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Winery tasting rooms: Zoning, licensing and leasing considerations

In an attempt to reach a greater number of consumers directly and enhance their retail sales, wineries are increasingly focused on their tasting room operations. In particular, many wineries have been opening offsite tasting rooms, often located in locations with high visitor traffic, which provide consumers the opportunity to taste and purchase their wines. Offsite tasting rooms are particularly popular with those wineries that produce their wine in another's facility and therefore do not have access to a tasting room within an actual winery facility. This article addresses some zoning, licensing and leasing considerations related to such tasting rooms.

LICENSING

Today, the concept of the "virtual winery" is increasingly popular. It denotes a wine brand that is not produced in its own bricks-and-mortar winery facility, and with rising prices for winery properties, many in the business have chosen to avoid the overhead associated with owning a winery facility outright, opting instead to produce their wine at a "custom crush" facility.

The term is, however, misleading because there are two types of virtual wineries, and one is not, properly speaking, a winery at all. A winery is, by definition, an entity that holds a Type 02 Winegrower License from the California ABC. Type 02 virtual wineries actually produce their own wine, albeit in another winery's facility, and they are therefore eligible to open a tasting room.

Those whose wine is "custom crushed" for them by another winery, however, do not hold a Type 02 license and thus are not true wineries. Rather, they generally hold a Type 17/20 license combination, which means they are licensed as a wholesaler of wine with limited retail privileges. These wineries are not eligible to open a tasting room, although they may have their wines poured in a wine bar or sold in off-premise wine shops.

Wineries holding a Type 02 license may obtain what is known as a Duplicate Type 02 license, which allows a winery to have a tasting room away from the facility where the wine is made. Some wineries have tasting rooms both at their production facility and in another location, and some have a single offsite tasting room, with no tasting at their production facility. Either way, a winery may have no more than one offsite tasting room.

Wineries may offer tasting of wine free of charge in their tasting rooms, or they may charge consumers to taste wine. They may sell wine by the glass, and they may also sell wine by the bottle to be consumed on or off premise. Wineries may also join together and operate shared tasting rooms, where consumers may taste wines from more than one winery. In the case of a shared tasting room, each winery must have a designated space where its wine is served, or the wine must be served in a glass with a distinctive marker exclusive to the licensee. In a shared tasting room each winery's wine must be segregated, sales of wine must be recorded separately, and sales taxes must be paid separately. The wineries share the space, but they each operate their tasting activities independently.

ZONING

A winery may establish an offsite tasting room only if local zoning permits such a use. Under the zoning ordinances of the various municipalities in Napa and Sonoma counties, tasting rooms generally are conditional uses, which means that they require discretionary use permit approval by the city. Generally, tasting rooms – together with wine shops and cocktail lounges or bars – are allowed with a use permit in commercial zoning districts. Certain jurisdictions have limitations upon the types of wine that can be poured in a tasting room. For example, the city of St. Helena limits its offsite tasting room activities to wines made from a minimum 75% Napa Valley grapes, which are labeled Napa Valley or a sub-appellation thereof. When adopting its tasting room policy, the city was guided by similar regulations in the unincorporated county of Napa, which require new wineries to produce at least 75% of their wine from Napa grapes.

Similarly, certain jurisdictions have begun to take steps to limit the number of new tasting rooms within their boundaries. Cities such as Yountville and Healdsburg have expressed concern with the possible over-concentration of tasting rooms in their downtown areas, and they have adopted land-use policies that can be used to limit such uses. Yountville requires that a certain percentage of the retail space within a new tasting room be devoted to non-wine uses, and Healdsburg has a lengthy ordinance that incorporates numerous findings for the approval of alcohol beverage establishments. These include findings that the proposed use would not result in an "undue concentration" of such establishments and that the proposed use is of a size and activity level that is compatible with other uses in the surrounding area.

As more wineries open tasting rooms in downtown areas, it is not unreasonable to expect a proliferation of such land-use policies giving local agencies the ability to condition or deny tasting rooms. Although offsite tasting rooms may be a boon to a winery's retail sales, local agencies justifiably feel that large numbers of such tasting rooms detract from the character of a downtown area because they generally serve only a visitor population. Wineries who are considering opening an offsite tasting room would be well advised to move forward with their projects while the various North Bay municipalities have relatively lax zoning regulations governing such uses.

LEASING

The lease is a critical component and certain issues are raised by the tasting room use. As a threshold matter, the obligation of the tenant should be conditioned upon the issuance of a use permit within a reasonable time period. The tenant will need to be the same entity that is obtaining the ABC license. If the tasting room facility will be shared, a landlord will want all of the users to be joint and severally liable, so that if one failed, the other(s) would continue to be responsible for its obligations. The shared tenants should therefore have a cross-indemnification agreement. The description of the premises should match that in the ABC license application and may include the right to use parking, patio area, storage and trash disposal areas. The visibility of the premises from the adjacent street or road should be protected so that the landlord is restricted from installing structures, signs or landscaping that would block visibility. Use of parking areas should be controlled. The ideal arrangement will provide designated parking spaces for the tasting room. The landlord should be restricted from designating restricted parking available for other users in a manner that would impair convenient access to tasting room visitors. If the landlord controls adjacent space, certain non-compatible uses should be prohibited, for example, those, such as training centers, that create high parking demand but do not draw visitors, and other uses that tasting room visitors might consider unattractive. If the premises is part of a larger project controlled by the landlord, consider whether the tenant should have the exclusive right to operate a tasting room in the project or whether it may be desirable to be located near other tasting rooms. Consider, also, whether the selection of the premises is being made on the assumption of its proximity to other complementary tenants of the same landlord, such as a delicatessen, in which event it might be possible to have the benefit of an arrangement that reduces the rent, or even provides a right to terminate, if sales decline after the complementary use ceases. There are, of course, numerous other issues associated with commercial leases, including the rent and the basis of any increases, rent during option periods, the solvency of the landlord and protection from a foreclosure by the landlord's lender, the ability to assign the lease or sublet the premises either in connection with a sale of the business as a going concern or a decision to discontinue the use and have the space used for another purpose, the obligations for payment of operating expenses and taxes and the condition of the premises at the end of the term.

CONCLUSION

Wineries wishing to bolster their retail sales may find that the operation of a tasting room in a downtown area with high visitor traffic can be a viable business strategy. By obtaining a Duplicate 02 license from the ABC and a use permit from the local municipality, a winery can have the necessary licenses to operate an offsite tasting room. And with some guidance through the pitfalls of negotiating a commercial lease, the winery may find that a new tasting room facility makes sound economic sense. Having a tasting room in a downtown area makes a winery highly visible to consumers and provides the enjoyment of a tasting room experience without the overhead of operating a traditional tasting room and production facility. ■

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