

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

March 24, 2008

Honorable Kevin J. Green
State Representative
The Capitol
Lansing, MI 48909

Dear Representative Green:

Attorney General Cox has asked me to respond to your letter asking whether it is legal for a business to serve a complimentary glass of beer to patrons in its barbershops. Due to the subject matter of your request, I asked staff in the Alcohol and Gambling Enforcement Division to review your letter. The following represents their findings.

Your request refers to an attached letter from a constituent on whose behalf you ask if it is a violation of the Michigan Liquor Control Code of 1998 (Code), 1998 PA 58, MCL 436.1101 *et seq.*, to serve a complimentary beer at certain of the barbershops operated by the constituent's corporation. The constituent's letter indicates that complimentary beer is offered to customers and non-customers at the noon hour and thereafter. In addition, your constituent advises that its policy to offer complimentary beer involves the following restrictions: 1) the person served must be over the age of 21; 2) the person must not have consumed any alcohol before visiting the barbershop; 3) the person must consume the offered beer on barbershop premises; and 4) the person is limited to one beer per day. The patron is not required to purchase a service or make some other purchase to obtain the complimentary beer.

Your question requires review of the Code's statutory provisions. In construing statutes, courts give effect to the Legislature's intent as expressed in a statute's plain terms, giving the statutory wording its plain and ordinary meaning. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the language of a statute is unambiguous, a court need not look outside of nor construe the statute, but must enforce the statute as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). Where a statute contains a definition, the definition supersedes any commonly accepted dictionary definition. *W. S. Butterfield Theatres, Inc, v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958), cited in *Betten Auto Ctr, Inc, v Dep't of Treasury*, 478 Mich 864; 731 NW2d 424 (2007).

Section 201(2) of the Code, MCL 436.1201(2), confers on the Liquor Control Commission the "right, power, and duty to control the alcoholic beverage traffic and traffic in

other alcoholic liquor within this state, including the manufacture, importation, possession, transportation and sale thereof."

The Code defines certain words and terms relevant to your question. Section 111(1), MCL 436.1111(1), defines "person" to mean "an individual, firm, partnership, limited partnership, association, limited liability company, or corporation." Section 111(7), MCL 436.1111(7), defines the word "sale" to include "the exchange, barter, traffic, furnishing, or giving away of alcoholic liquor."

Section 203(1) of the Code, MCL 436.1203(1), confers authority on the Commission over persons and entities that may traffic in alcoholic liquor, stating in relevant part:

Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

Persons not licensed by the Commission are prohibited from manufacturing or selling alcoholic liquor under section 901, MCL 436.1901:

A person, directly or indirectly, himself or herself or by his or her clerk, agent, or employee, shall not manufacture, manufacture for sale, sell, offer or keep for sale, barter, furnish, import, import for sale, transport for hire, transport, or possess any alcoholic liquor unless the person complies with this act.

Section 1027(1) and (4) of the Code, MCL 436.2027(1) and (4), places restrictions on alcoholic liquor samplings and tastings:

(1) Unless otherwise provided by rule of the commission, a person shall not conduct samplings or tastings of any alcoholic liquor for a commercial purpose except at premises that are licensed by the commission for the sale and consumption of alcoholic liquor on the premises.

* * *

(4) For purposes of this section, "commercial purpose" means a purpose for which monetary gain or other remuneration could reasonably be expected.

The above-cited statutes provide explicit direction that a person, as defined by the Code, may not engage in sales, furnishings, or the giving away of alcoholic liquor unless the person complies with all applicable requirements enacted under the Code. The Code's definition of the word "sale" leaves no doubt that an unlicensed person engaged in a regular business practice of furnishing or giving away alcoholic liquor engages in the

sale of alcoholic liquor. Further, neither the Code nor the Liquor Control Commission's rules promulgated under the Code, 1979 AC, R 436.1001 *et seq.*, contain any provision allowing the serving of alcoholic liquor on unlicensed barbershop premises.

Moreover, section 913(1) of the Code, MCL 436.1913(1), directs that an unlicensed person may not provide for nor engage in alcoholic liquor transactions:

(1) A person shall not do . . . the following:

(a) Maintain, operate, or lease, or otherwise furnish to any person, any premises or place that is not licensed under this act within which the other person may engage in the drinking of alcoholic liquor for consideration.

* * *

(5) As used in this section, "consideration" includes any fee, cover charge, ticket purchase, the storage of alcoholic liquor, . . . or the purchasing of any service or item, or combination of service and item

Subsections (1) and (5) of section 913 plainly indicate that a person who maintains or operates unlicensed premises, e.g., a barbershop, while storing alcoholic liquor on the premises and permitting patrons to engage in the drinking of alcoholic liquor on the same premises offends the statute.

Further, because the word "consideration" as defined in section 913(5), MCL 436.1913(5), includes "any fee" or "the purchasing of any service or item, or combination of service and item," the question arises whether the activity of serving free beer on an unlicensed premises constitutes "consideration." Michigan's courts have held that "consideration" is present where there is any amount of significant economic activity. In *United-Detroit Theaters Corp v Colonial Theatrical Enterprise, Inc*, 280 Mich 425; 273 NW 756 (1937), defendants gave out tickets for a lottery to both the theater's paying customers and to persons not paying but standing in the theater's foyer or on the street in front of the theater. Defendants argued they were not operating an illegal lottery because the three elements for establishing a lottery – consideration, prize, and chance – were not present. Defendants claimed consideration was lacking since non-paying customers were given the lottery tickets without charge. But the Court rejected their argument, citing *Sproat-Temple Theatre Corp v Colonial Theatrical Enterprise, Inc*, 276 Mich 127; 267 NW 602 (1936), and *Glover v Malloska*, 238 Mich 216; 213 NW 107 (1927). In doing so, the Court noted that, while some patrons did not pay for theater admission tickets or for the lottery tickets that might entitle them to a prize, and though the defendants did not receive any direct consideration from these individuals, consideration was nevertheless paid and received because the prizes attracted persons on the street as well as persons from other theaters into defendants' theaters. "In this manner those obtaining prizes pay considerations for them, and the theaters reap a direct financial benefit." 280 Mich at 429.

Therefore, it is reasonable to conclude that an unlicensed barbershop promoting free beer to patrons, whether or not the patrons pay for haircuts or hair products, is employing the offer of free beer as a solicitation device. By this device, the barbershop attracts paying customer business from persons passing by on the street and from those who learn of the offer by word of mouth. By using the free beer device, the barbershop also seeks to draw customers from other barbershops to its own premises. Thus, similar to the free prize offerings to non-paying patrons in *United-Detroit Theaters Corp*, the barbershop uses the free beer offer to non-paying customers as consideration, i.e., to reap a direct financial benefit. Only a licensed business may do so consistent with MCL 436.1913(1).

Subsections(1), (3), and (4) of section 909, MCL 436.1909(1), (3) and (4), provide the following pertinent criminal penalties for violations of the Code:

(1) Except as otherwise provided in this act, a person, other than a person required to be licensed under this act, who violates this act is guilty of a misdemeanor.

* * *

(3) A person who performs any act for which a license is required under this act without first obtaining that license or who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor under section 1107 is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than \$1,000.00, or both.

(4) It is the intent of the legislature that the court, in imposing punishment under this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attempts to commercialize violations of this act or the rules or regulations promulgated under this act.

In addition, there may be other requirements or constraints set out in ordinance provisions of a political subdivision having jurisdiction over the subject premises that might apply. The nature of the liquor business is such that municipal entities are permitted to regulate alcoholic liquor traffic inside their boundaries while exercising their police powers but subject to the Commission's larger overall control. "[T]he power of the local communities to control alcoholic beverage traffic is extremely broad." See *Bundo v City of Walled Lake*, 395 Mich 679, 699-700; 238 NW2d 154 (1976).

Honorable Kevin J. Green
Page 5

Therefore, in order for a person to provide complimentary beer to patrons visiting its barbershops, the person may only do so with the required licensing or other permission by the Commission under MCL 436.1203(1), MCL 436.1901, MCL 436.2027(1), and MCL 436.1913(1).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Carol L. Isaacs". The signature is fluid and cursive, with a large initial "C" and "I".

Carol L. Isaacs
Chief Deputy Attorney General