Ohio Elections Commission
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October 31, 1986

ADVISORY OPINION NO. 86-2

Syllabus: Where divisions (I) and (J) of Revised Code section 3517.13 conflict with the statutory authority of the Ohio Department of Liquor Control to purchase brand names of spirituous liquor, the department's statutory authority supercedes the provisions of R.C. section 3517.13 (I) and (J).

TO: William J. Flaherty, Director, Ohio Department of Liquor Control

You have requested an opinion on the following question:

> Do divisions (I) and (J) of Revised Code section 3517.13 apply with respect to purchases of spirituous liquor by the Ohio Department of Liquor Control?

Chapter 4301 of the Revised Code establishes the Department of Liquor Control and sets the forth the duties of the department. R.C. section 4301.10 provides in relevant parts as follows:

> (A) The department of liquor control shall:
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> (3) <u>Put into operation, manage and control a system of state liquor stores for the sale of spirituous liquor at retail</u> and to holders of permits authorizing the sale of such liquor; . . . . . and by means of such stores, and such manufacturing plants, distributing and bottling plants, warehouses, and other facilities as it deems expedient, establish and maintain a state monopoly of the distribution of such liquor and its sale in packages or containers; and for such purpose manufacture, <u>buy</u>, import, possess, <u>and sell spirituous liquors</u> as provided in Chapters 4301 and 4303 of the Revised Code, and in the regulations promulgated by the director of liquor control pursuant to such chapters; . . . borrow money to carry on its business, and issue, sign, endorse, and accept notes, checks, and bills of exchange; but all obligations of the department created under authority of this division shall be a charge only upon the monies received by the department from the sale of spirituous liquor and its other business transactions in connection therewith, and shall not be general obligations of the state;
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> (8) Exercise all other powers expressly or by necessary implications conferred upon the department by Chapters 4301 and 4303 of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters.
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> (B) The department may:
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> (4) Fix the wholesale and retail prices at which the <u>various classes, varieties, and brands of spirituous liquor</u> shall be sold by the department. . . . <u>In fixing selling prices, the department shall compute an anticipated gross profit</u> at least sufficient to provide in each calendar year all costs and expenses of the department, including the costs and expenses of enforcement, and also an adequate working capital reserve for the department. Such gross profit shall not exceed thirty-five percent of the retail selling price based on the costs of the department, and in addition the sum required by Section 4301.12 of the Revised Code to be paid into the state treasury. (Emphasis added)

R.C. section 4301.19 provides in part as follows:

> * * * * * * * *
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> If any persons desire to purchase any variety or brand of spirituous liquor which is not in stock at the state liquor store where the same is ordered, the department shall immediately procure the same after reasonable deposit is made by the purchaser in such proportion of the approximate cost of the order as is prescribed by the rules or regulations of the director. The purchaser shall be immediately notified upon the arrival of the spirituous liquor at the store at which it was ordered. Unless such purchaser pays for the same and accepts delivery within five days after the giving of such notice, the department may place such spirituous liquor in stock for general sale, and the deposit of the purchaser shall be forfeited.

As recited above, the Department of Liquor Control has a statutory duty to put into operation and manage a system of state liquor stores and to purchase and offer for sale spirituous liquor at retail to the general public and to permit holders. The department is delegated responsibility for operating a retail business in which the state has decided to engage. Moreover, the department is mandated by statute to pay for the expenses of the department from its income from sales of spirituous liquor and to anticipate a gross profit in setting prices for spirituous liquor. Chapter 4301 of the Revised Code grants the department broad authority to determine the best and most efficient way of carrying out its statutory responsibilities. In State, ex rel. Fisher, Dir., Dept. of Liquor Control v. Ferguson, Auditor of State, 142 O.S. 179, 184 (1943), the Ohio Supreme Court noted this grant of authority. The court stated:

> The department is authorized to enter into contracts of all descriptions within the scope of its functions as defined by the Liquor Control Act. Language could scarcely be formulated to state more clearly a purpose to confer upon the Department of Liquor of Control all the power and authority essential to establish, maintain, and conduct the very extensive business entrusted to it. The Department of Liquor Control, having been placed in full charge of the liquor business in which the state decided to engage, was delegated the power and discretion essential to carry out that purpose. . . . Authority, full and complete, is conferred to administer all the affairs of the department.

As in the private sector, the success of the department in operating a business at a profit is dictated by the department's ability to satisfy consumer demand, including preferences for particular varieties and brands of spirituous liquor. The language contained in R.C. section 4301.10(B)(4), to wit, that the department shall fix the wholesale and retail prices at which the various classes, varieties and brands of spirituous liquor shall be sold by the department, anticipates that the department will stock more than one variety and more than one brand of the different varieties of spirituous liquor. R.C. section 4301.19 further demonstrates the obligation of the department to meet consumer preferences. That section provides that if a particular variety or brand of spirituous liquor is not in stock, a patron may require the department to order it. The concern of the General Assembly that the Department of Liquor Control be responsive to consumer demand is no doubt due to the fact that the department maintains a monopoly over the sale of spirituous liquor within the state of Ohio.

A particular brand of spirituous liquor is not a fungible item. Each brand has its own recipe and most are patented. Even if the difference between brands is negligible, consumer preferences are often based on brand names as opposed to properties of the actual product. A particular brand is manufactured by a particular distillery. Therefore, there is only one source from which the particular brand may be purchased. For these reasons, purchases of particular brands cannot be competitive bid. It is well recognized that competitive bidding for a sole source item is inconsistent with the theory behind competitive bidding. Section 3-205 of the American Bar Association's Model Procurement Code for State and Local Governments states as follows:

> A contract may be awarded for a supply, service, or construction item without competition when, under

> regulations promulgated by the Policy Office, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

Likewise, sole source items and competitive bidding are treated as being inconsistent in the publication State and Local Government Purchasing of the National Association of State Purchasing Officials of the Council of State Governments and under Ohio's own regulations on competitive bidding. OAC 123:5-1-30(A) declares that, "It is the policy of the state that specifications [for items to be purchased through competitive bidding] permit maximum practical competition consistent with the purpose." Part of the reason for competitive bidding is to secure the lowest price. However, all contracts by the Department of Liquor Control for spirituous liquor require the supplier to guarantee the department the lowest price at which the product is offered to any other purchaser nationwide.

In some instances, divisions (I) and (J) of R.C. section 3517.13 may on their face prohibit the award of a purchase contract for spirituous liquor. The divisions do not contain any exemption for goods and services which a department or agency is obligated to purchase, but which are available from only one source. In such instances, a statutory conflict arises between the Department of Liquor Control's obligation to purchase particular brands of spirituous liquor and the provisions of R.C. section 3517.13(I) and (J). This conflict must be resolved according to the rules of statutory construction. However, before proceeding to resolve this conflict, it is important to first clarify the function of the Ohio Elections Commission in issuing advisory opinions with respect to divisions (I) and (J) of R.C. section 3517.13.

The Commission does not grant exemptions to R.C. section 3517.13 (I) or (J). Only those exemptions which are expressly or implicitly legislated by the General Assembly are available. However, the Commission has been authorized to render advisory opinions construing legislative intent with respect to particular cases. Where statutory language is clear and does not conflict with other statutory provisions, then legislative intent is apparent. However, where statutory language is ambiguous or conflicting, then legislative intent must be determined by resort to the rules of statutory construction.

It is well settled that where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence. State v. Frost, 57 O.S. 2d 121 (1979), Cincinnati v. Thomas' Soft Ice Cream, Inc., 52 O.S. 2d 76 (1977), Gibson v. Summers Construction Co., 163 O.S. 220 (1955), Andrianos v. Community Traction Co., 155 O.S. 47 (1951), Acme Engineering Co. v. Jones, 150 O.S. 423 (1948), Doll v. Bar, 58 O.S. 113 (1898). In addition to case law, R.C. section 1.51 provides as follows:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Divisions (I) and (J) of R.C. section 3517.13 are general provisions and were enacted in 1974. The Liquor Control Act was enacted in 1935 creating the Department of Liquor Control and delegating to it responsibility for putting into operation and managing a system for purchasing and selling spirituous liquor in Ohio. However, there is no manifest legislative intent in R.C. section 3517.13 that its general provisions shall prevail over special provisions of other statutes which are in irreconcilable conflict. In order for the later general provision to supersede the special statute, it must be clear that the General Assembly intended a repeal of the special statute. State, ex rel. Myers v. Chiaramonte, 46 O.S. 2d 230, 239 (1976), Lucas County Commissioners v. Toledo, 28 O.S. 2d 214 (1971), Muskingum Co. v. Board of Public Works, 39 O.S. 628 (1984), Leach v. Collins, 123 O.S. 530 (1931). There is no indication in the language of R.C. section 3517.13(I) or (J), that the General Assembly intended to repeal the obligation of the Department of Liquor Control to be responsive to consumer preferences by purchasing and providing for retail sale different varieties and brands of spirituous liquor.

For the reasons stated herein, it is the opinion of the Ohio Elections Commission that where divisions (I) and (J) of R.C. section 3517.13 are in conflict with the statutory authority of the Ohio Department of Liquor Control to purchase brand names of spirituous liquor, the department's statutory authority supersedes the provisions of R.C. section 3517.13 (I) and (J).

Larry H. James, Chairman

Voting to issue the Opinion: Larry H. James, Harry J. Lehman and Ralph C. McNichols.
Voting not to issue the opinion: Judith D. Moss and Thomas Moody.