(1) and 1-23-110(b)(2) respectively. It should be noted that there is no public hearing required to be placed, either in the notice of drafting period or the notice of the intended state action.

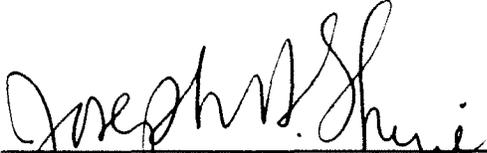
If I can answer any further questions, please do not hesitate to contact me.

Very truly yours,

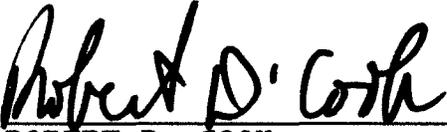

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