STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LIQUOR CONTROL COMMISSION

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| In the matter of the request of | ) |
| **Holly Foods, Inc.,** | ) |
| for a declaratory ruling regarding the validity of | ) |
| administrative rule R 436.1133 | ) |
| | ) |

At the December 17, 2013, meeting of the Michigan Liquor Control Commission (Commission) in Lansing, Michigan.

PRESENT: Andrew J. Deloney, Chairman
Dennis Olshove, Commissioner

## DECLARATORY RULING

Holly Foods, Inc. filed a request for declaratory ruling on September 23, 2013. At a meeting held on October 15, 2013, the Commission granted Holly Foods request to issue a declaratory ruling concerning the validity of Mich Admin Code R 436.1133 (Rule 33). Specifically, Holly Foods requests the Commission to declare that, as applied to the specific facts presented, Rule 33 is not valid for the following reasons:

1. The rule discriminates against Holly Foods in favor of other licensees;
2. The rule exceeds the rule-making authority delegated to the Commission under the Michigan Liquor Control Code of 1998 (Code); and
3. The rule was rescinded by operation of law when the Code was adopted.

## I. Facts Presented

Holly Foods is the holder of a Specially Designated Merchant (SDM) license with Sunday Sales (AM) at 15191 N. Holly, Holly, Michigan 48442 which allows Holly Foods to sell beer and wine for consumption off the premises. Holly Foods states that it is a full service grocery store located in the Holly Plaza Shopping Center just northeast of N. Holly Road and Grange Hall Road in the Village of Holly.

Holly Foods made application on October 19, 2012 for a new Specially Designated Distributor (SDD) license under the quota provided for in Section 533 of the Michigan Liquor Control Code, MCL 436.1533. An SDD license would allow Holly Foods to sell spirits and mixed spirit drink for consumption off the premises in addition to beer and wine. A completed application was received on October 24, 2012 and the application was authorized for investigation by the Commission's Enforcement Division (Enforcement) on October 26, 2012. Enforcement reported that there was one existing SDD license located within 2,640 feet of Holly Foods. Unless one of its exceptions applies, Rule 33 prohibits the Commission from issuing Holly Foods a new SDD license. Rule 33 provides:

> An application for a new specially designated distributor license or for the transfer of location of an existing specially designated distributor license shall not be approved by the commission if there is an existing specially designated distributor license located within 2,640 feet of the proposed site. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503. This rule may be waived by the commission for any of the following reasons:
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> (a) If the existing specially designated distributor has purchased less than $10,000.00 in spirits from the commission during the last full calendar year.

(b) If the existing specially designated distributor has a B-hotel or A-hotel license.

(c) If the proposed location and the existing specially designated distributor's licensed establishment are separated by a major thoroughfare of not less than 4 lanes of traffic.

(d) If the proposed licensed establishment is located in a neighborhood shopping center which does not have an existing specially designated distributor's licensed establishment and if the proposed licensed establishment is located not less than 1,000 feet from any existing specially designated distributor's licensed establishment. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503.

(e) If an existing specially designated distributor licensee is located within 2,640 feet of 1 or more existing specially designated distributor licensees and requests a transfer of location, which location is within 2,640 feet of the same existing specially designated distributor licensee or licensees, upon a showing of good cause by the licensee who is requesting the transfer of location.

The Commission concluded that the location is within 2,640 feet of an existing SDD license and does not meet any of the waiver provisions and, therefore, at a meeting held February 6, 2013, denied Holly Foods request for a new SDD license under administrative rule 33. In response to the denial, Holly Foods filed an appeal, which the Commission heard on June 27, 2013. A decision is still pending.

## II. Applicable Law

Article IV, Section 40 of the Constitution of Michigan 1963 permitted the Legislature to establish the Commission, which shall exercise complete control of the alcoholic beverage traffic in this state, including retail sales, subject to statutory limitations. Consequently, the Legislature established the Commission and gave it the sole right,

power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor in this state, including the manufacture, importation, possession, transportation and sale of alcoholic liquor under Section 201(2) of the Code, MCL 436.1201(2). In furtherance of this duty to control alcoholic beverage traffic and traffic in other alcoholic liquor in this state, the Legislature conferred upon the Commission the authority to adopt rules and regulations governing the carrying out of this act and the duties and responsibilities of licensees in the proper conduct of their licensed places under Section 215(1) of the Code, MCL 435.1215(1). These rules shall be promulgated by the Commission under the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

In *Mallchok v Liquor Control Commission of Michigan*, 72 Mich App 341 (1976), the Michigan Court of Appeals held that all of the Commission's orders, policies, and procedures regarding licensing qualifications must be promulgated as rules under the provisions of the Administrative Procedures Act. As a result, the Commission promulgated emergency rules under Section 48 of the Administrative Procedures Act, MCL 24.248, which were filed with the Secretary of State on February 18, 1977. These emergency rules included the 2,640-feet prohibition contained in Rule 33. Thereafter, the Commission promulgated similar rules under the non-emergency provisions of the Administrative Procedures Act, which became effective on March 14, 1978.

According to MCL 436.2303(2), those rules promulgated under former act 1933 (Ex Sess) PA 8, and in effect on the effective date of the Code, remain in effect until rescinded or otherwise changed according to law, as provided for in Section 31 of the Administrative Procedures Act of 1969.

The crux of this request for this declaratory ruling by Holly Foods is the promulgation of administrative rule R 436.1133 which was the basis for the denial of their application for a new SDD license and states:

> An application for a new specially designated distributor license or for the transfer of location of an existing specially designated distributor license shall not be approved by the commission if there is an existing specially designated distributor license located within 2,640 feet of the proposed site. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503. This rule may be waived by the commission for any of the following reasons:
>
> (a) If the existing specially designated distributor has purchased less than $10,000.00 in spirits from the commission during the last full calendar year.
>
> (b) If the existing specially designated distributor has a B-hotel or A-hotel license.
>
> (c) If the proposed location and the existing specially designated distributor's licensed establishment are separated by a major thoroughfare of not less than 4 lanes of traffic.
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> (d) If the proposed licensed establishment is located in a neighborhood shopping center which does not have an existing specially designated distributor's licensed establishment and if the proposed licensed establishment is located not less than 1,000 feet from any existing specially designated distributor's licensed establishment. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503.
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> (e) If an existing specially designated distributor licensee is located within 2,640 feet of 1 or more existing specially designated distributor licensees and requests a transfer of location, which location is within 2,640 feet of the same existing specially designated distributor licensee or licensees, upon a showing of good cause by the licensee who is requesting the transfer of location.

## III. History of the promulgation of R 436.1133

The Michigan Court of Appeals in the case of *Mallchok v Liquor Control Commission of Michigan,* 72 Mich App 341 (1976) rendered a decision that all of the Commission's orders, policies and procedures regarding licensing qualifications must be promulgated as rules under the provisions of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328. As a result of this decision, the Commission promulgated emergency rules under Section 48 of the Administrative Procedures Act, MCL 24.248 which were filed with the Secretary of State on February 18, 1977. These emergency rules included the 2,640-feet prohibition contained in R 436.1133. Thereafter, the Commission promulgated similar rules under the provisions of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328 which became effective on March 14, 1978. At no time during this process or no time since has the Commission's authority to promulgate this rule been at issue.

## IV. Analysis

As stated above, Holly Foods asserts three challenges to Rule 33. First, Holly Foods maintains that Rule 33 is not valid because it discriminates against Holly Foods in favor of other licensees. Specifically in this instance Holly Party Shoppe-North located at 15228 N. Holly, Holly, MI 48442 is 446 feet from Holly Foods proposed location. Holly Foods contends that discriminatory rules are barred by Section 32 of the Administrative Procedures Act, MCL 24.232(2). Although MCL 24.232(2) contains that limitation, Holly Foods incorrectly concludes that Rule 33 is discriminatory. Rule 33 treats all similarly

situated licensees and applicants the same. It provides a qualification that an applicant for a SDD license must meet before approval of the Commission can be granted. In this instance, Holly Foods does not meet the requirement of being located over 2,640 feet from any existing SDD license, specifically Holly Party Shoppe-North; it also does not meet any of the exceptions to the proximity restriction contained in the rule. The Commission applies this rule uniformly for all applicants for a SDD license and any applicant for a SDD license that is located within 2,640 feet of an existing SDD license must meet one of the exceptions contained in the rule for the Commission to consider granting a waiver of the proximity restriction. In this matter, Holly Foods did not qualify for an exception. Notably, the Commission does not have the discretion to waive the rule unless one of the exceptions applies. *Kassab v Acho* 150 Mich App 104, 112(1986). An agency is bound by its own rules. *Id.*

Second, Holly Foods also maintains that Rule 33 exceeds the Commission's rule-making authority contained in the Liquor Control Code. Holly Foods claims that Section 533 of the Code does not direct, instruct, authorize, or delegate rule-making authority to the Commission with respect to the issuance of a SDD license. If this was in fact the case the Commission could not apply any of its other licensing qualifications in evaluating an applicant for a SDD license, including past convictions and the operating record of the applicant as a licensee of the Commission. As noted above, the Commission was given broad discretion to promulgate rules to govern the carrying out of the Code. The Code addresses licensing people to sell alcoholic liquor and gives the Commission authority to make licensing decisions. See, e.g., MCL 436.1501. Rules carrying out the Code's

licensing provisions include rules concerning licensing qualifications. Further, in Kassab v Acho 150 Mich at 112, the court held "[t]hat the commission's rules and regulations, promulgated pursuant to the Liquor Control Act, MCL 436.7; MSA 18.977, prohibit the commission from issuing an SDD license in violation of the one-half mile rule."

Finally, Holly Foods contends that Rule 33 was rescinded by operation of law when the Code was adopted. Holly Foods asserts under Section 31(2) of the Administrative Procedures Act, MCL 24.231(2), the rule was automatically rescinded as of the date the former Act, 1933 (Ex Sess) PA 8, was repealed. However, the same rule-making power or duty was vested in the same agency, namely the Commission, in the Code that was adopted by the legislature. Further, the Code specifically states in Section 1303(2), MCL 436.2303(2), that those rules promulgated under former act, 1933 (Ex Sess) PA 8, and in effect on the effective date of the Code shall remain in effect until rescinded or otherwise changed according to law under the Administrative Procedures Act of 1969, MCL 24.231. Thus, Rule 33 was not automatically rescinded by operation of law when the Code was adopted.

## V. Conclusion

The constitutional provision and statutes cited above support the Commission's broad rulemaking authority in its exercise of control of the alcoholic beverage traffic in Michigan. In fact, the Michigan Court of Appeals recognized this authority in a case dealing with the one-half mile rule. *Kassab v Acho* 150 Mich at 112. Further, there is no provision in the Code that limits the Commission from setting proximity restrictions or

geographical limitations on applicants for licensure. Rule 33 was properly promulgated under the provisions of the Administrative Procedures Act of 1969 with legislative oversight through the Joint Committee on Administrative Rules and is applied uniformly as part of the licensing qualifications an applicant for a new SDD license must satisfy. Finally, the Code clearly states that those rules promulgated under former act 1933 (Ex Sess) PA 8 and in effect on the effective date of the Code shall remain in effect until rescinded or otherwise changed according to law under the Administrative Procedures Act of 1969,MCL 24.231.

The Commission, therefore, concludes that administrative rule R 436.1133 was properly promulgated, is a licensing qualification that applies uniformly to all applicants for new SDD licenses, and was not rescinded by operation of law when the Code was adopted by the Legislature.

MICHIGAN LIQUOR CONTROL COMMISSION

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Andrew J. Deloney, Chairman

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Dennis Olshove, Commissioner

Date: December 17, 2013