



IN RE:

New Midwest Rentals, LLC
d/b/a Des Moines Valero #202
821 E. Euclid
Des Moines, Iowa 50316

Beer Permit No. BC-29785

DOCKET NO. A-2013-00152

ADMINISTRATOR'S FINAL ORDER ON REMAND [CONSOLIDATED]

New Midwest Rentals, LLC
d/b/a Des Moines Valero #204
3733 Easton Blvd.
Des Moines, Iowa 50317

Beer Permit No. BC-29805

DOCKET NO. A-2013-00164

NOW, on this 25th day of March, 2016, this matter comes before the Administrator of the Iowa Alcoholic Beverages Division (Division) on remand from the Iowa District Court for Polk County (District Court).

STATEMENT OF CASE

Gerald Forsythe is the 100 percent owner of New Midwest Rentals, LLC (Permittee). In 2010, the Permittee acquired five gas station/convenience stores which operate under the name "Valero." Two of the Des Moines Valero stores are involved in this matter.

The Division initially issued beer permits to the two stores in question in 2011. On April 25, 2012, the Division received a new application for a wine direct shipper license from Continental Vineyards, LLC d/b/a Broken Earth Winery. Mr. Forsythe's name appeared on the owner page of the application, and he signed the application. The Division learned Mr. Forsythe's name was also associated with the two beer permits. Further research revealed that Mr. Forsythe is a director, officer, and the majority shareholder with a 72.5 percent ownership interest in Broken Earth Winery.

The ownership of the Valero stores in question and the ownership of Broken Earth Winery violate Iowa's "tied-house" law (Iowa Code § 123.45 (2015)). In 2012, the Division renewed the beer permits in question, believing Mr. Forsythe was actively in the process of divesting himself of one of the conflicting ownership interests.

In 2013, the Valero stores in question filed second renewal applications for the beer permits. Upon learning that Mr. Forsythe continued to own the Valero stores and Broken Earth Winery, the Division denied the beer permit renewal applications. The Permittee then filed timely appeals of the permit denials.

A hearing on the matter was conducted by Administrative Law Judge Margaret LaMarche. Judge LaMarche's March 27, 2014, proposed decision affirmed the Division's denial of the beer permit renewal applications. The Permittee filed an appeal to the Division. Division Administrator Stephen Larson reviewed the briefs and affirmed the denial of the beer permit renewal applications. The Permittee then filed an action for judicial review with the District Court.

On March 12, 2015, the District Court issued a Ruling and Order on Petition for Judicial Review in this matter. District Court Judge Robert A. Hutchison remanded the case to the Division to "interpret section 123.45 in accordance with the use [of] the proper rules of statutory construction to determine whether Gerald Forsythe's ownership interest in both the Broken Earth Winery and the Valero Stores with a retail beer permit is prohibited under Iowa Code section 123.45."

In an Order dated July 20, 2015, Administrator Larson issued an Order for Review and established a schedule for the parties to file objections or exceptions and present briefs in support of their respective positions. The objections or exceptions and briefs of the Permittee were due on or before Monday, August 24, 2015, and the objections or exceptions and briefs of the State of Iowa Assistant Attorney General (State) were due on or before Wednesday, September 23,

2015. The Permittee's responsive briefs were due on or before Thursday, October 8, 2015. The record reflects that the Permittee and the State timely submitted briefs.

FINDINGS OF FACT

Since the facts of the matter are not in dispute, the findings of fact in Judge LaMarche's March 27, 2014, proposed decision are hereby adopted and incorporated into this ruling as if set out in full.

CONCLUSIONS OF LAW

The Division has been directed to interpret Iowa Code § 123.45 (2015) in accordance with the rules of statutory construction. The goal when interpreting statute is to determine legislative intent. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). In doing so, consideration should be given to language the general assembly used in the statute, the object the general assembly sought to accomplish, and the wrong the general assembly sought to remedy. *Swainston v. Am. Family Mut. Ins. Co.*, 774 N.W.2d 478, 482 (Iowa 2009). When interpreting a statute, we "must be mindful of the state of the law when it was enacted and seek to harmonize the statute, if possible, with other statutes on the same subject matter." *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999).

The Iowa legislature declared that it is public policy of this state that the Iowa Alcoholic Beverage Control Act, Iowa Code chapter 123, "shall be deemed an exercise of the police power of the state, *for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of that purpose.*" Iowa Code § 123.1 (emphasis added). Alcoholic beverage sales in Iowa are prohibited except upon the "terms, conditions, limitations and restrictions" enumerated in Iowa Code chapter 123. Iowa Code § 123.2.

Like other states, Iowa operates under a three-tier system. This system organizes those involved in alcohol's distribution (producers, wholesalers, and retailers) into three tiers and imposes different licensing requirements on them. This system was put in place to curb industry abuses that contributed to the passage of the 18th Amendment to the United States Constitution and to stop the illegal practices that came about during Prohibition. The three-tier system protects retailer independence, encourages responsible consumption, ensures the proper collection of tax, and enables states to regulate the sale of alcoholic beverages within their borders. The statutory prohibition of "tied houses" is found in Iowa Code § 123.45 (2015). "A 'tied-house' is a retail outlet that is owned or controlled by a manufacturer, wholesaler, or other entity in the chain of alcohol beverage distribution." *Auen*, 679 N.W.2d at 591.

The Permittee centers their argument on the lack of overlapping or common ownership interest of a manufacturer and retailer involving the same beverage. The District Court found the statute ambiguous, highlighting the disjunctive "or" used by the legislature. "A person engaged in the business of manufacturing ... alcoholic beverages, wine, *or* beer ... shall not directly or indirectly ... hold a retail liquor control license *or* retail wine *or* beer permit" Iowa Code § 123.45 (2015) (emphasis added). The District Court ordered the Division to interpret its rules in accordance with *Auen*, 679 N.W.2d at 590 (holding the legislature clearly vested interpretation with the Division). The following is the Division's interpretation of the law based upon the legislative intent of Iowa Code § 123.45 (2015).

The Division interprets the legislative intent of Iowa Code chapter 123, as set forth in Iowa Code § 123.1, to require strict separation between the manufacture, wholesale and retail levels. With this in mind, the Division must liberally construe Iowa Code § 123.45 (2015) to achieve the legislative mandate. The language of Iowa Code § 123.45 (2015) not only prohibits the actual control over a retailer by an industry member, but relationships between industry members and retailers that *create the potential* for influence or arrangement of business interests. *Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 449 S.W.3d 154, 167 (Tex. App. 2014). (The Texas Alcoholic Beverage Commission denied Cadena's wine and beer retail off-

premises permit application due to Cadena's parent company's cross-tier investment in a brewery. On appeal, the Court concluded that the parent company would, if Cadena's wine and beer retailer's off-premises permit application had been granted, have "interest in the business of a brewer," by virtue of its non-controlling interest in an international brewer, and would also "have a direct or indirect interest in the business of a retailer." This case is not binding, but is persuasive.)

For example, when reading Iowa Code § 123.45 (2015) in its entirety, the legislature has prohibited industry members from directly or indirectly supplying, furnishing, giving, or paying for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, wine, beer, or food within a retailer; from directly or indirectly extending credit for alcoholic beverages or beer; and from directly or indirectly paying for a retail license or permit. Moreover, prohibited relationships extend not only to persons who actually own or have an interest in a manufacturer or wholesaler, but also to any jobber, representative, broker, employee, or agent of such a person. *Id.* Therefore, allowing a person engaged in the business of manufacturing to simultaneously hold a retail permit of another alcoholic beverage creates the potential for influence or an arrangement of business interests, which is certainly what the legislature intended to prohibit.

The State argues tied-house prohibitions "are intended to preserve retailer independence by limiting the ability of manufacturers and distributors of alcoholic beverages to assume monopolistic control over and to exert undue influence upon retailers of alcoholic products. *See Winn Dixie Stores, Inc. v. Schenk Co.*, 662 So.2d 1021, 1023 (Fla. Dis. Ct. App. 1995)." This logic is persuasive. Historically, following Prohibition, the State of Iowa gradually allowed private retailers of different beverages and amended the tied-house prohibitions accordingly.

In 2009, the legislature amended Iowa Code § 123.56 by adding new subsection 6:

Notwithstanding any other provision of this chapter, a person employed by a class "A" native wine permittee may be employed

by a brewery with a class “A” native beer permit provided the person has no ownership interest in either licensed premises.

Acts 2009 (83 G.A.) ch. 73, S.F. 420, § 1. Iowa Code § 123.56(6) explicitly provides for an exception to Iowa Code § 123.45 (2015) by allowing an employee of an Iowa winery authorized to sell at retail to also be employed by an Iowa brewery, provided the person has no ownership interest in either the winery or brewery. Iowa Code § 123.45 (2015) prohibits a manufacturer or wholesaler from holding a retail license or permit or having an interest in the ownership, conduct, or operation of a retailer, regardless of what type of alcoholic beverage the retailer sells. The exception provided in Iowa Code § 123.56(6) would be unnecessary if the legislature intended the wording in Iowa Code § 123.45 (2015) to be read in the disjunctive and to allow industry members to have interest in a retailer or hold a retail license or permit when no common beverage existed between the two entities. To that end, the Division interprets the Code to require the three tiers to remain independent of each other, without regard for the alcoholic beverage type.

The 2015 clarifying amendments to Iowa Code § 123.45 resolve any potential ambiguity identified by the District Court.

123.45 Limitations on business interests.

1. A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee, or agent of such a person, shall not do any of the following:
 - a. Directly or indirectly supply, furnish, give, or pay for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, wine, beer, or food within the place of business of a licensee or permittee authorized under this chapter to sell at retail.
 - b. Directly or indirectly extend any credit for alcoholic beverages or beer or pay for any such license or permit.
 - c. Directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.
 - d. Hold a retail liquor control license or retail wine or beer permit.

2. However, a person engaged in the wholesaling of beer or wine may sell only disposable glassware, which is constructed of paper, paper laminated, or plastic materials and designed primarily for personal consumption on a one-time usage basis, to retailers for use within the premises of licensed establishments, for an amount which is greater than or equal to an amount which represents the greater of either the amount paid for the disposable glassware by the supplier or the amount paid for the disposable glassware by the wholesaler. Also, a person engaged in the business of manufacturing beer may sell beer at retail for consumption on or off the premises of the manufacturing facility and, notwithstanding any other provision of this chapter or the fact that a person is the holder of a class "A" beer permit, may be granted not more than one class "B" beer permit as defined in section 123.124 for that purpose.

3. A licensee or permittee who permits or assents to or is a party in any way to a violation or infringement of this section is guilty of a violation of this section.

2015 Iowa Acts ch. 30, H.F. 536, § 42. The Code is clear that persons who manufacture liquor, wine, or beer, and their employees or agents, shall not do certain things, including having a direct or indirect interest "in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail." Any ambiguity identified by the District Court was resolved by the legislature, continuing the clear delineation of independence among the three tiers.

The legislature has directed the Division to maintain strict separation between the retail, wholesale, and manufacturing tiers of the industry through its enactment of Iowa Code chapter 123. The Division concludes a rational and logical interpretation of Iowa Code § 123.45 (2015) prohibits the Permittee from holding Iowa retail beer permits. The record reflects that Mr. Forsythe continued to hold a majority ownership interest in the Broken Earth Winery, despite being given adequate time to divest himself of the conflicting ownership interest. Therefore, Judge LaMarche's March 27, 2014, proposed decision to uphold the denial of the two beer permit renewal applications is reasonable.

ORDER

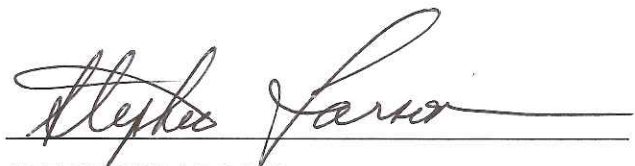
Therefore, the proposed decision of Judge LaMarche is supported by the record and hereby affirmed.

The parties are hereby notified that, pursuant to Iowa Code § 17A.19, this Order constitutes final agency action for the purpose of Iowa Code chapters 17A and 123. This Order becomes final unless a party to the hearing files a Petition for Judicial Review with Iowa District Court within 30 days from the date of this Order.

Moreover, the parties are notified that, pursuant to Iowa Code § 17A.19(5), the filing of a Petition for Judicial Review does not automatically stay execution or enforcement of the Division's action. The Division may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review. If the Division refused to grant the stay or other temporary remedies, the court may grant the relief.

DATED this 25th day of March, 2016, in Ankeny, Iowa.

IOWA ALCOHOLIC BEVERAGES DIVISION

A handwritten signature in cursive script, appearing to read "Stephen Larson", is written over a horizontal line.

STEPHEN LARSON

Administrator

Copies to:

Margaret LaMarche
Administrative Law Judge
Department of Inspections & Appeals
Wallace State Office Building
Des Moines, Iowa 50319

Cameron Coppess
Iowa Lottery
13001 University Avenue
Clive, Iowa 50325

John Lundquist
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building
Des Moines, Iowa 50319

Steven Mandernach
Social Gaming Unit
Lucas State Office Building
Des Moines, Iowa 50319

Lt. Mark Stine
Iowa State Patrol, District #1
260 N.W. 48th Place
Des Moines, Iowa 50313

Robert Bailey
Iowa Alcoholic Beverages Division
1918 SE Hulsizer Road
Ankeny, Iowa 50021

City Clerk
City Hall
400 Robert D. Ray Drive
Des Moines, Iowa 50309

Fred L. Dorr
Attorney at Law
4201 Westown Pkwy, Suite 250
West Des Moines, Iowa 50266

Chief Dana Wingert
Des Moines Police Department
25 E 1st Street
Des Moines, Iowa 50309

Stephanie Strauss
Iowa Alcoholic Beverages Division
1918 SE Hulsizer Road
Ankeny, Iowa 50021