OP. NO. 06-019

ALCOHOLIC BEVERAGE CONTROL ACT: ADMINISTRATION OF LICENSES – LICENSES GRANTED BY BOARD; LIMITATIONS; REVOCATION AND SUSPENSION.

Authority for Virginia Alcoholic Beverage Control Board to issue wholesale wine license to cooperative wholesaler; license is not prohibited provided cooperative wholesaler is not 'owned, in whole or in part, by any manufacturer of alcoholic beverages, any subsidiary or affiliate of such manufacturer or any person under common control with such manufacturer. Decision regarding what constitutes 'common control' is factual determination for Board. Act does not prohibit farm winery from leasing portion of its premises or from leasing equipment to such wholesaler for use in its business or from employing same persons as wholesaler. Statutes and regulations that apply to other wholesalers also apply to cooperative wholesalers composed of persons associated with farm wineries.

The Honorable Robert S. Bloxom
Secretary of Agriculture and Forestry
April 18, 2006

Issue Presented

You pose several questions regarding the distribution of a farm winery's products by a cooperative wholesaler. First, you ask whether a cooperative wholesaler is the type of entity which may be issued a wholesale wine license pursuant to § 4.1-207[1] or whether such license would be prohibited by § 4.1-223. You next ask whether the Alcoholic Beverage Control Act[2] prohibits a farm winery from leasing a portion of its premises to a cooperative wholesaler. You also inquire whether the Act prohibits a farm winery from leasing equipment to a wholesaler for use in its business or prohibits a farm winery from employing the same person employed by the cooperative wholesaler. Finally, you ask whether a cooperative wholesaler, composed of persons associated with farm wineries, is subject to all of the statutes and regulations that apply to other wholesalers.

Response

It is my opinion that the Virginia Alcoholic Beverage Control Board[3] may issue a wholesale wine license to a cooperative wholesaler pursuant to § 4.1-207. Such license is not prohibited by § 4.1-223(2) provided the cooperative wholesaler is not "owned, in whole or in part, by any manufacturer of alcoholic beverages, any subsidiary or affiliate of such manufacturer or any person under common control with such manufacturer." Further, it is my opinion that any decision regarding what constitutes "common control" is a factual determination for the Board in any particular situation.[4] It also is my opinion that the Alcoholic Beverage Control Act does not prohibit a farm winery from leasing a portion of its premises to a cooperative wholesaler or from leasing equipment to a wholesaler for use in its business. Additionally, the Act does not prohibit a farm winery from employing the same persons employed by the cooperative wholesaler. Finally, it is my opinion that the statutes and regulations that apply to other wholesalers also

apply to cooperative wholesalers composed of persons associated with farm wineries.

Background

You relate that the Virginia Alcoholic Beverage Control Board has received several questions regarding the options available to Virginia farm wineries to distribute their products to retailers. The inquiries were prompted by the decision of the United States District Court for the Eastern District of Virginia in the matter of *Brooks v. Danielsen*.[5] The District Court declared that § 4.1-204(4)-(5), which provided farm wineries a direct wholesale privilege, was unconstitutional. As a result, farm wineries are required to sell their products to an independent wholesale distributor for resale to retailers. You inquire regarding the legality of forming cooperative wholesalers[6] to distribute their products to retailers as an alternative to selling their products to existing wholesale distributors.

Applicable Law and Discussion

1. Whether a Cooperative Wholesaler May be Granted a Wholesale Wine License.

A cooperative wholesaler is the type of entity for which the Virginia Alcoholic Beverage Control Board may issue a wholesale wine license pursuant to § 4.1-207. Section 4.1-100 defines "licensee" as "*any person* to whom a license has been granted by the Board." (Emphasis added.) Thus, for a cooperative wholesaler to be a "licensee" of the Board in any capacity, it must first be a "person." Pursuant to § 1-230,[7] a "person" is "any individual, corporation, partnership, association, *cooperative*, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof." (Emphasis added.) Because a cooperative is a person, it may apply for a wholesale wine license pursuant to § 4.1-207.

Although a cooperative clearly may apply for a wholesale wine license, the analysis is not complete without considering whether there are impediments to the Virginia Alcoholic Beverage Control Board taking favorable action on the license application. The provisions relevant to this determination are §§ 4.1-222 and 4.1-223. Generally, the conditions in § 4.1-222 for which the Board may refuse to grant the license to a cooperative are related to the suitability and character of the cooperative's members and the suitability of and nature of the proposed location of the business.[8] Assuming none of these conditions exist, the Board may issue a wholesale wine license to the cooperative unless it is prohibited by § 4.1-223.

Generally speaking, §§ 13.1-312 through 13.1-345 provide for agricultural cooperative associations.[9] These provisions do not explicitly address wholesale wine licensees; therefore, the limitations of § 4.1-223 apply.[10] As expressly stated in § 4.1-223(2), the cooperative wholesaler cannot be owned, in whole or in part, by any manufacturer of alcoholic beverages (in this case, a winery) if it desires a wholesale wine license. Additionally, § 4.1-223(2) prohibits a cooperative from obtaining a wholesale wine license if it shares "common control" with any winery or other entity sharing common control with that winery.[11]

Title 4.1 does not define the term "common control." Therefore, it may be construed using its plain meaning.[12] "Common" means "belonging to or shared by two or more individuals or … by all members of a group."[13] "Control" means "[t]he direct or indirect power to direct the management and policies of a person or entity … the power or authority to manage, direct, or oversee."[14] Therefore, in this context, the members of a cooperative wholesaler are prohibited from sharing the authority or ability to direct, manage, or oversee policies or business affairs under the license with owners of the winery or any entity under common control with that winery.

However, § 13.1-725 of the Virginia Stock Corporation Act,[15] defines the term "control" as

> the possession, directly or indirectly, through the ownership of voting securities, by contract, arrangement, understanding, relationship or otherwise, of the power to direct or cause the direction of the management and policies of a person. The beneficial ownership of 10 percent or more of a corporation's voting shares shall be deemed to constitute control.[16]

Employing this definition, the same group of individuals within the wineries or retailers are prohibited from holding, either directly or indirectly, the power to direct or cause the direction of the management and policies of the cooperative wholesaler. For example, such individuals may not control the cooperative through the ownership of voting securities or by contract other than a commercial contract for goods or nonmanagement services. In keeping with the Stock Corporation Act, such control would be presumed from evidence of the ownership, control, power to vote, or holding of proxies representing collectively ten percent or more of the voting securities of any winery or retailer.

While I may provide general guidance, the ultimate decision regarding what constitutes "common control" is a factual determination for the Virginia Alcoholic Beverage Control Board. Because § 2.2-505 does not contemplate that opinions be rendered on matters requiring factual determinations,[17] I must respectfully decline to render an opinion regarding whether a specific cooperative wholesaler or business model violates the prohibition against common control in § 4.1-223(2). Based on the cooperative business model that you describe,[18] however, it appears that such a cooperative would not violate § 4.1-223(2).

2. Whether Certain Dealings between Farm Wineries and Cooperative Wholesalers are Prohibited.

The Alcoholic Beverage Control Act does not prohibit a farm winery from leasing a portion of its premises to a cooperative wholesaler or from leasing equipment to a wholesaler for use in its business. Further, the Act does not prohibit a farm winery from employing the same person that is employed by the cooperative wholesaler. The applicable limitations on wholesalers are found in §§ 4.1-215 and 4.1-216.

Section 4.1-215(C) requires "a separation between manufacturing interests, wholesale interests and retail interests in the production and distribution of alcoholic beverages in order to prevent suppliers from dominating local markets through vertical integration and to prevent excessive sales of alcoholic beverages caused by overly aggressive marketing techniques." Section 4.1-215(C) also

provides that exceptions to the general prohibition "shall be limited to their express terms so as not to undermine the general prohibition."

Section 4.1-216(C), often referred to as the "tied-house prohibition," provides that:

> Subject to certain exceptions …, no manufacturer, bottler, importer, broker or wholesaler of alcoholic beverages, … shall sell, rent, lend, buy for or give to any retail licensee, or to the owner of the premises in which the business of any retail licensee is conducted, any (i) money, equipment, furniture, fixtures, property, services or anything of value with which the business of such retail licensee is or may be conducted, or for any other purpose; … provided that no transaction permitted under this section or by Board regulation shall be used to require the retail licensee to partially or totally exclude from sale at its establishment alcoholic beverages of other manufacturers or wholesalers.

Section 4.1-216(A) defines "[m]anufacturer, bottler, importer, broker or wholesaler of alcoholic beverages" to include "any officers or directors of any such manufacturer, bottler, broker or wholesaler."

In the business arrangement you describe, separation is maintained between manufacturing interests, wholesale interests, and retail interests. The manufacturers are distinct entities according to the facts you provide. The cooperative wholesaler is distinct from the retailers. Additionally, no rebates, discounts, or any other forms of consideration are to be gained by retailers that are customers of the cooperative wholesaler for buying products of the wholesaler or vice versa. The cooperative wholesaler in the contemplated arrangement is not selling, renting, lending, buying for, or giving to any retail licensees any money, equipment, furniture, fixtures, or property that the retailers can use to conduct their businesses. Furthermore, none of the facts you provide indicate that a transaction would require any retail licensee to exclude the sale of alcoholic beverages of other manufacturers or wholesalers from its premises.

Prior opinions of the Attorney General explain that the predecessor statute to § 4.1-216(C) was enacted following the repeal of prohibition for the purpose of preventing the integration of wholesalers and retailers of alcoholic beverages by removing the retailer from financial obligation to the wholesaler.[19] Courts have also described the aim of "tied house" laws as follows:

> By the granting of gifts and loaning of money to retailers, distributors could effectively "tie" themselves to retailers to the point of excluding all competitors. This form of vertical integration between beer distributing and retailing allowed the distributor to exercise almost complete control over the retailers.[20]

According to a 1988 opinion of the Attorney General[21] concerning § 4.1-216(C)'s predecessor, even price discounts given to retailers by wholesalers are only prohibited "when they are coupled with an agreement or understanding that a retailer will buy other products of the wholesaler … to the exclusion of competitors, or when they lead to domination and control of a retail outlet by the wholesaler."[22] The purpose of § 4.1-216 is not violated by the business model

you propose. According to the facts you provide and the previous analysis, neither an exclusive agreement nor "domination and control" exist.

Finally, the tied-house prohibition is linked to a penal statute. Section 4.1-328(B) provides that "[a]ny person convicted of a violation of this section, § 4.1-216 or of [Virginia Alcoholic Beverage Control] Board regulations adopted pursuant to subdivision B 3 of § 4.1-111 shall be guilty of a Class 1 misdemeanor."

Because a penal statute is involved, that statute must be strictly construed against the Commonwealth.[23] "It cannot be extended by construction or by implication to favor the prosecution."[24] Accordingly, a strict interpretation of the tied-house prohibition makes criminal prosecution less likely because that statute does not address cooperative wholesalers that lack common ownership or control with wineries or retailers.

III. Applicability of Statutes and Regulations to Cooperative Wholesalers.

Section 4.1-207(2) makes no distinction based upon the type of entity receiving the license. Section 4.1-401 defines a "wine wholesaler" as "any wholesale wine licensee offering wine for sale or resale to retailers or other wine wholesalers without regard to whether the business of the person is conducted under the terms of an agreement with a licensed winery." Therefore, the license procedure for wholesale wine licensees is applicable to a cooperative that is a wine wholesaler.

Statutory construction requires that words be given their ordinary meaning, given the context in which they are used.[25] This certainly is the case when the words are not expressly defined by statute.[26] Absent a statutory definition, the plain and ordinary meaning of the term is controlling.[27] "'The manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[28] The definition of a wine wholesaler in § 4.1-401 applies to "any" wholesale wine licensee. The word "any" means "one or some indiscriminately of whatever kind."[29] The term "wine wholesaler," therefore, includes wholesale wine licensees that are cooperatives composed of persons associated with farm wineries. Thus, the Virginia Wine Franchise Act,[30] which governs "wine wholesalers," also governs such cooperatives.[31]

Because the term "wine wholesaler" is not specifically defined in the other chapters of the Alcoholic Beverage Control Act or in any of the Virginia Alcoholic Beverage Control Board's regulations set forth in the Virginia Administrative Code,[32] the same analysis applies to those provisions. Moreover, the provisions do not expressly exclude cooperative wholesalers from their application. Therefore, I conclude that all provisions of the Act and the Board's regulations governing wholesale licenses also apply to wholesale licenses held by cooperatives.

Conclusion

Accordingly, it is my opinion that the Virginia Alcoholic Beverage Control Board[33] may issue a wholesale wine license to a cooperative wholesaler pursuant to § 4.1-207. Such license is not prohibited by § 4.1-223(2) provided the cooperative wholesaler is not "owned, in whole or in part, by any manufacturer of alcoholic beverages, any subsidiary or affiliate of such manufacturer or any person under common control with such manufacturer." Further, it is my opinion

that any decision regarding what constitutes "common control" is a factual determination for the Board in any particular situation.[34] It also is my opinion that the Alcoholic Beverage Control Act does not prohibit a farm winery from leasing a portion of its premises to a cooperative wholesaler or from leasing equipment to a wholesaler for use in its business. Additionally, the Act does not prohibit a farm winery from employing the same persons employed by the cooperative wholesaler. Finally, it is my opinion that the statutes and regulations that apply to other wholesalers also apply to cooperative wholesalers composed of persons associated with farm wineries.

[1]You also refer to a wholesale beer license issued pursuant to § 4.1-208. The same rationale applied to a wholesale wine cooperative would apply to a wholesale beer cooperative. For purposes of this opinion, I refer to the statutes concerning a wholesale wine license and a wholesale wine cooperative.

[2]Va. Code Ann. §§ 4.1-100 to 4.1-517 (1999 & Supp. 2005).

[3]*See* § 4.1-101 (1999) (establishing Board within Department of Alcoholic Beverage Control); § 4.1-102(A) (1999) (establishing membership of Board); § 4.1-103 (1999) (enumerating general powers of Board).

[4]For many years, Attorneys General of Virginia have concluded that § 2.2-505, which authorizes official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. *See, e.g.*, Op. Va. Att'y Gen.: 2004 at 44, 48 n.16; 2003 at 21, 24; 2001 at 73, 74; *see also* Op. Va. Att'y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6 (citing predecessor § 2.1-118). It is my opinion that answering the common control inquiry requires either a factual determination or is a matter reserved to another entity. Therefore, I must respectfully decline to render an opinion regarding whether a specific business entity or a contemplated cooperative wholesaler violates § 4.1-223.

[5]No. 3:99CV755 (E.D. Va. Apr. 27, 2005). The matter currently is pending in the United States Court of Appeals for the Fourth Circuit (Nos. 05-1540, 05-1541, and 05-1791).

[6]You relate that the contemplated cooperative wholesaler would: establish a place of business in the Commonwealth; post a surety bond to secure its tax remissions; comply with its record-keeping responsibilities; obtain a separate license for each location from which to exercise the privileges of the wholesale license; and exclude members that are business organizations or sole proprietors that hold a farm winery license. Further, no winery will have an ownership interest in the cooperative wholesaler. It also is understood that the same group of individuals will not directly or indirectly hold the power to direct or cause the direction of the management and policies of the cooperative wholesaler and the winery or retailer through the ownership of voting securities, or by contract other than a commercial contract for goods or nonmanagement services. Control shall be presumed to exist if any member of the cooperative wholesaler directly or indirectly owns, controls, holds with the power to vote, or holds proxies representing collectively ten percent or more of the voting securities of any winery or retailer. No rebates, discounts, or any other forms of consideration are to be gained by retailers that are customers of the cooperative wholesaler for

buying its products. No transaction of such cooperative wholesaler will require any retail licensee to exclude the sale of alcoholic beverages of other manufacturers or wholesalers from its premises.

[7]Article 2 of Title 1, §§ 1-202 through 1-257, contains rules of construction and definitions. Section 1-202 applies the rules and definitions to "the construction of [the] Code …, unless such construction is inconsistent with the manifest intention of the General Assembly."

[8]For example, the Board may refuse to grant a license if any member of a cooperative is less than twenty-one years of age; has been convicted of a felony; has not demonstrated financial responsibility; has maintained a noisy, lewd, disorderly, or unsanitary establishment; or is unable to speak, understand, read, and write the English language. *See* § 4.1-222(A)(1)(a)-(b), (f)-(g), (i) (Supp. 2005). The Board may also refuse to grant a license when any cooperative member has the reputation of excessive drinking of alcoholic beverages or has an addiction to narcotics; has misrepresented a material fact in the application; is a police officer within the locality where the establishment will be licensed; is physically incapable of conducting the business or has been adjudicated incapacitated; or is a member, agent, or employee of the Board. *See* § 4.1-222(A)(1)(k), (l), (o), (q). Other conditions for which the Board may refuse to grant the license are related to the proposed location to be occupied by the applicant. *See* § 4.1-222(A)(2)(a)-(e).

[9]Agricultural cooperative associations, pursuant to § 13.1-314, must be comprised of five or more individuals or two or more associations of bona fide producers of agricultural products.

[10]When it is not clear which of two statutes applies, the more specific statute prevails over the more general. *See* Va. Nat'l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979); Scott v. Lichford, 164 Va. 419, 424, 180 S.E. 393, 395 (1935); City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Op. Va. Att'y Gen.: 2003 at 6, 9; 2001 at 17, 19; 1990 at 227, 228; 1987-1988 at 276, 277; 1980-1981 at 330, 331.

[11]There are other reasons for which the Board must refuse to grant a license. These reasons are not, however, the focus of your inquiry. *See* § 4.1-223(1) (prohibiting grant of wholesale wine license to person without established place of business in Commonwealth); § 4.1-223(3) (prohibiting grant of mixed beverage license to places offering lewd entertainment); § 4.1-223(4) (prohibiting grant of wholesale wine license until applicant files required bond); § 4.1-223(5) (prohibiting grant of mixed beverage license to any member, agent, or employee of Board); § 4.1-223(6) (prohibiting grant of license until license tax is paid).

[12]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970). "In the absence of a statutory definition," a term is "given its ordinary meaning, given the context in which it is used." Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980), quoted in Sansom v. Bd. of Supvrs., 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *see also* Op. Va. Att'y Gen.: 2003 at 137, 138; *id.* at 104, 106.

[13]Merriam Webster's Collegiate Dictionary 231 (10th ed. 2001) [hereinafter Collegiate Dictionary].

[14]Black's Law Dictionary 353 (8th ed. 2004).

[15]Va. Code Ann. §§ 13.1-601 through 13.1-779, § 13.1-780 (not set out in Code) (1999 & Supp. 2005).

[16]*See also* Va. Code Ann. § 2.2-4301 (2005) (defining "affiliate") Va. Code Ann. § 38.2-1322 (2002) (defining "affiliate" and "control").

[17]*See supra* note 4.

[18]*See supra* note 6 and accompanying text.

[19]*See* Op. Va. Att'y Gen.: 1997 at 6, 6; 1987-1988 at 43, 44 (construing former § 4-79(a)).

[20]Ted Sharpenter, Inc. v. Ill. Liquor Control Comm'n, 119 Ill. 2d 169, 175, 518 N.E.2d 128, 130-31 (1987); *see also* Foremost Sales Promotions, Inc. v. Director, 860 F.2d 229, 236 (7th Cir. 1988) (noting that primary purpose of Federal Alcohol Administrative Act "tied house" statutes "'seems to be prevention of a form of vertical integration whereby wholesalers or producers might gain effective control of ostensibly independent retail outlets'") (quoting Nat'l Distrib. Co. v. U.S. Treasury Dep't, 626 F.2d 997, 1004 (D.C. Cir. 1980), 1997 Op. Va. Att'y Gen., *supra* note 19, at 6.

[21]1987-1988 Op. Va. Att'y Gen, *supra* note 19, at 44.

[22]*National Distributing*, 626 F.2d at 1020, *quoted in Ted Sharpenter*, 119 Ill.2d at 177, 518 N.E.2d at 132.

[23]Commonwealth v. Am. Booksellers Assoc., 236 Va. 168, 178, 372 S.E.2d 618, 624 (1988).

[24]*Id.*; *see also* Harward v. Commonwealth, 229 Va. 363, 365, 330 S.E.2d 89, 90 (1985) (noting that penal statutes are strictly construed against Commonwealth; may not be extended by implication, but confined to offenses proscribed by language employed); Johnson v. Commonwealth, 211 Va. 815, 819, 180 S.E.2d 661, 664 (1971) (noting that penal statutes are construed in favor of defendant; may not be extended by construction or implication to favor Commonwealth).

[25]City of Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993); *see also* 2003 Op. Va. Att'y Gen. 3, 4.

[26]*See McKeon*, 211 Va. at 27, 175 S.E.2d at 284.

[27]*See Sansom*, 257 Va. at 594-95, 514 S.E.2d at 349; *Orange-Madison*, 220 Va. at 658, 261 S.E.2d at 533-34; 2003 Op. Va. Att'y Gen., *supra* note 12, at 138; *id.* at 106.

[28]Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)); *see also* 2002 Op. Va. Att'y Gen. 297, 299.

[29]*See* Collegiate Dictionary, *supra* note 13, at 53.

[30]Sections 4.1-400 to 4.1-418 (1999).

[31]This is consistent with § 4.1-400(4) of the Wine Franchise Act, which provides that the underlying purpose and policy of the Act is "[t]o establish conditions for creation and continuation of *all* wholesale wine distributorships, including original agreements and any renewals or amendments thereto, to the full extent consistent with the laws and Constitutions of the Commonwealth and the United States." (Emphasis added.) Furthermore, the definition of "wine wholesaler" set forth in § 4.1-401 applies "[a]s used in this chapter."

[32]*See* 3 Va. Admin. Code 5-10-10 to 5-70-220 (1996 & Supp. 2005).

[33]*See* supra note 3.

[34]See supra note 4.

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