

Mailing Date: NOV 23 2010

[Appeal](#)

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE FOR THE PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-0921
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W09-399556
v.	:	
	:	LID - 53682
WYCOMBE VINEYARDS INC	:	
T/A WYCOMBE VINEYARDS & WINERY	:	
1391 FOREST GROVE RD	:	
FURLONG PA 18925-1367	:	
	:	
BUCKS COUNTY	:	
LICENSE NO. LK-197	:	

JUDGE SHENKLE
 BLCE COUNSEL: Roy Harkavy, Esq.
 LICENSEE COUNSEL: John A. Torrente, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on May 7, 2010. There are three counts in the citation.

The first count alleges that Licensee violated §505.2(a)(6.3) of the Liquor Code, 47 P.S. §505.2(a)(6.3), by permitting patrons to possess wine in that part of its satellite limited winery habitually used for the service of wine after 10:00 p.m. on September 4, 2009, and after 9:00 p.m. on October 31, 2009.

The second count alleges that Licensee violated §505.2(a)(6.1) of the Liquor Code, 47 P.S. §505.2(a)(6.1), on August 27 and September 4, 2009, by furnishing and/or giving food for consumption off premises at a place other than its limited winery's primary location.

The third count alleges that Licensee violated §505.2(a)(6.1) of the Liquor Code, 47 P.S. §505.2(a)(6.1), on August 27, September 4, October 1 and 31, 2009, by selling wine for consumption by the glass at a place other than its limited winery's primary location.

A hearing was held on September 8, 2010, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On April 24, 2008, the Chief Counsel of the Pennsylvania Liquor Control Board signed the following letter to the president of Licensee (LCB Advisory Opinion No. 08-166):

RE: Extension of Hours

Dear Mr. Fraser:

ISSUE: This is response to your letter of April 15, 2008 to this office, in which you ask for permission for your satellite limited winery location in Doylestown to stay open until 10:00 p.m. on the first Friday of each month. The Borough of Doylestown holds a "First Friday" event on these days, and the local businesses are asked to remain open from 6:00 p.m. until 10:00 p.m. so that guests can participate in all the activities. You hold Limited Winery License No. LK-197 (LID 53682). The location to which you refer is at Main Street Market #4, 22 South Main Street, Doylestown, PA 18901 (LK-197-1).

OPINION: The operating hours for limited wineries are set forth in section 505.2(a)(6.3) of the Liquor Code [47 P.S. § 5-505.2(a)(6.3)] and generally require limited wineries to cease sales by 9:00 p.m. This section also authorizes a limited winery to remain open to conform to closing times of neighboring mall or shopping district businesses, between Thanksgiving and New Year's Day, so long as they close no later than 10:00 p.m. In addition, a limited winery also may request approval from the Board to extend sales hours in individual locations at other times during the year or beyond the limits of their legal operating hours by making such requests in writing to this office.

Upon good cause, the Board has historically granted the extension of hours at a limited winery location until 10:00 p.m. Thus, your request to extend your hours at your satellite location in Doylestown on the first Friday of each month is hereby granted.

(Exhibit C-3).

2. In addition to its principal business address in Furlong, Pennsylvania (given in the caption above), Licensee has a licensed premises at 22 South Main Street, Doylestown, PA. On Thursday, August 27, 2009, a liquor enforcement officer operating in an undercover capacity visited the Doylestown premises at about 7:40 p.m. There were approximately five patrons inside the premises at that time, eating food and drinking wine (N.T. 8-12).

3. On Friday, September 4, 2009, the officer returned to the Doylestown premises at about 9:35 p.m. There were about ten patrons in the upstairs portion of the premises and about five downstairs. Wine was being served. The officer was given a glass of sangria when he entered and another at about 10:40 p.m. One group of patrons was having fondue. Service was continuing when the officer left the premises at 11:35 p.m. (N.T. 12-13).

4. On Thursday, October 1, 2009, the officer arrived at the Doylestown premises at 8:10

p.m. There were four or five patrons. The officer ordered and was served a glass of sangria. He left the premises at 8:50 p.m. (N.T. 14-15).

5. On Saturday, October 31, 2009, the officer arrived at the Doylestown premises at 9:00

p.m. There were three patrons. Two of them were finishing a meal and the third was having a glass of wine. At 9:45 p.m. the officer identified himself to the manager as a liquor enforcement officer and informed him of the officer's understanding that the premises was permitted to operate until 10:00 p.m. only on the first Friday of each month, but was otherwise required to cease dispensing wine at 9:00 p.m. (N.T. 15-17).

6. On November 30, 2009, Mr. Fraser wrote the following to ra-lblicensing@state.pa.us:

Dear Sir/Madam:

We hold a limited winery license # LK-197-1 which is a satellite location from our primary location. The satellite location is located in the middle of a cultural district with many fine restaurants. The satellite location also has a County Food Establishment License allowing table seating for our customers to enjoy our food offerings. The approved hours for serving wine at our satellite location is 9AM until 9PM except from Thanksgiving to New Years when we can sell/ serve wine until 10PM.

We have recently been cited by enforcement because our patrons did not vacate the premises one half hour after the 9PM time limit citing section 4-499 in the liquor law that pertains to "all" license holders. We were also advised by enforcement that we could apply for an extended food hours permit, application # PLCB-318 that would solve this problem.

After submitting that application, it was returned because that permit did not apply to Limited Wineries and that section 4-499 that enforcement was citing, did not apply to Limited Wineries. I was also advised by licensing that Limited Winery restrictions came under Section 5, not Section 4. At the time, our patrons were still enjoying their dinner but were not being served any additional wine, if they were served wine at all.

It appears that I am caught in the middle between licensing and enforcement. I have no problem with the selling limitations, but I believe there should be a way to allow customers to finish their meal as there is for customers dining at retail licensed establishments.

Please advise at your earliest convenience, preferably before my hearing. Thanks you, Richard A Fraser, Wycombe Vineyards, Inc.

(N.T. 49, Exhibit L-10).

7. On December 24, 2009, the Chief Counsel of the Pennsylvania Liquor Control Board signed the following letter to the president of Licensee (LCB Advisory Opinion No. 09-041): RE: Limited Winery Hours of Operation

Dear Mr. Fraser:

ISSUE: This office is in receipt of your e-mail dated November 3, 2009, [*sic*] in which you advise that you hold a limited winery license for one (1) primary location and one (1) satellite location. You further advise that your satellite location is also a licensed "food establishment." You ask if you were to host a private party at the primary location, such as a wedding or private corporate meeting, must all guests vacate the premises thirty (30) minutes after the 9:00 p.m. required closing time, even if no wine is being sold.

You further inquire if patrons at the satellite location must vacate the satellite premises by 9:30 p.m. if they are still eating their meal and no wine is being sold.

Lastly, you ask if the answer to either of your previously-asked questions is answered in the affirmative, is there a permit available to extend the hours in which food may be offered.

The Board's records indicate that licensee is holder of Limited Winery License No. LK-00197 (LID 53682) for premises located at 1391 Forrest Grove Road, Furlong, Pennsylvania 18925-1367. The Board-approved location is 22 South Main Street, Doylestown, Pennsylvania.

OPINION: Section 505.2(a)(6.3) of the Liquor Code provides that limited wineries may operate only between the hours of 9:00 a.m. and 9:00 p.m. [47 P.S. § 5505.2(a)(6.3)]. However, section 505.2(a)(6.3) permits a limited winery to request approval from the Board to extend sales hours in individual locations beyond the limits of their legal operating hours by submitting such request in writing to the Office of Chief Counsel. In a follow-up phone call conversation with you on December 7, 2009, you advised Board counsel that it would be your intention to remain open for business until 10:00 p.m. on days when the primary location and the satellite location are regularly open to the public. The Board has historically granted requests for the extension of hours at limited winery locations until 10:00 p.m., but for only specifically identified dates. Permission will not be granted for an openended extension of hours.

As to the primary location, while section 499 of the Liquor code requires Article IV licensees to vacate their premises within one-half (1/2) hour from the time they are legally required to stop selling alcohol, that section does not apply to a limited winery. The winery must nonetheless close by either 9:00 p.m. or 10:00 p.m. as set forth above. See 47 Pa. C.S. § 505.2(a)(6.3).

As for the satellite location, while you mentioned the possibility of patrons enjoying a meal at those premises, it is also important to note that limited winery licensees may

only sell items, including food, delineated in section 11.111 of the Board's Regulations. [40 Pa. Code § 11.111]. Sales of food for on-premises consumption, as well as wine sales by the glass, may only be conducted at the limited winery's primary location; sales for consumption at satellite locations are prohibited. See 40 Pa. Code § 11.111(a)(2).

Should you have any further questions or concerns regarding the Liquor Code or the Board's Regulations, please do not hesitate to again contact this office.

(Exhibit C-4).

8. On February 19, 2010, the Chief Counsel of the Pennsylvania Liquor Control Board signed the following letter to the president of Licensee (LCB Advisory Opinion No. 10-037): Re: Reconsideration of LCB Advisory Opinion 09-491

Dear Mr. Fraser:

ISSUE: This letter is in response to your letter dated December 30, 2009, wherein you asked the Pennsylvania Liquor Control Board ("Board") to reconsider Advisory Opinion 09-491, which was issued in response to an e-mail you submitted on November 3, 2009. In that e-mail, you asked three (3) questions:

“1. At the primary location, if we were to host a private party... i.e.; wedding or private corporate meeting, must all guests vacate the premises 30 minutes after the 9:00 PM sales limitation even though wine is no longer being sold?

2. At the satellite location/licensed food establishment, must the patrons enjoying a meal vacate the premises by 9:30 PM even though wine is no longer being sold after 9:00 PM?

3. If either of these questions is answered in the affirmative, is there a permit available to extend the food offering time limit and if so, what application is appropriate?”

In Advisory Opinion 09-491, dated December 24, 2009, this office advised:

“Section 505.2(a)(6.3) of the Liquor Code provides that limited wineries may operate only between the hours of 9:00 a.m. and 9:00 p.m. [47 P.S. § 5505.2(a)(6.3)]. However, section 505.2(a)(6.3) permits a limited winery to request approval from the Board to extend sales hours in individual locations beyond the limits of their legal operating hours by submitting such request in writing to the Office of Chief Counsel. In a follow-up phone call conversation with you on December 7, 2009, you advised Board counsel that it would be your intention to remain open for business until 10:00 p.m. on days when the primary location and the satellite location are regularly open to the public. The Board has historically granted requests for the extension of hours at limited

winery locations until 10:00 p.m., but for only specifically identified dates. Permission will not be granted for an open-ended extension of hours.

“As to the primary location, while section 499 of the Liquor Code requires Article IV licensees to vacate their premises within one-half (1/2) hour from the time they are legally required to stop selling alcohol, that section does not apply to a limited winery. The winery must nonetheless close by either 9:00 p.m. or 10:00 p.m. as set forth above. [See 47 Pa. C.S. § 505.2(a)(6.3)].

“As for the satellite location, while you mentioned the possibility of patrons enjoying a meal at those premises, it is also important to note that limited winery licensees may only sell items, including food, delineated in section

11.111 of the Board’s Regulations. [40 Pa. Code § 11.111]. Sales of food for on-premises consumption, as well as wine sales by the glass, may only be conducted at the limited winery’s primary location; sales for consumption at satellite locations are prohibited. [See 40 Pa. Code § 11.111(a)(2)].”

In your letter dated December 30, 2009, you ask the Board to reconsider its response concerning the need to vacate the premises after “sales hours.” You indicate that at your primary location, where you harvest the grapes and process the wine, there are many evenings when you work into the night. Your concern is that Advisory Opinion 09-491 would make processing the harvest after 9:00 p.m. illegal.

You further suggest that the Board was incorrect when it stated, in Advisory Opinion 09-491, that “Sales of food for on-premises consumption, as well as wine sales by the glass, may only be conducted at the limited winery’s primary location; sales for consumption at satellite locations are prohibited.” It is your position that there is no authority for limiting the sale of food and wine by the glass to the primary location, and not permitting such sales to occur at the satellite location(s).

The Board’s records indicate that Licensee is holder of Limited Winery License No. LK-00197 (LID 53682) for premises located at 1391 Forrest Grove Road, Furlong, Pennsylvania 18925-1367. The additional Board-approved location is 22 South Main Street, Doylestown, Pennsylvania.

OPINION: With regard to the hours of operation, section 505.2(a)(6.3) of the Liquor Code provides that holders of a limited winery license may:

Sell alcoholic cider, wine and wine coolers only between the hours of nine o'clock antemeridian and nine o'clock postmeridian. During the period from Thanksgiving Day through New Year's Day, limited winery sales locations may remain open to conform with the closing times of neighboring mall or shopping district businesses but no later than ten o'clock postmeridian. A limited winery also may request approval from the board to extend sales hours in individual locations at other times during the year or beyond the limits set forth in this clause. The request shall be made in writing to the board's Office of the Chief Counsel and shall detail the exact locations where

sales hours are proposed to be extended, the proposed hours and dates of extended operation and the reason for the proposed extended hours.

[47 P.S. § 5-505.2(a)(6.3)]. As you note in your letter of December 30, 2009, the statute speaks to the hours when sales transactions may be conducted and is silent with regard to the issue of when patrons must vacate the premises. While section 499 of the Liquor Code requires patrons of Article IV licensees to vacate their premises within one-half (1/2) hour from the time the licensee is legally required to stop selling alcohol, that section does not apply to limited wineries, which are Article V licensees.

This distinction reflects the General Assembly's intent to treat limited wineries differently from Article IV licensees. For example, hotel and restaurant licensees may sell alcohol until 2:00 a.m. and club licensees may sell alcohol until 3:00 a.m. [47 P.S. § 4-406(a)(4)]. However, a limited winery may only be open between the hours of 9:00 a.m. to 9:00 p.m., with the option of requesting permission from the Board to remain open until 10:00 p.m. [47 P.S. § 5-509, 40 Pa. Code § 111.11(a)(4)].

Please note that the Board's Regulations use the terms "open" and "sale" interchangeably:

Sales may be made generally only between the hours of 9 a.m. and 9 p.m. Monday to Saturday.... During the period from the Thanksgiving Day holiday through New Year's Day, limited winery sales locations may remain open until 10 p.m. of sales day to conform with the closing times of neighboring mall or shopping district businesses.

[40 Pa. Code § 111.11(a)(4) (emphasis added)]. Therefore, it is the opinion of this office that when a limited winery location is open, it is permitted to sell wine, and that when it is not permitted to sell wine, the limited winery location is closed. To reiterate the answer to your original question about patrons, when the limited winery location is closed, patrons must vacate the premises.

Please be advised that there is nothing in the Liquor Code that requires employees who are actively engaged in an employment-related activity to vacate the premises or cease working. As mentioned above, section 499 of the Liquor Code requires patrons of Article IV licensees to vacate their premises within one-half (1/2) hour from the time the licensee is legally required to stop selling alcohol. [47 P.S. § 499]. Note that a "patron" is defined as "an individual who purchases food, nonalcoholic beverages, liquor, alcohol or malt or brewed beverages for a consideration from a licensee or any person on the licensed premises *except those actually engaged in an employment related activity.*" [47 P.S. § 1-102 (emphasis added)]. Accordingly, even if section 499 applied to limited wineries, your employees could continue with employment-related activities after the winery closed. Therefore, Advisory Opinion 09-491 does not make processing the harvest after 9:00 p.m. illegal.

As to the issue of selling food and wine by the glass at satellite locations, this office's previously stated position is that wine may be sold by the glass at the primary winery location but not at a satellite location. This position is based on the fact that, while sections 505.2(a)(6.1) and 505.2(a)(4) of the Liquor Code specifically mention sales

by the glass when discussing wine sales at the main winery and when the winery is selling under the authority of a wine exposition permit, section 505.2(a)(3) does not mention sales of wine by the glass when discussing sales at satellite locations. This has been the office's position since shortly after limited wineries were given the ability to sell wine by the glass at their primary location by Act 239 of 2004, and this office shall continue to adhere to its consistent position in this matter, absent legislative change. Therefore, no food or wine may be sold for on-premises consumption at a Board-approved satellite location.

In your original letter, you asked if there is a permit available to extend the "food offering time limit." Please note that the General Assembly has provided a mechanism for this in section 505.2(a)(5), which allows holders of a limited winery license to:

[a]pply for and hold a hotel liquor license, a restaurant liquor license or a malt and brewed beverages retail license to sell for consumption at the restaurant or limited winery on the licensed winery premises, liquor, wine and malt or brewed beverages regardless of the place of manufacture under the same conditions and regulations as any other hotel liquor license, restaurant liquor license or malt and brewed beverages retail license.

[47 P.S. § 5-505.2(a)(5)]. Such a license would permit you to apply for extended hours sales and Sunday sales, like any other retail licensee. [See 47 P.S. § 4-406].

(Exhibit C-5).

9. Richard Fraser is Licensee's president. He began growing grapes in 2000 and started producing wine in 2004. The current limited winery license issued by the Board bears the legend:

ALSO AT THE FOLLOWING LOCATIONS:
LK 197-1
MAIN STREET MARKET #4
22 S MAIN ST
DOYLESTOWN PA 18901

(N.T. 27, Exhibit L-2)

10. The license document does not use the phrase "satellite location" or "main location" or "primary location." In applying to the Board for authority to conduct business at the Doylestown premises, Licensee completed form PLCB-1685, entitled "APPLICATION FOR LIMITED WINERY ADDITIONAL BOARD-APPROVED LOCATION" (N.T. 27-29, Exhibit L-3).

11. The retail space at 22 South Main Street had been gutted from its previous use and the developer proposed to renovate the interior 15,000 square feet to have the appearance of a small town with a center walkway of brick. Licensee was the second tenant to take possession (N.T. 29).

12. Construction work began in the summer of 2007 and continued for more than a year, during which the premises was visited by four or five PLCB licensing inspectors. Mr. Fraser believed that there was no question concerning his right to sell wine by the glass and food for consumption on

the licensed premises. He did perceive a gray area in the issue of “closing time” as opposed to “sales hours” and asked the inspectors this question: “I know I can’t sell wine after 9:00 or whatever . . . but what about my patrons there? What time do they leave?” Each of the licensing inspectors told Mr. Fraser to use his best judgment, to allow a reasonable time (N.T. 30-32).

13. Licensee submits its Limited Winery Monthly Report of Operations online, through the Board’s web site. These reports indicated to Mr. Fraser that there was no distinction between the principal winery location and additional locations as to the right to sell wine by the glass or food for on-premises consumption (N.T. 31).

14. For four or five months after opening, the Doylestown business was mainly take-out, because there was no room for a sit-down operation. As the mall neared completion and became fully occupied, foot traffic increased substantially. A neighboring lunch business put out tables and chairs. Mr. Fraser thought of expanding in that way as well. The PLCB’s web site has a link titled rblicensing@state.pa.us which launches an e-mail a person can use to ask questions (N.T. 32-33).

15. Mr. Fraser’s question, sent on October 12, 2007, at 9:32 a.m., had the subject line “Question about wine sales ‘by the glass’ by limited wineries.” The e-mail read:

We have a limited winery (#LK-197-1) and have just been approved for a new satellite location. Can you advise concerning the rules regulating wine by the glass sales? Our location is within a small, inside mall type facility. Although our premise is separate and secure there is table seating in the common area of the mall. The layout is very similar to an inside food court common in many larger shopping malls. May we sell by the glass inside our premises, for the customer to consume at a table located in the common area, which is out side of our premise?

(N.T. 32-34, 37-38, Exhibit L-4).

16. At 10:00 a.m. that day an e-mail was sent to Mr. Fraser with the same subject line. It read: “Act 239 of 2004 allows limited wineries to sell by the glass on the licensed premises, so I would say they have to say [*sic*] on the licensed premises with their glass of wine. I will attach section of the Liquor Code regarding this matter:” The e-mail then quoted the following language from 47 P.S. §5-505.2, relating to limited wineries:

(6.1) Sell food for consumption on or off the licensed premises and sell by the glass only wine and alcoholic ciders that may otherwise be sold by the bottle. (6.2) Sell wine or liquor scented candles acquired or produced by the limited winery.

(6.3) Sell alcoholic cider, wine and wine coolers only between the hours of nine o'clock antemeridian and nine o'clock postmeridian. During the period from Thanksgiving Day through New Year's Day, limited winery sales locations may remain open to conform with the closing times of neighboring mall or shopping district businesses, but no later than ten o'clock postmeridian. A limited winery also may request approval from the board to extend sales hours in individual locations at other times during the year, or beyond the limits set in this clause. The request shall be made in writing to the board's Office of the Chief Counsel and shall detail the exact locations

where sales hours are proposed to be extended, the proposed hours and dates of extended operation and the reason for the proposed extended hours.

(N.T. 32-34, 38-39, Exhibit L-4).

17. Business at the Doylestown location continued to improve. The landlord was developing the lower level of the mall and asked Mr. Fraser if he wanted to expand. There wasn't another square inch available at street level. The landlord proposed a spiral staircase leading down to an area where there could be table seating. Mr. Fraser applied to the Borough to expand their health permit. The Board's licensing inspectors visited again and saw the menus, the wine glasses, the bottles of wine. They did not mention that there was any problem with this, and Mr. Fraser himself did not think there was one (N.T. 34-35).

18. Based on his expectation that the license issued by the Board applied both to the Wycombe winery premises and the Doylestown location, Mr. Fraser went forward with substantial expenditures to prepare the Doylestown location for the intended business. These expenses totaled \$35,119.82. This did not include labor, which Mr. Fraser supplied (N.T. 41-42, Exhibit L-6).

19. After the present enforcement action became known to Mr. Fraser, he was faced with uncertainty going forward as to the type of business he could conduct. Licensee's current lease with its landlord for the Doylestown premises provides that "THIS LEASE IS CONDITIONAL UPON PLCB LICENSING APPROVING IN WRITING THE LEASE SPACE AND TENANT'S ABILITY TO SELL WINE BY THE GLASS AND FOOD IN THE LEASEHOLD SPACE INCLUDING THE EXPANDED AREA UNDER THIS LEASE." (N.T. 43-44, Exhibit L-7).

20. After the Bureau's investigating liquor enforcement officer completed his work in this case he called Mr. Fraser to explain his findings. The officer said that he had been investigating complaints of selling beer and sales to visibly intoxicated persons, and advised of the dates he visited the premises. The officer said his finding was that Licensee was not selling beer, and no service to a visibly intoxicated person was observed. He said he did find three cans of beer, of two different brands, hidden behind one of the coolers in the back. Mr. Fraser attributed that to an employee, kept for personal consumption. The officer said that if the employee brought the beer with him and took it home at night, that was okay (N.T. 45-46).

21. The officer also told Mr. Fraser that he had purchased a glass of wine after 9:00 p.m. Mr. Fraser said he would talk to the employee about that. The officer also said there had been patrons in the premises past 9:30, and informed Mr. Fraser that patrons were required to vacate the premises a half-hour after closing. Mr. Fraser told the officer he'd have to talk with Licensing about this, because there is nothing in the law that requires patrons to vacate. The officer said he would check with his supervisor, and a couple of days later he called Mr. Fraser again to give the authority for the requirement that patrons vacate. He informed Mr. Fraser that there was a way around this problem, by applying to the Board for an Extended Hours – Food Permit. Mr. Fraser got the form for that permit from the Board's web site and sent it in with the \$60 fee (N.T. 46-47).

22. The officer called Mr. Fraser again and advised that he had checked with his supervisor and they were going to stick by the half-hour requirement. Mr. Fraser called a woman in Licensing who advised him that the Bureau's interpretation was wrong. The half-hour requirement does not apply to limited wineries, she said. Mr. Fraser gave her the Bureau enforcement officer's phone number and a couple of days later the woman from Licensing called him back and advised that the Bureau was sticking by their interpretation and there was nothing Licensing could do (N.T. 47-48).

CONCLUSIONS OF LAW:

The first count of the citation does not state a cause of action because 47 P.S. §505.2(a)(6.3) does not regulate the possession of wine, only sales of wine.

The second count of the citation does not state a cause of action because the law does not confine a limited winery's sales of food for on-premises consumption to its primary location.

The third count of the citation does not state a cause of action because the law does not confine a limited winery's sales of wine by the glass to its primary location.

DISCUSSION:

The first count of the citation alleges that Licensee violated §505.2(a)(6.3) of the Liquor Code, 47 P.S. §505.2(a)(6.3). The specification is that Licensee permitted patrons to possess wine in that part of its satellite limited winery habitually used for the service of wine after 10:00 p.m. on September 4, 2009, and after 9:00 p.m. on October 31, 2009.

The evidence supports a conclusion that Licensee served wine to an undercover liquor enforcement officer after the hours during which it was authorized to do so on the two occasions alleged in the citation. However, the citation does not charge Licensee with this violation. Instead, it is alleged that "Licensee permitted patrons to possess wine in that part of its satellite limited winery habitually used for the service of wine" on the two dates mentioned.

47 P.S. §505.2(a)(6.3) is silent as to whether patrons of a limited winery are permitted to possess previously-served glasses of wine after the time when Licensee must cease serving it. Therefore the conduct alleged in the first count is not prohibited by law. If the Bureau had charged Licensee with wine sales outside the permitted hours, the count would have been sustained.

The second count alleges that Licensee violated §505.2(a)(6.1) of the Liquor Code, 47 P.S. §505.2(a)(6.1), on August 27 and September 4, 2009, by furnishing and/or giving food for consumption off premises at a place other than its limited winery's primary location. There is no support in the statute for the proposition that there is any difference at all between a winery's "primary" location and its "satellite" location; indeed, the terms and their synonyms are not used in the Liquor Code in this context.

Licensee's limited winery license document makes no distinction as to the two locations; they are both "Board-approved" licensed premises. All of the rights a limited winery licensee may exercise it may exercise in any area which has been licensed to it.

The same reasoning applies to the third count, which alleges that Licensee violated §505.2(a)(6.1) of the Liquor Code, 47 P.S. §505.2(a)(6.1), on August 27, September 4, October 1 and 31, 2009, by selling wine for consumption by the glass at a place other than its limited winery's primary location. There is no distinction between the two locations.

The Board's advisory opinions, set forth in the findings, take a contrary position, based on 40 Pa. Code §11.111. This regulation was promulgated on March 11, 1969, and amended most recently on October 9, 1998. The authority for this regulation comes from 47 P.S. §2-207(i), which states that the board shall have the power "(i) From time to time, to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of this act."

When this regulation was promulgated, as well as when it was last revised, the policy concerning limited wineries set forth in the Liquor Code was substantially more restrictive than it became with the passage of Act 239 of 2004. When the Liquor Code was reenacted and amended by Act 14 of 1987, the statutory provision relating to limited wineries read as follows:

Section 505.2. Limited Wineries.--Holders of a limited winery license may:

- (1) Produce wines and wine coolers only from fruits grown in Pennsylvania in an amount not to exceed two hundred thousand (200,000) gallons per year.
- (2) Sell wine and wine coolers produced by the limited winery or purchased in bulk in bond from another Pennsylvania limited winery on the licensed premises, under such conditions and regulations as the board may enforce, to the board, to individuals and to hotel, restaurant, club and public service liquor licensees, and to Pennsylvania winery licensees: Provided, That a limited winery shall not, in any calendar year, purchase wine produced by other limited wineries in an amount in excess of fifty per centum of the wine produced by the purchasing limited winery in the preceding calendar year.
- (3) Separately or in conjunction with other limited wineries, sell wine and wine coolers produced by the limited winery on no more than five board-approved locations other than the licensed premises, with no bottling or production requirement at those additional board-approved locations and under such conditions and regulations as the board may enforce, to the board, to individuals and to hotel, restaurant, club and public service liquor licensees.

It may be seen that the rights of a limited winery in this first legislative version were very limited, although from the beginning they have included the right to sell wine at “no more than five board-approved locations other than the licensed premises.” There was no distinction between or among a winery’s primary and additional locations in terms of what they could do. By the time 40 Pa. Code §11.111 was promulgated in its current version, this statute had been amended twice more.

In 1994 the legislature added a preamble making clear that the law was “in the interest of promoting tourism and recreational development in Pennsylvania,” and added a new subsection (4):

- (4) At the discretion of the board, obtain a special wine permit to participate in wine and food expositions off the licensed premises. A special wine permit shall be issued upon proper application and payment of a fee of thirty dollars (\$30) per day for each day of permitted use, not to exceed five (5) consecutive days. A limited winery may not obtain more than five special wine permits in any calendar year. The total number of days for all the permits may not exceed ten (10) days in any calendar year. A special wine permit shall entitle the holder to engage in the sale of wine produced by the bottle or in case lots by the permittee under the authority of a limited winery license. Holders of special wine permits may provide tasting samples of wines in individual portions not to exceed one fluid ounce. Samples at wine and food expositions may be sold or offered free of charge. Except as provided herein, limited wineries utilizing special wine permits shall be governed by all applicable provisions of this act as well as by all applicable regulations or conditions adopted by the board.

For the purposes of this clause, wine and food expositions are defined as affairs held indoors or outdoors with the primary intent of educating those in attendance of the availability, nature and quality of Pennsylvania-produced wines in conjunction with suitable food displays, demonstrations and sales. Wine and food expositions may

also include activities other than wine and food displays, including arts and crafts, musical activities, cultural exhibits, agricultural exhibits and similar activities.

The 1996 amendment added subsection (5):

(5) Apply for and hold a hotel liquor license, a restaurant liquor license or a malt and brewed beverages retail license to sell for consumption at the restaurant or limited winery on the licensed winery premises, liquor, wine and malt or brewed beverages regardless of the place of manufacture, under the same conditions and regulations as any other hotel liquor license, restaurant liquor license or malt and brewed beverages retail license.

It may be seen that the Board's regulation, 40 Pa. Code §11.111, was an appropriate exercise of the regulatory authority at the time it was promulgated and as last amended. However, following that last amendment the legislature went on to make further substantial changes to the statute:

Act 1998-155 increased the allowable days of permits from ten to twenty.

Act 1999-47 authorized a licensee to obtain a permit to use up to 25% "permitted fruit" grown within 350 miles of the winery (possibly not in Pennsylvania).

Act 2002-212 expanded the powers of limited wineries to sell or trade their products with each other if a secondary fermentation process was involved.

Act 2003-15 increased the allowable days of permits from twenty to forty.

Act 2004-239 added subsections (a)(6.1) through (a)(6.3).

This last revision puts a stake through the heart of the proposition that limited wineries are not permitted to sell food for on-premises consumption or wine by the glass.

The legislature has, in effect superseded the inconsistent provisions of the Board's regulations, specifically 40 Pa. Code §11.111(a)(1) and (8).

The Board's prohibition in the first of these provisions, "[t]here may be no sales for consumption on the licensed premises" has been rendered inoperative by the legislature's declaration that "holders of a limited winery license may (6.1) Sell food for consumption on or off the licensed premises and sell by the glass only wine and alcoholic ciders that may otherwise be sold by the bottle."

LCB Advisory Opinion No. 10-037, reproduced above in finding of fact #8, answers Licensee's contention that the previous advisory opinion was in error by restating its position that wine may be sold by the glass at the primary winery location but not at a satellite location. The stated basis for this conclusion is that "while sections 505.2(a)(6.1) and 505.2(a)(4) of the Liquor Code specifically mention sales by the glass when discussing wine sales at the main winery and when the winery is selling under the authority of a wine exposition permit, section 505.2(a)(3) does not mention sales of wine by the glass when discussing sales at satellite locations."

The fallacy of this assertion is that it implies that the first two provisions cited appear somewhere in law under a heading labeled “things limited wineries may do only at their primary location.” There is no such heading in this legislation. There is no basis to distinguish between a “primary” location and a “satellite” one.

The legislature did not have to specify all of the things a limited winery may do at additional board-approved locations because this would have been a repetition of what was said about what a limited winery may do at any board-approved location.

That is, all of the provisions of 47 P.S. §505.2 apply to all limited wineries: the sentence structure alone tells us this. The main part of the statute is section (a), which recites that holders of a limited winery license may do any of the things set forth in all of the subsections which comprise section (a).

All of these subsections, including the one authorizing additional board-approved locations, the one authorizing special permits for as many as 40 days in a calendar year, and the one authorizing sales of food for on-premises consumption and wine by the glass, are things which limited wineries may do.

The advisory opinion concludes with an argument that the Board has always construed the law this way and will “continue to adhere to its consistent position in this matter, absent legislative change.”

I must respectfully point out to the Board that legislative change in fact occurred on December 8, 2004, when Act 239 became effective. The Board’s regulation, most recently revised on October 9, 1998, has been superseded by legislative enactment.

The conflicting provisions of the regulation are “inconsistent with this act” as that term is used in 47 P.S. §2-207(i), and thus beyond the power of the Board to regulate. Limited Winery licensees have the right to sell their products by the glass and food for on-premises consumption at any board-approved location, because the legislature has given them that right.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 10-0921 is DISMISSED.

Dated this 1ST day of November, 2010.



David L. Shenle, J.

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.