

March 30, 2015

Katherine M. Bigler
Hiwassee Acres LLC
dba Adams County Winery
251 Peach Tree Road
Ortanna, PA 17353
VIA FACSIMILE: 717-334-4026

John G. Kramb
Historic Fairfield Inn, LLC
15 West Main Street
P.O. Box 300
Fairfield, PA 17320

Re: Interlocking Business Questions

Dear Ms. Bigler and Mr. Kramb:

ISSUE: This is in response to your facsimile of February 17, 2015, wherein you ask numerous questions relating to the ability of a limited winery licensee to hold a restaurant liquor license. Your questions will be restated below, followed by the response of this office.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Hiwassee Acres, LLC, doing business as Adams County Winery (“the Winery”), holds Limited Winery License No. LK-134 (LID 43143) for the premises at 251 Peach Tree Road, Ortanna, Pennsylvania.

Katherine Bigler (“Bigler”) and John Kramb (“Kramb”) own the property upon which the Winery is located. Since 1998, the Winery has leased the property from Bigler and Kramb. In addition, Bigler and Kramb own real estate at 25 Chambersburg Street, Gettysburg, Pennsylvania. In 2006, the Board approved 25 Chambersburg Street as an additional Board-approved location for the Winery; the Winery leases this location from Bigler and Kramb as well.

The Winery originally had both Bigler and Kramb as its members. In 2013, Kramb was removed as a member of the Winery, in anticipation of his purchase of a restaurant liquor license.

Kramb, through another limited liability company (“LLC”) of which he is the sole member, purchased property at 15 West Main Street in Fairfield, Pennsylvania.

Bigler guaranteed the mortgage note for the purchase of that property. On that property is located the Historic Fairfield Inn (“the Inn”), a restaurant which is run by the Historic Fairfield Inn, LLC, of which Kramb is the sole member. Kramb then attempted to have a restaurant liquor license transferred to the Inn.

On May 17, 2013, the Board advised Kramb that Bigler’s guarantee of the mortgage for 15 West Main Street created a prohibited interlocking business interest as it related to Kramb’s attempt to transfer the restaurant liquor license to the Inn. The Board also noted that Kramb’s co-ownership in property that is rented to the Winery (251 Peach Tree Road, 25 Chambersburg Street) created additional prohibited interlocking business interests.

On August 17, 2013, Kramb wrote a letter to then-Governor Corbett, asking that the law be changed and that the Governor “induce the LCB to issue the R license” to you. That letter was forwarded to this office, which responded on August 28, 2013, with a letter explaining the Liquor Code’s prohibitions between interlocking interests among manufacturer licensees and retail licensees.

On November 20, 2013, the Winery was approved for an additional Board-approved location at 15 West Main Street in Fairfield, Pennsylvania, the location of the Inn. At that time, Kramb withdrew his application for the transfer of the restaurant liquor license to the Inn.

You believe that an entity may acquire both a limited winery license and a restaurant license for use at the same location, and that more than one (1) location may be so licensed. You also believe that all of the rights the Winery has may be exercised in any area which has been licensed to it.

OPINION: Your questions are restated below:

1. May the R license currently held in safekeeping by the Board now be transferred to the Winery – specifically, did locating the licensed winery premises (satellite store) at 15 West Main Street (the same location as the proposed R license) resolve the prohibited interlocking business interest?

No. Please note that, in the Liquor Code, the legislature has chosen to use the phrase “licensed winery premises” or “licensed premises” to mean the original licensed location where the manufacturing of wine takes place. [See 47 P.S. §§ 5-505.2(a)(2), (a)(5), (a)(6.1)]. When the legislature is referring

to what are commonly known as “satellite” locations, it uses the phrase “the limited winery’s additional board-approved locations.” [See 47 P.S. §§ 5-505.2(a)(3), (a)(6.1)].

Section 505.2(a)(5) authorizes a limited winery to apply for and hold a retail license, such as a restaurant liquor license, for use on the licensed winery premises. [47 P.S. § 5-505.2(a)(5)]. This section does not include the statutory language that would allow a restaurant license to be transferred to an additional board-approved location. Thus, only the licensed winery premises, located at 251 Peach Tree Road in Ortanna, could also hold a restaurant liquor license.

2. If Bigler were added as a member of the Inn (and remained a member of the Winery at the same location), would that resolve the prohibited interlocking business interest issues and permit issuance of the R license to the Inn?

No. Before further explanation, please note that an LLC is a separate, legal entity, regardless of whether the membership of that LLC is identical to another LLC. It may help to think of an LLC as another person.

In the instant matter, the Winery is held by Hiwassee Acres LLC. The Inn is held by the Historic Fairfield Inn, LLC. Even if Bigler and Kramb were to hold identical memberships in both LLCs, there are still two (2) separate and distinct LLCs involved: Hiwassee Acres LLC and the Historic Fairfield Inn, LLC.

When an application for transfer of a license is filed, an investigation is conducted into the background of the applicant. When the applicant is a legal entity such as an LLC or corporation, it becomes necessary to investigate the people who actually comprise that legal entity, to ensure adherence to the law. It was just such an investigation that revealed, in 2013, the connections between Kramb and the Winery.

The Liquor Code prohibits interlocking businesses. As explained in section 411, “The purpose of this section is to require a separation of the financial and business interests between manufacturers and holders of hotel or restaurant liquor licenses...issued under this article, and no person shall, by any device whatsoever, directly or indirectly, evade the provisions of the section.” [47 P.S. § 4-411(e)]. A limited exception was created to allow

manufacturers to obtain retail licenses, such as a restaurant license, to use at the same location where manufacturing occurs. In simpler and very generalized terms, retail licensees and manufacturing licensees must either be completely separate or completely identical.

The Inn and the Winery are not completely separate, because of Bigler's guarantee of the mortgage for the Inn, as well as Kramb's co-ownership of the Winery's licensed premises and satellite location. In addition, the Inn and the Winery are not completely identical; they have different locations and different owners.

Adding Bigler to the Inn does not resolve any of the identified prohibited interlocking business issues. In fact, it may increase the number of prohibited interlocking business interest issues, for now Bigler's ownership of the Winery would have to be considered. Section 411 of the Liquor Code provides that "No manufacturer...shall at the same time be...the owner, proprietor or lessor of any place covered by any hotel, restaurant or club liquor license." [47 P.S. § 4-411(a)]. The Liquor Code does allow a *de minimus* exception, whereby if Bigler's ownership interest in the Inn were less than five percent (5%), it would not be considered. [47 P.S. § 4-411(e)]. However, the other prohibited interlocking business issues remain.

3. If Kramb were added as a member of the Winery, would that resolve the prohibited interlocking business interest issues and permit issuance of the R license to the Winery?

No. If the goal is to transfer the restaurant license to the Winery, then it could be transferred to the Winery at the 251 Peach Tree Road location only. Whether Kramb is a member in the Winery is irrelevant. See the answer to Question Number 1, above.

4. If Kramb were added as a member of the Winery, would that resolve the prohibited interlocking business interest issues and permit issuance of the R license to the Inn?

No. Retail licensees and manufacturing licensees must either be completely separate or completely identical. Adding Kramb to the Winery would actually increase the number of prohibited interlocking business interest

issues, for now Kramb's ownership of the Winery would have to be considered. See the answer to Question Number 2, above.

5. If Bigler were to be released as a guarantor on the real estate at 15 West Main Street, would that result in any different answers?

No, although it would be one (1) less prohibited interlocking business interest issue that blocks the transfer of the restaurant liquor license to the Inn. The remaining prohibited interlocking business interest issues are the joint ownership by Bigler and Kramb of the limited winery premises at 251 Peach Tree Road and of the additional Board-approved location at 25 Chambersburg Street.

6. If Bigler were removed as guarantor and the Winery leases for the properties in Ortanna, Gettysburg, and Fairfield were rent-free, would that result in any different answers?

No, although removing Bigler as guarantor would be one (1) less prohibited interlocking business interest issue that blocks the transfer of the restaurant liquor license to the Inn. With regard to the Winery leases, the issue is not, *per se*, the amount of rent, but rather the ownership of the property that the Winery leases. Section 411(d) of the Liquor Code provides that "no...restaurant licensee...shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property or the equipment of any property or any mortgage lien against the same, used by a manufacturer in manufacturing liquor..." [47 P.S. § 4-411(d)].

In addition, allowing the Winery to lease property rent free could violate another provision of section 411(d):

[N]or shall any hotel, restaurant or club licensee, either directly or indirectly, lend any moneys, credit, or give anything of value or the equivalent thereof, to any manufacturer for equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment used for the manufacture of liquor....

[Id.].

7. If the Inn were to establish a different, other limited winery at 15 West Main Street, could the restaurant license then be issued to the Inn? The Winery would cease operations at 15 West Main Street.

In theory, this may be possible. However, please note that it is not permissible for a limited winery to outsource the manufacturing of wine to a location that is not the licensed premises. Section 505.2 of the Liquor Code allows a limited winery to sell wine that is produced on the licensed premises. [47 P.S. § 5-505.2].

Moreover, section 509 of the Liquor Code requires every license to be posted in a conspicuous place where the business is carried on under it. [47 P.S. § 5-509]. Section 511 requires that every license shall specify by definite location every place to be occupied or used in connection with the business to be conducted thereunder. [47 P.S. § 5-511]. In addition, section 511 provides that it shall be unlawful for the holder of any license to occupy or use any place in connection with any business authorized under a license other than the place or places designated by the license. [Id.]. Therefore, if the Inn were to obtain a new limited winery license, it would have to apply to license the location where the actual manufacturing takes place.

Assuming that the Inn is able to successfully establish a licensed limited winery premises (not an additional Board-approved location) at the 15 West Main Street location, then the restaurant liquor license may be transferred to it.

8. If the Inn were to open a limited distillery at 15 West Main Street, could the restaurant license then be issued to the Inn? The Winery would cease operations at 15 West Main Street.

Again, in theory, this may be possible. Section 411 provides that “An entity may acquire both a manufacturer’s license or a limited winery license and a hotel, restaurant or retail dispenser license for use at the same location and more than one location may be so licensed. [47 P.S. § 4-411]. Therefore, the type of manufacturing license – winery, distillery, or brewery – that may be established at 15 West Main Street, prior to the transfer of the restaurant liquor license, is immaterial for purposes of prohibited interlocking business interest issues. In addition, section 505.4(b)(3) allows the holder of a limited distillery license to apply for and hold a restaurant liquor license to sell, on

the licensed distillery premises, liquor, wine and beer. [47 P.S. § 5-505.4(b)(3)].

However, please be aware that the requirements of section 509 and section 511 of the Liquor Code, explained in the answer to Question Number 7, above, apply to limited distillery licenses as well. Therefore, if the Inn were to obtain a limited distillery license, it would have to apply to license the location where the actual manufacturing takes place.

9. The original request for the restaurant liquor license included coverage of the entire property, including land and another building on the property. There is a nearby building that is currently used only by the restaurant. This building is on the same tract of land as the restaurant and is approximately ten (10) feet from the back door of the restaurant kitchen. Could either the new limited winery or limited distillery license be located in this nearby building and still have the relationship qualify as a permitted couplet? If not, would a passageway from the nearby building to the restaurant result in a favorable determination?

As stated in the answer to Question Number 8, above, the Liquor Code refers to the licenses being used at the "same location." The statute does not provide any more specificity, nor do the Board's Regulations. However, as long as both buildings are on the same deeded property, are located ten (10) or less feet away, and same entity owns the entire property, a retail license and a manufacturing license located on that same property could be considered a couplet. Please note that acceptance of this scenario does not constitute approval. If an application is received, a thorough investigation will be conducted. The decision to approve or disapprove an application for transfer is not made by this office, but by the three (3)-member Board.

10. Is there any other possible scenario which would permit the Board to issue a restaurant license to 15 West Main Street?

If Bigler were to be released as guarantor of the mortgage for 15 West Main Street, and Kramb relinquished ownership of the property at 251 Peach Tree Road and 25 Chambersburg Street, then the prohibited interlocking business issues would be eliminated. However, please be advised that the finances pertaining to each license must kept completely separate from the other.

Another possibility may be to transfer the limited winery license to 15 West Main Street. Please note that such a transfer would depend upon the ability of that location to satisfy the requirements for such a location. See the answer to Question 8, above.

11. Do you know of any other scenario in which we could get the restaurant liquor license that does not involve one of us divesting ourselves of long-held marital property (our home and farm)?

See the answers to Questions 1, 7, 8, 9, and 10. For further guidance, you may wish to consult a private attorney who is experienced with Liquor Code matters.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

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LCB Advisory Opinion No. 15-123