

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY COUNCIL OF THE CITY OF BLOOMINGTON

In the Matter of the Application of DRT
Wine & Spirits LLC d/b/a Total Wine &
More, for an off-sale liquor license in the
City of Bloomington

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Perry Wilson (ALJ) for a hearing on September 10, 2014 at the City Council Chambers, Bloomington Civic Plaza, 1800 West Old Shakopee Road, Bloomington, Minnesota. After post-hearing submissions by the parties and the public, the record closed on September 30, 2014.

Sandra Henkels Johnson, Bloomington City Attorney and Marianna Kaul, Assistant Bloomington City Attorney, appeared on behalf of the City of Bloomington (City). Mark Jacobson and Debra Page, Lindquist & Vennum LLP, appeared on behalf of DRT Wine & Spirits LLC d/b/a Total Wine & More (Applicant).

STATEMENT OF THE ISSUE

An applicant for an off-sale liquor license must have “good moral character and reputation.”¹ The question in this case is whether DRT Wine & Spirits LLC d/b/a Total Wine & More has demonstrated “good moral character and reputation” within the meaning of Minn. R. 7515.0410 for the purposes of qualifying for an off-sale liquor license in the City of Bloomington.

The parties stipulated that this issue be phrased as follows:

Whether or not the Applicant, based on past activities or criminal record, poses a threat to the public interest or to the effective regulation and control of alcohol or creates or enhances the dangers of unsuitable, unfair or illegal practices, methods and activities in the manufacture, sale, distribution or possession for sale or distribution of alcohol or the carrying on of the business and financial arrangements incidental to the manufacture, sale, distribution, or possession for sale or distribution of alcohol?

Based upon the submissions of counsel, the statements at the public hearing and the hearing record, the ALJ makes the following:

¹ See, Minn. R. 7515.0410.

SUMMARY OF RECOMMENDATION

The ALJ **RESPECTFULLY RECOMMENDS** that the Bloomington City Council **GRANT** the application of DRT Wine & Spirits LLC d/b/a Total Wine & More, for an off-sale liquor license in the City of Bloomington.

Based upon the submissions of counsel, the statements at the public hearing and the hearing record, the ALJ makes the following:

FINDINGS OF FACT

Before the hearing began, the parties stipulated to the following facts:

A. Background of Total Wine & More

1. Total Wine & More is the operating name under which DRT Wine & Spirits, LLC proposes to operate the store in Bloomington at 4260 West 78th Street if a license is issued.
2. Total Wine & More began with one store in Delaware in 1991.
3. There are now 105 Total Wine & More stores operating in 16 states as of July 2014.
4. An average Total Wine & More store carries about 8,000 different wines, about 3,000 different spirits, and about 2,500 different beers.
5. Total Wine & More obtains accounting, marketing, and management services from Retail Services and Systems, Inc. (RSSI), which owns Total Wine operating companies in Delaware, Virginia, North Carolina, and South Carolina.
6. RSSI is owned by David and Robert Trone and five trusts. RSSI does not own an interest in the Applicant, DRT Wine & Spirits, LLC, but is the lead borrower in a \$250 million credit facility with five banks, as to which the Applicant is a co-borrower and a co-guarantor of the facility, along with all the other entities operating stores under the Total Wine name. Lenders deposit funds into one account and RSSI divides the funds among the Total Wine entities.

B. Application Under Consideration

7. Applicant DRT Wine & Spirits, LLC is a limited liability company registered under Minnesota law and has two members, David Trone and Robert Trone.²

8. DRT Wine & Spirits, LLC does not own any other liquor stores in Minnesota or elsewhere, and has no pending license applications in Minnesota or other states.

9. Other Total Wine & More stores are owned by entities whose members or shareholders are trusts, but there are no trusts with any membership or other interests in DRT Wine & Spirits, LLC.

10. An application was filed in September 2013 by Minnesota Fine Wines & Spirits, LLC for a liquor license in the City of Bloomington to open a Total Wine & More store. The applicant withdrew that application, due in part to concerns raised by the City about the minor beneficiaries of trusts that have an ownership interest in Minnesota Fine Wines & Spirits, LLC.

11. The license application of DRT Wine & Spirits, LLC is complete.

12. There are no past-due or delinquent taxes owing on the property where the Total Wine & More store is proposing to open.

13. DRT Wine & Spirits, LLC has provided sufficient proof of all insurance coverage required for issuance of an off-sale liquor license.

14. The store proposed by DRT Wine & Spirits, LLC is not located within 300 feet of a school or place of worship.

15. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, is under 21 years of age, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(2).

16. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, is a manufacturer, brewer, or wholesaler as defined in Bloomington Code § 13.01.01, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(3).

²The Bloomington City Code requires detailed information about the persons other than the Applicant with an interest in the business, or any element thereof, to facilitate the City's ability to fully analyze the integrity of the Applicant and its operating history. City Code §13.40 also allows customization of the required information so as to expand the scope of the inquiry into suitability for licensure. City Code § 13.42 authorizes the issuing authority to conduct any and all investigations to verify the information on the application.

Under this broader scope of review, the Applicant in this proceeding includes RSSI because it is closely associated with the Applicant. The Applicant, in full, and RSSI, in part, are owned by David and Robert Trone. RSSI is the employer of David and Robert Trone. Therefore, the Trones and RSSI are also considered the Applicant for purposes of the review required by City Code § 13.43 (1) and Minn. R. 7515.4010 (B).

17. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, has been convicted within the last five years of any felony nor of any crime involving the manufacture, sale, distribution, or possession of alcohol, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(4).

18. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, has had a liquor license revoked within the past five years, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(5).

19. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, had an interest in any business that has had a liquor license revoked within the past five years, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(6).

20. No corporate officer of DRT Wine & Spirits, LLC, or proposed general manager, has an interest in any other establishment in the City that holds or is applying for an off-sale liquor license, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(7).

21. No spouse of any corporate officer of DRT Wine & Spirits, LLC or the proposed general manager is ineligible for a liquor license in the City, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(8).

22. DRT Wine & Spirits, LLC, and its owners David Trone and Robert Trone, are the real parties in interest in the off-sale liquor license application under consideration, and the grant of an off-sale liquor license to DRT Wine & Spirits, LLC is not barred by Bloomington Code § 13.46(9).

C. Total Wine's Record in Minnesota

23. Roseville, Burnsville and Woodbury are the only Minnesota cities to consider a license application for a Total Wine & More store.

24. Roseville, Burnsville and Woodbury have all approved the license applications for Total Wine & More stores.

25. Existing local liquor retailers, and the Minnesota Licensed Beverage Association (MLBA), a trade association and lobbying organization for liquor retailers, have actively opposed license applications for Total Wine & More stores in Roseville, Burnsville, Woodbury, and Bloomington.

26. Attorneys for Bev Mo, a national competitor of Total Wine, also filed documents opposing Total Wine's Bloomington application, as did a local law firm, Binsfeld and Engebretson, P.A.

27. The MLBA and a competing Roseville liquor retailer appealed the city of Roseville's granting of a liquor license for a Total Wine & More store to the Minnesota Court of Appeals. The Court of Appeals dismissed the appeal with prejudice, holding that the competing retailer and the MLBA did not have standing to bring the appeal because their only interest in the matter was in preventing competition.

28. The decisions by the cities of Burnsville and Woodbury to grant liquor licenses for Total Wine & More stores were not appealed.

29. The first Total Wine & More store in Minnesota opened in Roseville in March 2014.

30. The Burnsville and Woodbury Total Wine & More stores opened or are expected to open in the fall of 2014.

The ALJ finds the additional facts set forth below:

A. Applicant's Affirmative Proof of Good Character

31. As evidence of its commitment to the communities in which it does business, seventy-five percent of the employees in Applicant's stores work full time. Managers receive 150 hours of training.³ Total Wine has received a variety of "retailer of the year" awards from business, retail, and liquor-industry publications⁴ and prides itself on its investment in its customers, employees, and communities.⁵

32. Total Wine made donations in 2013 to more than 4,200 charitable organizations nationwide, and has made a number of donations to Minnesota organizations since opening for business in Roseville, Minnesota in March 2014.⁶

33. Total Wine has had stores open for 758 "store years" (defined as number of stores times number of years each store has been open) and in that time has had 12 violations for sales to minors and no violations for sales to intoxicated persons.⁷

34. From 2009 to 2012, Total Wine had between 63 and 88 stores open nationwide, and in that time had one violation for a sale to a minor. During the same period, the off-sale liquor stores open in Bloomington and their Minnesota affiliates (commonly owned stores and stores operating under the same trade name) numbered between 123 and 127, and had a total of 38 violations for sales to minors and intoxicated persons.⁸

³ Statement of David Trone.

⁴ Ex. 38.

⁵ Statements of D. Trone and E. Cooper.

⁶ Ex. 40; Statement of E. Cooper.

⁷ Statement of D. Trone; Ex. 01.0043-.0044.

⁸ Ex. 47.

35. There is no evidence that any of the violations by Total Wine stores were willful, or that owners David Trone or Robert Trone were personally involved in any of them.

36. The Applicant has implemented a centralized tracking program to monitor, track, and take corrective measures in response to any actual or alleged liquor law violations.⁹ The Applicant is also in the process of hiring a general counsel to ensure that it adheres to applicable laws in all states in which it does business, including Minnesota.¹⁰

37. The Applicant's internal policy for its proposed store, and the policy for all Total Wine stores in Minnesota, is to check the identification of every customer regardless of appearance.¹¹ The Applicant has established this policy for the express purpose of avoiding any sales to minors.¹²

38. Total Wine stores have a "zero tolerance" policy, pursuant to which any employee who does sell alcohol to a minor is immediately terminated.¹³

39. The Applicant and all Total Wine stores use state-of-the-art inventory-management systems and have dozens of cameras in each store as part of their efforts to avoid shoplifting. As a result, Total Wine's loss rate, or "shrinkage," is among the best in the retail sector.¹⁴

40. The proposed store will have an education room. Nationwide, Total Wine stores use their education rooms approximately 10 percent of the time for staff training, 15 percent of the time for customer education classes, and 75 percent of the time for community groups.¹⁵ No food will be served in the education room or in any other place in the proposed store.¹⁶

41. After the original application for a license by Minnesota Wine & Spirits was withdrawn, Applicants commissioned Waypoint, Inc. to prepare due diligence reports on RSSI, Robert Trone and David Trone.¹⁷ This was a broad scope investigation that included collection of information from the liquor licensing authorities for each state in which Applicant does business. Records from state and federal courts were also examined. With respect to information obtained from the state regulatory agencies, the

⁹ Statement of D. Trone.

¹⁰ *Id.*

¹¹ Statements of D. Hopper and D. Trone.

¹² *Id.*

¹³ *Id.*

¹⁴ Statement of D. Trone.

¹⁵ Statement of E. Cooper.

¹⁶ *Id.*

¹⁷ Ex. 2.

Waypoint report concluded that of the 101 Total Wine & More stores in 15 states, there were 29 violations of liquor laws and regulations found by the 15 agencies.¹⁸

B. Minnesota Enforcement Activity Involving Applicant

42. The Minnesota Department of Public Safety's Alcohol and Gambling Enforcement Division (AGED) investigated the issue of whether Applicant properly obtained liquor licenses for the Total Wine stores in Roseville and Burnsville, after receiving a complaint from Jay Nelson, an employee of the Haskell's liquor store in Burnsville. AGED concluded that "it does not appear that Total Wine & More violated the Minnesota 340A Liquor Law statutes in obtaining their license. Total Wine and More did not obtain any alcohol inventory during the business transaction and does not appear to have violated any statute in Minnesota 340A Liquor."¹⁹ AGED accordingly closed its investigation and did not issue any charges or citations.²⁰

C. Minnesota Licensing Proceedings Involving the Applicant

43. Three other Minnesota cities, Roseville, Burnsville, and Woodbury have considered whether to grant Applicant a liquor license. In each of these cases, the city councils were presented with Applicant's record of liquor-related violations in other states.²¹ Each city council heard oral and received written evidence from the MLBA that was substantially the same as the evidence presented by the MLBA and its members in this proceeding. Each city council determined that the Applicant should receive a license.²²

D. Other State Licensing Proceedings Involving Applicant

In the record are a number of documents from other states' enforcement proceedings that contain allegations regarding the Applicant's conduct that were never proven or that were dismissed. The findings below are based on admissions of the Applicant, fact findings, and legal conclusions in enforcement or legal proceedings. The ALJ's reasons for making this distinction are described in the Memorandum below.

¹⁸ *Id.* By letter dated September 5, 2014, William Griffith asserted that the Waypoint Report is incomplete because it does not include a number of violations from Pennsylvania for 1983 to 1995. See pp.23-25. The Waypoint Report notes that the records received from Pennsylvania were not complete at the time the report was prepared.

¹⁹ Letter from W. Griffith to the ALJ, dated September 5, 2014, at 39, 41.

²⁰ By letter dated September 16, 2014, William Griffith, attorney for MLBA argued that Applicant committed violations of Minnesota law by selling product below cost, failing to make a complete disclosure to the Roseville City Council and offering tastings in violation of Minnesota law. With respect to the sales below cost, both Minnesota AGED and the Commerce Department declined to investigate due to lack of authority and lack of resources. The omission of material in the application in Roseville, if any, has been remedied by the MLBA's submissions to the Roseville City Council. See letter from William Griffith to Mark Gaughan, November 22, 2013, attached to letter from William Griffith to ALJ Wilson dated September 5, 2014. As to the tastings, the ALJ finds this is an unproven allegation, not supported by an admission of the Applicant. The most that can be said on this subject is that the way Applicant conducts its tastings in other states might violate the law in Minnesota.

²¹ Exs. 5 to 19.

²² *Id.*

i. Pennsylvania

44. In 1989, David Trone was charged in Allegheny County, Pennsylvania, with five criminal counts relating to the transportation of malt or brewed beverages without a transporter for hire license, receiving allowances on rebates, criminal solicitation, and criminal conspiracy.²³ All five counts were dismissed in 1990, and the court records were subsequently expunged.²⁴ An Allegheny County district attorney later explained, under oath, that the charges were “without prosecutorial merit.”²⁵

45. In 1992, Pennsylvania state prosecutors charged David Trone with 23 criminal counts relating to the ownership of retail beer warehouse outlets, stemming from actions allegedly occurring between 1987 and 1992.²⁶ Twenty of the 23 counts were dismissed on July 21, 1994, in a decision that stated that “the multiplicity of counts and strained interpretations of the law certainly amount to prosecutorial overreaching.”²⁷

46. The three remaining counts were dismissed and the remainder of the case was resolved through a settlement agreement dated September 7, 1994. The settlement included payment to the state of \$40,000, and execution of a consent decree imposing a number of conditions on the future operations of David Trone’s Beer World stores. The conditions functioned to divest David Trone’s interest in multiple liquor licenses, require that the relationship between Trone’s RSSI consulting firm and licensed liquor stores revert to a purely consulting role, and discouraged the sale of stale beer to customers without notice of that fact. The settlement also required Trone to drop two lawsuits he had filed against the state. The records relating to this matter were later expunged.²⁸

47. In 1992, Robert Trone was charged in Dauphin County, Pennsylvania, with one count of criminal conspiracy. The charges against him were later dismissed, and the court records were subsequently expunged.²⁹

48. A lawsuit filed by several competitors against David Trone, his stores and a large distributor alleged antitrust and civil Racketeering Influenced and Corrupt Organization (RICO) violations.³⁰ The Third Circuit Court of Appeals affirmed the district court’s grant of summary judgment in favor of defendants on the RICO claims, but reversed summary judgment on the antitrust claims and remanded the case. At the motion stage, the Court of Appeals found sufficient evidence to show that “Trone, his employees, and the separately incorporated stores have contracted, combined and conspired to restrain trade in beer in Allegheny County, by confronting wholesalers as a group and using their buying power and the threats described above (poor product

²³ Ex. 02.0102

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ex. 02.0104.

²⁷ *Id.*

²⁸ Ex. 31.0044-.0058.

²⁹ Ex. 02.0103.

³⁰ *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 268 (3rd Cir. 1999).

placement) to force the wholesalers to sell them beer at a price lower than that available to other retailers.”³¹ These claims were later settled and never finally adjudicated.

ii. New Jersey

49. In 1992, the New Jersey Division of Alcoholic Beverage Control commenced an investigation of Total Wine that lasted more than three years.³² The investigation centered on whether the four Total Wine stores in New Jersey violated the state’s two-license limit on the number of liquor licenses in which a person may have a beneficial interest.³³

50. The Total Wine licensees in question entered into settlements with the state of New Jersey in 2005 in the form of Consent Orders.³⁴ The Consent Orders included a plea of *non vult contendere* (no contest) to the charge of failure to produce books of account within seven days, and required each of the four stores to pay a total of \$250,000, for a total of \$1 million, to the state over a period of five years to reimburse the state for its costs of investigation.³⁵ In return for the plea and agreement, the Director of Alcoholic Beverage Control suspended each of the four licenses for 30 days, but the suspension was not required to be served so long as Total Wine & More complied with the Consent Order. The required 15 corrective actions included:

- a. separation of both ownership and operation of the Cherry Hill two stores from the EGH two stores;
- b. all supplies and non-alcoholic beverages sold by the stores must be priced and invoiced at reasonable levels;
- c. Cherry Hill, EGH and RSSI must re-arrange their business dealings to avoid shifting of profits among the entities and that any services provided by RSSI to Cherry Hill or EGH be at market rates and prices;
- d. Cherry Hill and EGH must comply with all applicable New Jersey laws regarding the practice of “packing out”;
- e. RSSI must register to do business in New Jersey;
- f. RSSI must not provide unpaid personnel to Cherry Hill or EGH;
- g. RSSI must not control the day-to-day operations of either Cherry Hill or EGH and each store must make its own purchases of wine, spirits or beer from wholesalers directly; and

³¹ *Id.* at 240.

³² Ex. 25.0003-4.

³³ *Id.*

³⁴ Statement of Thomas Heffelfinger.

³⁵ Ex. 25.0003-4.

- h. RSSI must not guarantee the debt of either Cherry Hill or EGH.³⁶
51. The other New Jersey cases are summarized as follows:
- a. Case 05-31602, Cherry Hill Wine and Spirits, Inc., trading as Total Wine and More. Lic.#: 0409-44-001 Offense: Tailored charges. Offense date: March 26, 2005. Case closed with warning letter.
 - b. Case 98-21677, Cherry Hill Wine and Spirits, Inc., trading as Total Wine and More. Lic. #: 0409-44-001 Offenses: 1) E141, Employee list incomplete or not available; 2) APP1 No current license application – short/long; 3) PULA Sale to underage. Offense dates May 5, 1998. Case closed May 31, 2000. Licensee paid \$7500 fine in lieu of 7-day suspension.
 - c. Case 95-20582, Cherry Hill Wine and Spirits, Inc., trading as Total Wine and More. Lic. #: 0409-44-001 Offense: Sale to underage person. Offense date: July 20, 1995. Case closed Jan. 8, 1997. Licensee paid \$10,000 fine in lieu of 7-day suspension.
 - d. Case 91-18763, Vineyard Liquors. Lic. #: 0409-44-001 Offenses: No federal tax stamp or indicia of payment and sale to underage person. Offense date: July 17, 1991. Case closed April 27, 1992. Licensee pay \$500 fine in lieu of 10-day suspension.
 - e. License application 0722-44-046-008 lists a January 1, 1997, violation Docket # 06028-965, prosecuted by Division of ABC, licensee paid \$10,000 fine. And there are four pending cases from February 2014 in New Jersey for Illegal Sales Below Cost in Case Nos. 13-35785, 23-35791, 13-35786, and 13-35831.³⁷

iii. Texas

52. A competitor of Total Wine, Gabriel Investment Group, Inc., brought a civil lawsuit against the Total Wine operating company in north Texas in 2013, accusing it of license subterfuge and violating state ownership limitations.³⁸ The district court judge issued a temporary injunction based on the allegations in the Gabriel Complaint.³⁹

53. The Texas liquor licensing authorities investigated and found that the *Gabriel* protest raised a valid issue:

RSSI is same ownership as Total Wine Spirits, Beer and More, Applicant and North Texas LLC. With the practice of sweeping accounts from each

³⁶ *Id.*

³⁷ Ex. 18.0159-.0204.

³⁸ Ex. 30.0005.

³⁹ *Id.*

entity, profit and losses are being controlled by RSSI, investment by the Texas entities was being controlled by RSSI. The interest paid for RSSI concentration bank account is transferred to Fine Wines and Spirits, LLC by journal entry as a percentage. Investments are in same bank account for RSSI. Repayment of San Antonio startup expenses are made from RSSI concentration bank account and bank credit facility same as a deficit/negative daily balance. RSSI is a different entity than Fine Wine and Spirits LLC.⁴⁰

54. On August 1, 2013, Total Wine withdrew its then pending Texas liquor license application. In October 2013, a new application was filed with supplemental information detailing the relationship between RSSI and Total Wine. New protests to that license were lodged with the Texas liquor licensing authority. After RSSI was added to the ownership for the San Antonio Total Wine store, the Texas licensing authority found no license subterfuge, and the injunction that was entered in the *Gabriel* case expired in November 2013.⁴¹

55. The Texas alcohol administrator interviewed in connection with the Waypoint report stated that Total Wine was exceptionally responsive and thorough and that he “couldn’t ask for a better license holder.”⁴²

iv. Florida

56. There are 21 stores in Florida doing business as Total Wine, and none have ever had any violations.⁴³ There were a number of allegations against the Applicant that were investigated by the Florida licensing authorities. These allegations were either found to be unproven or no action was taken.⁴⁴ In one case, the Applicant was found to have been in full compliance after an initial warning was issued “in order to receive invoices/records.”⁴⁵ In another, the matter was closed and the licensee found to be in compliance.⁴⁶ Seven complaints have been made by others against just one store, which were closed without action.⁴⁷ The Waypoint report notes that some of the allegations against Total Wine stores in Florida originated from “anonymous complaints” or were “[a]llegations brought by an [o]wner of another wine store.”⁴⁸

⁴⁰ Ex. 18.0330-0388.

⁴¹ Ex. 18.0327-0329.

⁴² Ex. 02.0083.

⁴³ Ex. 02.0053-57.

⁴⁴ *Id.*

⁴⁵ *Id.* at 53-54.

⁴⁶ *Id.* at 57.

⁴⁷ *Id.* at 55-56.

⁴⁸ *Id.* at 53, 57.

v. Connecticut

57. There were violations of Connecticut law noted in the Waypoint report, but documentation was not available.⁴⁹

58. Case #2013-618 - A violation of Connecticut Statutes § 30-68m, Retail Permittee; sales below cost prohibited. There was evidence that Total Wine and More advertised and sold alcoholic beverages below cost in the month of May 2013. Sixteen items were offered for sale in Norwalk, Connecticut below the state minimum. Total Wine made an "Offer in Compromise" to pay a \$500 fine in lieu of formal administrative hearing for incidents occurring from December 26, 2012 to March 14, 2013. This offer was accepted, the fine was imposed and Total Wine and More agreed to corrective action.⁵⁰

vi. Delaware

59. The Waypoint report substantiated five violations by the Applicant in Delaware. Three of the violations were in 1991 and 1993 for selling below cost, for having a non-employee on the premises after hours, and for an unspecified trade practice violation. The other two Delaware violations were in 2002, for having a server with an expired training card, and in 2011, for selling to an underage person.⁵¹

E. Statements by the Public

Members of the public offered statements at the hearing which are summarized below:

60. **Mark Adkins**, a Bloomington resident affiliated with the Chamber of Commerce, spoke in favor of the application. He said that he attended a lunch and presentation at the proposed store site. He was impressed with the size of the store and Applicant's community involvement. Mr. Adkins stated that he has visited Total Wine stores in the southern states and that the stores are well-stocked and have product that is well priced. He said that new competition in Bloomington will improve all off-sale liquor stores.

61. **John Johansson**, a representative of the landlord for the Applicant's proposed store in Bloomington, spoke in favor of the application. He stated that Applicant's new store is a part of the revival of the landlord's shopping center. Mr. Johansson stated that the other tenants in the center welcomed the Applicant's store.

62. **Jay Nelson**, of the Burnsville Haskell's Wine & Spirits store, stated that he is not afraid of competition, but that the same rules should apply to all licensees. He questioned Total Wine's acquisition of the Red Hawk Liquor store in Burnsville, without

⁴⁹ Ex. 2.

⁵⁰ Ex. 18.0024-.0042.

⁵¹ Ex. 02.0051.

any assets or inventory changing hands, and Total Wine's similar acquisition of a store in Roseville. It did not seem right to him that only Total Wine could compete for those licenses in cities where there is a limit on the number of off-sale liquor licenses. Mr. Nelson also recounted that his store had been recently "crawling with employees of Total Wine" documenting Haskell's pricing structure on certain products. Nelson asked one man, who identified himself as a marketing manager for Total Wine, to stop taking notes of Haskell's prices. When the man was leaving the store he told Nelson, "I'm sorry." Nelson responded, "Pardon me." The Total Wine marketing manager then said, "I'm sorry we will put you out of business." Nelson stated that he met with four of Burnsville's five council members and each one of them expressed concerns about Total Wine initiating litigation against the City should they deny Total Wine its license application.

63. **Gelmar Bechara** stated that he recently purchased a liquor store. He believed that a single violation would have prohibited him from operating in Bloomington, and that ten violations would have resulted in a certain denial.

64. **David Hautman**, the operator of Seven Eighths Liquor, stated that he has been in the business since 1976. He expressed concern about Total Wine pricing product below cost on the most popular products; this does not allow other stores to cover their expenses. He stated that Total Wine knows that and intends to drive out other businesses, and will also litigate to change current liquor laws that do not accommodate Total Wine's business strategy.

65. **Doug Junker**, the Bloomington Licensing Examiner, stated that Total Wine's listing of its charitable events held on their licensed premises as 'tastings' for a dollar value may not qualify under the educational exception of the state statutes prohibiting the opening of liquor product on the premises of an off-sale liquor license.

66. **Frank Ball**, a retired police officer and past director of the AGED discussed, on behalf of the MLBA, the history of the current alcohol regulations and his concern that liquor laws continue to prohibit all sales practices aimed at increasing alcohol consumption. The problem with the so-called "tied houses"⁵² was that they agreed to sell exclusively one manufacturer's product and their only goal was increasing sales. Mr. Ball also expressed concern about Total Wine's practice of selling liquor below cost in violation of Minn. Stat. § 325D.04.

67. **William Griffith**, an attorney for the MLBA, expressed concern about Total Wine's pattern and practice of serious liquor law violations. He stated that Total Wine had failed to disclose these violations to the cities where they sought licenses and that it was only after his associate, Jacob Steen, found the New Jersey violations that the Applicant agreed to supplement its license applications. He disagreed with Mr. Trone's characterization of the New Jersey monetary sanctions as "costs" because they are listed on New Jersey state records as "fines." Mr. Griffith stated that \$1 million

⁵² Mr. Ball explained that a "tied house" is a retail establishment, like a bar or restaurant, that sells only the liquor products of one manufacturer. It is therefore tied to that manufacturer.

in fines is significant and must have had a significant basis. Mr. Griffith also expressed concern about the closed manner in which Total Wine obtained its licenses in Roseville and Burnsville. He stated that Total Wine was able to acquire just the name of the business entity and the right to be first in line in a closed system of licensure. It remains, he said, a mystery what happened to the former stores' inventories. Mr. Griffith reiterated Mr. Ball's statement that Total Wine's practice of selling liquor below cost violates the law, and that it is motivated by a desire to limit the ability of other vendors to compete in this marketplace. Finally, Mr. Griffith stated that Total Wine does not take due care to abide by the law.

68. **Steve Burwell**, the owner and operator of Roseville's Fairview Wine & Spirits, expressed concern that Total Wine was able to obtain licenses in a closed system that were specifically reserved for Total Wine. He stated that Total Wine's characterization of its business as a "destination location" is calculated to obscure the ability of Total Wine to run others out of the business. The first businesses to be run out are small, local businesses. He testified that his six-pack beer sales have plummeted since Total Wine's entry into the market.

69. **Dustin Harkins**, a Bloomington home owner and sommelier, questioned why Total Wine would build out a full liquor store before it had a Bloomington license. He was concerned about the casual attitude of David Trone, calling Total Wine a "Toys R Us for adults." Harkins said liquor is a serious, highly regulated business. He also disputed Trone's allegation that the local liquor stores are using the government as a foil to stop them so that the local liquor stores avoid competition.

70. **Jennifer Scholler**, is an owner of a Minneapolis liquor store and a MLBA executive board member. Her family has owned a liquor store for 55 years. She stated that she had seen merchandisers (wholesalers) perform duties in the Total Wine stores that they do not in other local liquor stores, such as stocking the shelves. She stated that this unfair competition. She said that her business does not sell below cost and she calls out violations of others. She called Total Wine a scary bully. Total Wine needs to "do its homework" and learn and follow the rules. She also said that Total Wine should not conduct wine tastings on the premises; that violates the law.

71. **Ted Farrell**, President of Haskell's Wine & Spirits, an 80-year-old business with a 20-year presence in Bloomington, stated, "we welcome competition; it makes us better...Talk about fines, in 80 years we haven't had over \$2,000 in fines. If you were required to pay \$1 million – something bad happened." Even \$50,000 per year is an amazing fine or reimbursement, he said. As to the Florida instance—the paperwork issue, there is something there questionable, he said. "A one million dollar payment for Haskell's would wipe us out," he said. He characterized Trone's attitude as "Go ahead and fine me and I will find a way to take care of it."

72. **Rachel Engebretson**, a Bloomington business owner and a lawyer representing MGM Liquor (Palace Wine and Spirits), stated that Minnesota standard for license suitability should include analysis of the violations Total Wine attempts to sweep under the rug. These violations were not disclosed in hundreds of license applications.

She stated that Total Wine should have exercised more diligence in submitting its license applications than simply cutting and pasting from prior applications when they are selling a controlled substance; they should keep better track of their violation history, and it is surprising that Total Wine was so sloppy in their license applications given their resources. Liquor is not, she stated, a free market commodity; it is highly regulated. Engebretson cited the many social problems and costs associated with cheap alcohol. The \$687 per capita cost to Minnesota residents, she stated, is too high.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Minn. Stat. §§ 14.50, 14.55 and 340A.401 provide the ALJ and City with the authority to conduct this proceeding and to consider whether the Applicant's off-sale liquor license application should be approved. The role of the ALJ is to make findings, conclusions, and recommendations on that subject.

2. The City gave the Applicant proper and timely notice of the hearing in this matter, and the City has complied with all of the law's substantive and procedural requirements. This matter is properly before the ALJ pursuant to Resolution 2014-72 of the City Council referring the public hearing in this matter to the Minnesota Office of Administrative Hearings.

3. Minn. R. 7515.0410 (B) provides the standard to be applied to the determination of whether Applicant should be granted a liquor license by the City as follows:

The applicant shall have good moral character and reputation. An applicant does not have good moral character and reputation if, based on past activities or criminal record, the applicant poses a threat to the public interest or to the effective regulation and control of alcohol or creates or enhances the dangers of unsuitable, unfair, or illegal practices, methods and activities in the manufacture, sale, distribution, or possession for sale or distribution of alcohol or the carrying on of the business and financial arrangements incidental to the manufacture, sale, distribution, or possession for sale or distribution of alcohol.

4. Applicant has the burden of proving that it possesses the required good moral character by a preponderance of the evidence.⁵³

5. If Applicant proves that it is of good moral character by a preponderance of the evidence, those opposing Applicant's application have the burden of proving that Applicant does not satisfy the standard set by Minn. R. 7515.0410 (B).⁵⁴

⁵³ *Application of City of White Bear Lake*, 247 N.W.2d 901 (Minn. 1976).

⁵⁴ See Minn. R. 1400.7300, subp.5.

6. Hearsay evidence is admissible proof in this administrative proceeding, “if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.”⁵⁵ Proof of good moral character and proof rebutting evidence of good moral character must be based on facts in the record and not on unsupported allegations and accusations.⁵⁶

7. Based on the admissible evidence in the record, the Applicant has proved that it satisfies the good moral character standard set forth in Minn. R. 7515.0410.

8. Those opposing Applicant’s application have not shown by a preponderance of the evidence that Applicant is not of good moral character based on its criminal record.

9. Those opposing Applicant’s application have not shown by a preponderance of the evidence that Applicant is not of good moral character based on its past activities.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Findings of Fact and Conclusions of Law, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge respectfully recommends that:

The application of DRT Wine & Spirits LLC d/b/a Total Wine & More for an off-sale liquor license in the city of Bloomington be **GRANTED**.

Dated: October 20, 2014

s/Perry Wilson

PERRY WILSON
Administrative Law Judge

Reported: Digitally Recorded; transcription ordered by Applicant.

⁵⁵ *Id.*, subp.1.

⁵⁶ See *Godfather, Inc. v. City of Bloomington*, 375 N.W. 2d 68 (Minn. Ct. App. 1985).

NOTICE

This Report is a recommendation, not a final decision. The hearing process has been conducted and this Report has been prepared pursuant to Bloomington City Council Resolution Number 2014-72, dated August 4, 2014. The City Council of Bloomington will make the final decision after a review of the record. The Council may adopt, reject, or modify the Findings of Fact, Conclusions of Law, and Recommendations. Parties should contact the City Clerk's Office, City of Bloomington, 1800 West Old Shakopee Road, Bloomington, MN 55431-3027, to ascertain the procedure for filing exceptions or presenting argument to the City Council.

MEMORANDUM

The ALJ's decision to recommend that the City grant Applicant a liquor license was not an easy one. There are a number of facts and a pattern of accusations about Applicant's business practices in other states that give pause and call for careful review. In the end, the law requires that the decision about Applicant's license request be based on the facts in the record and not on unproven accusations; even if it seems that there is a pattern to the unproven accusations.

The City has broad discretion to grant or deny a liquor license. The City can consider an applicant's history of activity and can deny a license based on bad behavior, even if no criminal conviction exists.⁵⁷

The process followed by the city in *Godfather, Inc. v. City of Bloomington*,⁵⁸ shows how the prior history of an applicant should be analyzed in determining whether to grant a liquor license. In *Godfather*, the Bloomington police prepared a report about the applicant's conduct that was submitted to the city council. The report contained a number of unproven allegations about the applicant's prior conduct. To determine the facts about the applicant, the city council asked an administrative law judge to hold a hearing to make a determination of the facts. The hearing was held and the ALJ determined that the facts supported a finding that the applicant lacked "good moral character" in that:

1. applicant failed to withhold state and federal income tax and pay social security and unemployment compensation for a number of employees; and due to this failure, he was under investigation by local, state and federal authorities;
2. applicant failed in preventing others from using drugs in the Speakeasy Bar;
3. applicant failed to disclose on his liquor application that he was a defendant in a number of lawsuits; and

⁵⁷ See, *Wajda v. City of Minneapolis*, 310 Minn. 339, 343, 246 N.W.2d 455, 457 (1976) quoting *71 2 E. McQuillan, *Municipal Corporations* § 10.37 (3d ed. 1979).

⁵⁸ 375 N.W. 2d 68 (Minn. Ct. App. 1985).

4. applicant refused to cooperate with the city of Medicine Lake by operating a topless dancing show in his establishment.⁵⁹

The city council denied the application and the applicant appealed to the Minnesota Court of Appeals. One of the arguments made by the applicant on appeal was that the city had relied on unproven allegations about the applicant's behavior in denying the license. The Court of Appeals rejected that argument and noted that well-supported facts in the record justified the denial.⁶⁰

The City Council has decided to employ in this matter an approach similar to that it followed in *Godfather*. The ALJ has separated unproven allegations from facts and focused on facts in the record. That process is what led the ALJ to recommend granting the license here.

Applicant has demonstrated its good character by showing that it has a strong compliance record with regard to underage sales of alcohol and sales of alcohol to intoxicated persons. It backs that record up with a strict policy against such sales and swift punishment for employees who violate the law prohibiting such sales. Applicant provides full-time jobs for 75 percent of its employees. It has an extensive training program for managers. Applicant makes significant contributions to the communities in which it does business through charitable donations of various kinds.

The record also contains evidence of serious discipline received by Applicant in other states for various violations. The most significant of these violations are the \$1 million in fines Applicant paid in New Jersey, and the \$40,000 fine it paid in Pennsylvania. In addition, the *Gabriel* case in Texas, coupled with the Applicant's omission to include a full detail of its past history of regulatory discipline when it filed its first application for a license in Bloomington, is cause for concern that Applicant may have omitted these facts from its applications on purpose.

In this context, it is important to note that Applicant commissioned the Waypoint report and submitted it in connection with its now-pending application for a liquor license. This report was prepared under the guidance of former United States Attorney Thomas Heffelfinger. The report is extensive and its accuracy has not been seriously challenged. This is not the approach or the behavior of an applicant intent upon ignoring or obscuring its regulatory problems. To be sure, the Waypoint report shows 29 violations of law and a number of other unsubstantiated allegations. Many of the most serious of these allegations are old. Almost all of the allegations were resolved by the Applicant through an agreement with regulators. There is no evidence that Applicant was ever convicted of a crime. There is no evidence that Applicant was found to have committed a serious violation of liquor laws or regulations in Minnesota or in any of the other states in which it does business.

It is understandable that current off-sale liquor license holders in the city of Bloomington and their trade association object to this application. There is little doubt

⁵⁹ *Id.* at 71.

⁶⁰ *Id.*

that Applicant will be a formidable competitor. The Court of Appeals found in the Roseville case that alleged competitive injury does not give legal standing to object to this application. However, the MLBA has made a significant positive contribution to the consideration of the application here by pointing out the omissions in Applicant's disclosure of its history of liquor law compliance and discipline in other states.

The ALJ has considered the other issues raised by those opposing the application. The City is concerned that Applicant's size and scope will make it difficult to regulate its behavior with regard to the legal sourcing of product through Minnesota wholesalers. However, the record shows that the City's ability to regulate the Applicant will not be adversely affected by its size or its multi-state business scope. Among the liquor stores licensed in Bloomington are Cost Plus World Market, a national retail chain; Cub Foods and Cub Discount Liquor, a Minnesota chain that operates numerous stores; MGM Liquor Warehouse and MGM Wine & Spirits, a partially franchised chain with dozens of Minnesota locations; Sam's Club, a national discount retailer that is owned by Wal-Mart, the largest retailer in the United States; and Trader Joe's, another national retailer. Applicant's business is of a similar size and scope to these national retail chains with retail businesses in Bloomington. There was no evidence showing that the City has had a difficult time regulating these entities.

A number of objectors asserted that Applicant sells below cost at its stores in Minnesota. The only facts related to this assertion were e-mails from Minnesota AGED stating that it does not have jurisdiction to investigate sales below cost, and that the Department of Commerce, which does have jurisdiction, does not have the resources to conduct such an investigation.

Concern was also raised about the manner in which the Applicant will run its education room and whether it will conduct or refrain from conducting tasting as dictated by Minnesota law. The ALJ finds that there are no facts showing that Applicant has violated Minnesota law regarding tastings. The most that can be said is that the way Applicant has operated its education rooms and conducted tasting in other states might violate Minnesota law. The City also expressed concern about its ability to regulate Applicant's education room activities, but provided no specific evidence as to how regulating Applicant's conduct would be more difficult than regulating the conduct of other liquor stores located in the City.

The Applicant has shown that it satisfies the good moral character standard set forth in Minn. R. 7515.0410 (B). The off-sale liquor license should be granted.

P. M. W.