

**FILED: July 25, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CLACKAMAS GROCERY OUTLET WARHOUSE  
and GROCERY OUTLET, INC.,  
Petitioners,

v.

OREGON LIQUOR CONTROL COMMISSION  
and OREGON BEER AND WINE DISTRIBUTORS ASSOCIATION,  
Respondents.

Oregon Liquor Control Commission  
OLCC08M001, OLCC08L011

A145881 (Control)  
A145882

Argued and submitted on November 08, 2011.

John DiLorenzo, Jr., argued the cause for petitioners. With him on the briefs were Aaron K. Stuckey and Davis Wright Tremaine LLP.

Judy C. Lucas, Assistant Attorney General, argued the cause for respondent Oregon Liquor Control Commission. On the brief were John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Tiffany Keast, Assistant Attorney General.

Paul R. Romain argued the cause for respondent Oregon Beer and Wine Distributors Association. With him on the brief were The Romain Group, LLC, Margaret E. Schroeder, John A. Hirschy, and Black Helterline LLP.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

ARMSTRONG, P. J.

Affirmed.

1 ARMSTRONG, P. J.

2 Petitioners, Clackamas Grocery Outlet Warehouse and Grocery Outlet, Inc.,  
3 (GOI),<sup>1</sup> seek judicial review of a final order of the Oregon Liquor Control Commission  
4 (OLCC), in which the OLCC determined that GOI's business practice of receiving and  
5 storing wine at its Clackamas warehouse and delivering it to GOI retail stores throughout  
6 Oregon for sale to the public was not permitted.<sup>2</sup> The order also granted GOI an "off-  
7 premises sales license" (O license), *see* ORS 471.186, for its Clackamas facility, subject  
8 to certain restrictions consistent with that determination--that is, the O license specifically  
9 allows the sale of alcoholic beverages "only at retail directly to the consumer for off-  
10 premises consumption" and "does not authorize activities associated with the wholesale  
11 sale and distribution of alcoholic beverages to other licensed premises." GOI petitions  
12 for judicial review of the OLCC's order. For the reasons stated below, we affirm.

13 I. STATUTORY FRAMEWORK

14 To give necessary context to this dispute, we begin with a discussion of the  
15 statutory scheme established by the Liquor Control Act (the Act), ORS chapter 471; ORS  
16 474.105; ORS 474.115; *see* ORS 471.027, and, in particular, the applicable licensing

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<sup>1</sup> Clackamas Grocery Outlet Warehouse and Grocery Outlet, Inc., are each named as petitioners in this case; however, according to GOI's brief, Clackamas Grocery Outlet Warehouse is a location owned by Grocery Outlet, Inc., and not a separate entity. We refer to petitioners collectively throughout his opinion as GOI.

<sup>2</sup> As described in more detail below, \_\_\_ Or App at \_\_\_ (slip op at 6-7), the stores are owned or leased by GOI but are operated by independent store operators under contract with GOI.

1 provisions.<sup>3</sup> The OLCC is authorized by the legislature "[t]o control the manufacture,  
2 possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in  
3 accordance with [the Act]." ORS 471.730(1). It has the power and duty "[t]o grant,  
4 refuse, suspend, or cancel licenses and permits for the sale or manufacture of alcoholic  
5 liquor, or other licenses and permits in regard thereto[.]" ORS 471.730(2).

6 A person who is not licensed under the Act may not "sell, solicit, take  
7 orders for or peddle alcoholic beverages." ORS 471.405(3). Moreover, "[n]o licensee  
8 shall sell or offer for sale any alcoholic beverage in a manner, or to a person, other than  
9 the license permits the licensee to sell." ORS 471.405(1). Significantly, under ORS  
10 471.406:

11 "Any prohibition on the sale of alcoholic beverages provided for in  
12 this chapter includes:

13 "(1) Soliciting orders for alcoholic beverages or receiving orders for  
14 alcoholic beverages.

15 "(2) Keeping alcoholic beverages for sale or exposing alcoholic  
16 beverages for sale.

17 "(3) Delivering alcoholic beverages for value or in any way other  
18 than purely gratuitously.

19 "(4) Peddling alcoholic beverages.

20 "(5) Keeping alcoholic beverages with intent to sell.

21 "(6) Trafficking in alcoholic beverages.

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<sup>3</sup> Some of the statutes cited in this opinion have been amended since the events that gave rise to this review occurred. However, none of those amendments affect our analysis in this case; therefore, for convenience, we cite the current versions throughout this opinion.

1                   "(7) For any consideration, promised or obtained, directly or  
2 indirectly, or under any pretext or by any means, procuring alcoholic  
3 beverages, or allowing alcoholic beverages to be procured, for any other  
4 person."

5                   The Act authorizes various types of licenses, two of which are most  
6 pertinent to the issues raised in this case: (1) the "off-premises sales license," which, as  
7 noted, is referred to as an "O license," ORS 471.186; and (2) the "wholesale malt  
8 beverage and wine license," ORS 471.235. As discussed below, \_\_\_ Or App at \_\_\_, \_\_\_  
9 (slip op at 6, 9), GOI holds an O license (jointly with the store operator) for each  
10 individual GOI retail store and, as of October 2008, also has an O license for its  
11 Clackamas warehouse. GOI does not have, and never has had, a wholesale malt beverage  
12 and wine license.

13                   ORS 471.186 establishes the O license. Subsection (1) of that statute  
14 provides, in part:

15                   "The holder of an off-premises sales license may sell factory-sealed  
16 containers of wine, malt beverages and cider."<sup>4</sup>

17 The holder of an O license may also provide "sample tastings" on the licensed premises  
18 with the approval of the OLCC, ORS 471.186(2), and "may deliver wine or cider that is  
19 sold under the privileges of the license to retail customers in this state" as long as--among  
20 other restrictions--such deliveries are "made only for personal use and not for the purpose  
21 of resale," ORS 471.186(5), (5)(b). In addition, ORS 471.305 provides that "[t]he sale of

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<sup>4</sup> In contrast, a "full on-premises sales license" permits the holder to "sell by the drink at retail wine, malt beverages, cider and distilled liquor" generally to "be consumed on the licensed premises." ORS 471.175(1).

1 alcoholic liquors under any license issued by the [OLCC] authorizing retail sales by a  
2 licensee shall be restricted to the premises described in the license, but deliveries may be  
3 made by the licensee to customers pursuant to bona fide orders received on the licensed  
4 premises prior to delivery." "Premises" or "licensed premises" is defined to mean

5 "a location licensed under [chapter 471] and includes all enclosed areas at  
6 the location that are used in the business operated at the location, including  
7 offices, kitchens, rest rooms and storerooms, including all public and  
8 private areas where patrons are permitted to be present. 'Premises' or  
9 'licensed premises' include areas outside of a building that the commission  
10 has specifically designated as approved for alcoholic beverage service or  
11 consumption."

12 ORS 471.001(10)

13 Wholesale malt beverage and wine licenses are governed by ORS 471.235.

14 That license allows, among other activities, "the importation, storage, transportation,  
15 wholesale sale and distribution to licensees of the [OLCC]." ORS 471.235(1). The  
16 licensee "may not sell any alcoholic liquor for consumption upon the licensed premises."

17 *Id.*

18 Also of significance to this case are the so-called "tied-house" provisions,  
19 ORS 471.392 - 471.400, which, the OLCC contends, "prevent licensees from combining  
20 the features of one type of license with the features of another type of license, as well as  
21 from entering into certain business arrangements with other licensees." In particular, and  
22 subject to a myriad of exceptions not relevant here,<sup>5</sup> ORS 471.394 provides that "a person

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<sup>5</sup> For example, the prohibition in subsection ORS 471.394(1) against selling at both retail and wholesale does not apply to some "manufacturer or wholesaler" licensees "to the extent that retail sales are authorized by the statutes establishing the privileges of

1 licensed under the provisions of [chapter 471] may not sell alcoholic liquor at both retail  
2 and wholesale," ORS 471.394(1), and a manufacturer or wholesaler is prohibited from  
3 having any interest, "financial or otherwise," in the "premises, equipment, business or  
4 merchandise" of a retail licensee, and vice versa, ORS 471.394(2), (3).

5           For purposes of the tied-house provisions, an O license is a retail license.  
6 ORS 471.392(2) ("Retail licensee' means the holder of a full or limited on-premises sales  
7 license, an off-premises sales license or a temporary sales license."). A "manufacturer or  
8 wholesaler" is defined, in part, as "[a] person holding a brewery license issued under  
9 ORS 471.220, a winery license issued under ORS 471.223, a grower sales privilege  
10 license issued under ORS 471.227, a distillery license issued under ORS 471.230, a  
11 wholesale malt beverage and wine license issued under ORS 471.235 or a warehouse  
12 license issued under ORS 471.242." ORS 471.392(1)(a).

13           Finally, ORS 471.030(1) provides:

14           "The Liquor Control Act shall be liberally construed so as:

15           "(a) To prevent the recurrence of abuses associated with saloons or  
16           resorts for the consumption of alcoholic beverages.

17           "(b) To eliminate the evils of unlicensed and unlawful manufacture,  
18           selling and disposing of such beverages and to promote temperance in the  
19           use and consumption of alcoholic beverages.

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[*the*] license." ORS 471.396(1) (emphasis added). To illustrate: A person holding a winery license is defined as a manufacturer or wholesaler under ORS 471.392(1)(a). However, the statute establishing the winery license, ORS 471.223, also allows the licensee to "sell wines or cider at retail directly to the consumer for consumption on or off the licensed premises," ORS 471.223(1)(c), and to "sell malt beverages at retail for consumption on or off the licensed premises," ORS 471.223(1)(d).

1                   (c) To protect the safety, welfare, health, peace and morals of the  
2 people of the state."

3                                   II. FACTUAL AND PROCEDURAL HISTORY

4                   We take the facts, which are undisputed, from the OLCC's final order. *See*  
5 *Jefferson County School Dist. No. 509-J v. FDAB*, 311 Or 389, 393 n 7, 812 P2d 1384  
6 (1991) (unchallenged findings of fact are the facts for purposes of judicial review of an  
7 administrative agency's final order). We begin by quoting verbatim the OLCC's findings  
8 regarding GOI's wine purchasing, storage, and delivery system:

9                   "GOI purchases wine at wholesale from suppliers licensed by the  
10 OLCC. GOI stores the wine at its Clackamas facility until it delivers the  
11 wine to retail stores that operate under the trade name Grocery Outlet.  
12 These retail stores each have separate off-premises retail sales licenses held  
13 jointly by the store operator and GOI. \* \* \*

14                   "The operators of the Grocery Outlet retail stores operate the stores  
15 under contracts with GOI. The operators receive wine from GOI's  
16 Clackamas facility and sell the wine at retail under 31 separate off-premises  
17 retail sales licenses held jointly with GOI and the operators of individual  
18 stores.

19                   "GOI retains title to the wine transported from GOI's Clackamas  
20 facility to the 31 Grocery Outlet retail stores until the wine is sold by the  
21 retail store. At that time, title is transferred to the retail customer. The  
22 proceeds of the sale of wine are at all times the property of GOI, subject to  
23 the right of the independent store operator to receive a commission. No  
24 money is transferred from the retail store to GOI until after the wine is sold  
25 to the public. The retail store operator is paid only after the wine is sold to  
26 the public."

27 (Paragraph numbering, record citations, and footnotes omitted.) The OLCC also found  
28 that,

29                   "[p]ursuant to the contract between GOI and its independent store  
30 operators, 'GOI procures, distributes and consigns merchandise.' The  
31 independent store operator is responsible, 'as consignee of GOI

1 merchandise, for the operation of the retail store and for the safe and  
2 efficient handling and sale of GOI merchandise. \* \* \* Operator is not an  
3 employee of GOI, nor is Operator a franchisee, partner, reseller or owner  
4 with GOI.' Operators receive, as a commission from GOI, a percentage of  
5 the store's gross margin, generated from the sale of merchandise."

6 (Omission in original; record citation omitted.)

7 GOI maintained this purchasing and delivery system, using its Clackamas  
8 facility<sup>6</sup> or similar locations to receive and store wine and beer, for over 20 years.<sup>7</sup> In  
9 1986, the OLCC acknowledged that GOI's business model was permissible; in particular,  
10 the OLCC wrote, in a May 20, 1986, letter:

11 "[N]othing in the method of distribution of beer and wine by [GOI]  
12 suggests any conflict with the Liquor Control Act or Administrative Rules  
13 of this state. Our understanding is that the [GOI] warehouse merely  
14 consigns, and does not sell beer and wine to retail stores. We further  
15 understand that there is no fee or charge associated with the delivery of beer  
16 and wine to the retail stores."

17 Questions about GOI's system began to surface in 2005, and, in 2007, counsel for the  
18 Oregon Beer and Wine Distributors Association (OBWDA), sent an e-mail message  
19 notifying its members of the following:

20 "The [OLCC] no longer allows the central warehousing of wine by a  
21 retailer. The [OLCC] determined that wine may only be delivered to a  
22 licensed retail account, and the retail license does not allow the retailer to  
23 transport wine or beer from one licensed location to another, even if the two  
24 locations are owned by the same entity. Malt beverages also may not be  
25 delivered to a central warehouse.

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<sup>6</sup> GOI did not hold any OLCC license for the Clackamas facility until 2008, when, as described below, \_\_\_ Or App at \_\_\_ (slip op at 8-9), GOI received a temporary O license for that facility.

<sup>7</sup> In 2008, GOI stopped using this system for storing and transporting beer to GOI retail stores.

1                    "The new law on direct delivery of wine by an out-of-state winery to  
2                    an Oregon retailer also has a specific provision in it that the wine must be  
3                    delivered to a licensed retail location, not a central warehouse. As with  
4                    wine or beer delivered by an Oregon winery, brewery or wholesaler, the  
5                    beverages may not be transported by the retailer from one licensed location  
6                    to another.

7                    "Please review your delivery practices and determine if you are  
8                    delivering product to a central warehouse. If so, please end the practice."

9                    Shortly thereafter, GOI's wholesale distributors refused to process orders for delivery to  
10                    GOI's Clackamas facility.

11                    On January 30, 2008, the OLCC sent a letter to GOI's counsel, confirming  
12                    that "it has been the OLCC's position for at least the past several years that the practice of  
13                    central warehousing of alcoholic beverages by retailers is not authorized under Oregon  
14                    law." Recognizing, however, that GOI could "reasonably have relied" on the 1986 letter  
15                    that "seems to authorize the practice," the OLCC stated that it would not take any  
16                    enforcement action against GOI or its suppliers for 90 days. Distributors then resumed  
17                    delivering wine to GOI's Clackamas facility.

18                    In April 2008, GOI applied for a temporary O license for the Clackamas  
19                    facility, which GOI proposed to open for retail sales to the public on Fridays for two to  
20                    three hours, but which would also receive and store products for other GOI locations. In  
21                    a letter dated May 9, 2008, the OLCC informed GOI that that "the warehouse activities  
22                    being proposed at the Clackamas location are not consistent with the O license  
23                    privileges" and that, "[i]n order to operate under an O license, [GOI] would need to  
24                    discontinue the warehouse activities at the Clackamas location and conduct only retail

1 sales at that location." The OLCC also extended the deadline for compliance to July 26,  
2 2008. Before that deadline, GOI filed an action in Clackamas County Circuit Court and  
3 obtained an injunction preventing the OLCC from taking any adverse action against GOI  
4 based on the positions taken by the OLCC in its January 30 and May 9, 2008, letters.<sup>8</sup>

5           On October 14, 2008, the OLCC issued a letter indicating its approval of  
6 GOI's application for an O license at the Clackamas facility, subject to the following  
7 restriction:

8           "This license allows the sale of alcoholic beverages only at retail directly to  
9 the consumer for off-premises consumption. It does not authorize activities  
10 associated with the wholesale sale and distribution of alcoholic beverages  
11 to other licensed premises. Specifically, the following are prohibited:  
12 storing alcoholic beverage products except for products that will be sold to  
13 consumers at this location; wholesale sale of alcoholic beverage products  
14 (this means selling product to a person who will not consume the product  
15 but instead intends to resell it); and transportation or distribution of  
16 alcoholic beverage products to other licensed premises."

17 However, based on the Clackamas County Circuit Court's injunction, the OLCC agreed

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<sup>8</sup> The injunction was later amended to allow OLCC to issue an O license to GOI with the restrictions described in a letter dated October 14, 2008, \_\_\_ Or App at \_\_\_ (slip op at 9), and to allow GOI to appeal those restrictions through the appropriate administrative and legal venues. The OLCC and GOI also stipulated to the following:

"The OLCC will not take the position, in the pending administrative proceeding or any administrative proceeding stemming from the OLCC's action on [GOI's] pending license application or in any appeal from such administrative proceedings[,] that [GOI] is not authorized to store wine and beer at a central location and ship it thereafter to other locations because of the restrictions contained [in the O License for the Clackamas facility]. In addition, if it is determined by final administrative or appellate decision in the [p]roceedings that a standard, unrestricted 'O' License allows a licensee to engage in storage and shipping of beer or wine to other locations, then the OLCC will remove the restrictions from the Restricted 'O' License issued to Grocery Outlet."

1 "not to take action to enforce this restriction until after the conclusion of any  
2 administrative proceeding involving this restriction, including any appeal."

3 GOI timely requested a contested case hearing on the January 30 and May  
4 9, 2008, OLCC letters (the charging documents) and with respect to the restrictions  
5 imposed on the O license for the Clackamas facility. The matters were consolidated for  
6 hearing, and OBWDA was granted permission to participate as a party.

7 The parties filed cross-motions for summary determination, and, after oral  
8 argument on the motions, the administrative law judge (ALJ) issued a proposed order  
9 recommending that the OLCC authorize GOI to continue the purchasing and delivery  
10 practices described above and grant GOI's application for an unrestricted O license at the  
11 Clackamas facility. The ALJ rejected the OLCC and OBWDA's argument that GOI was,  
12 through its activities at the Clackamas facility, operating as an unlicensed wholesaler in  
13 violation of the statutory tied-house prohibitions, in particular, ORS 471.394(1), which,  
14 as noted, generally proscribes the sale of "alcoholic liquor at both retail and wholesale."  
15 The ALJ also concluded that nothing in the Act "specifically prohibits a retail licensee  
16 from storing wine at an unlicensed location for eventual sale at licensed premises";  
17 therefore, GOI was not required to obtain a separate license for the Clackamas facility,  
18 and, concomitantly, the restrictions imposed on GOI's O license were not necessary or  
19 justified under OAR 845-005-0355.<sup>9</sup> Both OBWDA and the staff of the OLCC registered

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<sup>9</sup> That rule allows the OLCC to place restrictions on a license in certain circumstances, including when, for example, the restriction "is in the public interest or convenience," OAR 845-005-0355(1)(c); one of the factors relevant to that determination

1 objections to the proposed order.

2           The OLCC issued a final order that rejected the conclusions reached by the  
3 ALJ. It explained that, under the "three-tier" regulatory system established by the  
4 legislature, involving distinct separations among manufacturers, wholesalers, and  
5 retailers, and including the tied-house provisions, "[n]o license may be used in a way that  
6 would allow the holder of that license to perform activities that are the province of  
7 another license in another tier[.]" Consistently with that fundamental premise, and  
8 invoking as well the purposes of the Act, the OLCC concluded that (1) "[b]y using the  
9 Clackamas warehouse facility as a distribution hub for wine to its 31 Oregon locations,  
10 [GOI] is engaging in wholesale alcohol sales in violation of ORS 471.405 (selling alcohol  
11 in a manner 'other than the license permits the licensee to sell') and ORS 471.394  
12 (prohibition on selling at both wholesale and retail)"; and (2) the restrictions that the  
13 OLCC imposed on the O license for GOI's Clackamas facility are appropriate under OAR  
14 845-005-0355 because they are needed to "prevent GOI from conducting activities that  
15 are outside the scope of the O license and are reserved to licensed wholesalers."  
16 Consequently, the OLCC's final order granted the OLCC's and OBWDA's motions for  
17 summary determination, denied GOI's, and ordered that "[GOI] is not authorized to  
18 continue its business practice of receiving and storing wine at the Clackamas facility and  
19 delivering it to [GOI] retail stores throughout Oregon for sale to the general public." The

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is "the need to eliminate or prevent conditions that have contributed to or that the  
[OLCC] reasonably believes will contribute to liquor or criminal law violations by the  
licensee[.]" OAR 845-005-0355(2)(b).

1 final order also granted GOI an O license for the Clackamas facility subject to the  
2 restrictions described above. GOI seeks judicial review of that final order.

### 3 III. ANALYSIS

4 On review, GOI asserts that the OLCC erred in concluding that GOI's wine  
5 distribution system is not authorized and, as a result, the OLCC also necessarily erred in  
6 approving the restrictions in the O license issued for the Clackamas facility. GOI  
7 challenges each of the three bases for the OLCC's conclusion that GOI's wine-purchasing  
8 and distribution system is not permitted, namely:

9 "([1]) the storage and distribution of wine are activities which are outside of  
10 the privileges of the O retail license and are reserved to wholesale  
11 licensees; ([2]) GOI's activities with respect to wine may not be conducted  
12 from an unlicensed location; and ([3]) the Tied House laws, in particular  
13 ORS 471.394, prohibit GOI, as a retail licensee, from engaging in the  
14 wholesale sale and distribution of wine to other retail outlets."

15 It also argues that, absent a statutory prohibition against it, the OLCC's 2008 policy on  
16 "central warehousing" of wine constitutes a rule under ORS 183.310(9), "which can only  
17 be adopted by formal rulemaking."

18 We review the dispute in this case, which turns on the meaning of various  
19 provisions in the Act, for legal error. ORS 183.482(8)(a). As explained below, we agree  
20 with the OLCC that GOI's practice of storing wine at its Clackamas facility and  
21 distributing it to GOI stores is prohibited by its O retail licenses for its stores and,  
22 therefore, that the license restrictions for the Clackamas facility are appropriate. That  
23 conclusion necessarily also negates GOI's argument regarding the requirement for formal  
24 rulemaking. Accordingly, we affirm.

1           As an initial matter, GOI contends that the OLCC's analysis is flawed  
2 generally because it is driven by the "three-tier system" concept, rather than actual  
3 statutory text. More specifically, GOI contends that the OLCC's underlying premise--that  
4 activities not specifically permitted by the statute governing the O retail license, such as,  
5 as relevant here, "storage," "transportation," and "delivery," are reserved for other tiers  
6 and therefore prohibited by the O license--is, first, not supported by statutory authority  
7 and, second, contradicted by the fact that, as acknowledged by the OLCC, some level of  
8 those activities *are* allowed under an O retail license. For example, as GOI points out,  
9 and the OLCC acknowledges, O licensees unavoidably "store" some quantity of wine as a  
10 component of their retail operations, even though ORS 471.186 does not specifically  
11 authorize "storage." Similarly, as noted above, O licensees are expressly authorized to  
12 engage in some delivery or transportation of wine. *See* ORS 471.186(5); ORS 471.305;  
13 OAR 845-006-0390. Moreover, GOI contends, such an interpretation of the scheme  
14 "would lead to utterly absurd results"; for example, as noted by the ALJ, the "retail sales  
15 license statutes also [do] not expressly authorize holders to *purchase* the alcoholic  
16 beverages to be sold at retail." (Emphasis in original.)

17           The OLCC and OBWDA, on the other hand, contend that the OLCC's  
18 interpretation of the statutory scheme is correct. Focusing on the text and context of the  
19 Act--including the legislative embodiment of a three-tier system and the enactment of the  
20 tied-house provisions--the OLCC contends that "the legislature intended to keep separate  
21 the activities of retailers, wholesalers and manufacturers and to allow their overlap only

1 where expressly authorized." Thus, in the OLCC and OBWDA's view, the Act  
2 "prohibit[s] any activity that is not expressly authorized." (Boldface omitted.) It follows  
3 that, because GOI has failed to identify any statutory authority for "us[ing] its Clackamas  
4 facility for storage, transport, or delivery of wine to retail locations for resale," it is acting  
5 unlawfully.

6 In short, GOI takes the overarching position that activities not specifically  
7 prohibited by the Act are allowed, while the OLCC and OBWDA contend that privileges  
8 not expressly granted to a particular license by the Act are prohibited. Neither of those  
9 absolutes withstands serious scrutiny. However, we need not reconcile the parties'  
10 absolutist positions in order to decide this case.

11 As mentioned, ORS 471.405(1) provides that "[n]o licensee shall sell or  
12 offer for sale any alcoholic beverage in a manner, or to a person, other than the license  
13 permits the licensee to sell." In turn, ORS 471.406--while not strictly a definition of the  
14 word "sell"--establishes the breadth of "[a]ny *prohibition* on the sale of alcoholic  
15 beverages" otherwise provided for in chapter 471 (emphasis added); that range includes a  
16 variety of activities that would not necessarily be encompassed under an ordinary  
17 understanding of the word.<sup>10</sup> ORS 471.405(1) is such a "prohibition"--it expressly bans  
18 the sale of alcoholic liquor "in a manner, or to a person, other than the license permits the

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<sup>10</sup> Cf. *Ban v. OLCC*, 196 Or App 545, 552, 102 P3d 744 (2004) (applying plain meaning of the term "sell"--that is, "to give up to another for money or other valuable consideration or to hand over or transfer title to"--in construing the meaning of "sell" in ORS 471.480(1), which *permits* the sale of alcohol by an employee of an O licensee who is at least 18 years of age (internal quotation marks omitted)).

1 licensee to sell" and it appears in chapter 471. Thus, by virtue of ORS 471.406, ORS  
2 471.405(1)'s "prohibition on sale" beyond what is permitted by the pertinent license  
3 includes, *inter alia*, "[k]eeping alcoholic beverages with intent to sell." ORS 471.406(5).

4           The word "sell," as used in the phrase "intent to sell," undoubtedly invokes  
5 the ordinary meaning of the term--it is not itself a "prohibition on the sale" of alcohol  
6 contained in chapter 471; moreover, to conclude otherwise would be endlessly circular--  
7 thus, the prohibition against selling wine "in a manner, or to a person, other than the  
8 license permits the licensee to sell" includes keeping wine with the intent to "give up to  
9 another for money or other valuable consideration or to hand over or transfer title to."  
10 [\*Ban v. OLCC\*](#), 196 Or App 545, 552, 102 P3d 744 (2004) (internal quotation marks  
11 omitted).

12           GOI readily acknowledges that it is engaged in retail selling of wine at each  
13 of the independently operated GOI stores<sup>11</sup> and that it stores wine for those sales at its  
14 Clackamas facility. Nonetheless, GOI contends that the wine held at the Clackamas  
15 facility is not kept with the intent to sell, "but rather is simply kept in storage pending a  
16 decision to move it to a retail location." That argument is without merit. Given the  
17 undisputed findings in this case, there can be no question that GOI purchases the wine  
18 and stores it in the Clackamas facility for the purpose of "giv[ing it up] to another"--the

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<sup>11</sup> For that reason, GOI would not be able to obtain a wholesale license for the Clackamas facility without violating the prohibition in ORS 471.394(1) against selling at both wholesale and retail.

1 consumer in the store--in exchange "for money" or "transfer[ring] title."<sup>12</sup> That the wine  
2 is stored for a time until the decision is made to move it to a particular location does not  
3 speak to a different "intent." The question, therefore, reduces to whether that prohibited  
4 activity is otherwise permitted by GOI's licenses.

5           We conclude that it is not. An O license permits its holder to "sell factory-  
6 sealed containers of wine," ORS 471.186(1); to provide "sample tasting" on the licensed  
7 premises with the OLCC's approval, ORS 471.186(2); and to "deliver" wine to retail  
8 customers for personal use, ORS 471.186(5). Under ORS 471.305, an O licensee is also  
9 permitted to deliver wine to customers "pursuant to bona fide orders received on the  
10 licensed premises prior to delivery." And, the OLCC's rules permit an O licensee to  
11 transport wine from a licensed wholesaler's premises back to the retailer's licensed  
12 premises. *See* OAR 845-006-0390 (authorizing "dock sales" of wine). Thus, those  
13 activities are "permitted" by the O license; others--to the extent they are encompassed  
14 within the meaning of "sales" in ORS 471.406 (and not otherwise allowed under other  
15 provisions of the Act)--are prohibited.<sup>13</sup>

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<sup>12</sup> As noted, the OLCC found--and GOI does not dispute--that "GOI retains title to the wine transported from GOI's Clackamas facility to the 31 Grocery Outlet retail stores until the wine is sold by the retail store. At that time, title is transferred to the retail customer."

<sup>13</sup> That conclusion is borne out by the context of the statute. In particular, and in contrast to the O license, activities such as "storage" and "transportation" are "permitted by the license" in the context of *other* licenses established under the Act. For example, the following licenses all explicitly allow some storage and transportation activities: wholesale malt beverage and wine license, ORS 471.235; brewery-public house license, ORS 471.200; brewery license, ORS 471.220; winery license, ORS 471.223; grower

1           In addition, ORS 471.305 further provides that "[t]he sale of alcoholic  
2 liquors under any license issued by the [OLCC] authorizing retail sales by a licensee *shall*  
3 *be restricted* to the premises described in the license." (Emphasis added.) Because, as  
4 we have discussed, a prohibition on the sale of alcohol in chapter 471 includes "[k]eeping  
5 alcoholic beverages with intent to sell," ORS 471.406(5), it follows--reading ORS  
6 471.305 in conjunction with ORS 471.406(5)--that that activity is restricted to the  
7 licensed premises. The term "licensed premises" is defined to include "all enclosed areas  
8 at the location that are used in the business operated *at the location*, including offices,  
9 kitchens, rest rooms and *storerooms*." ORS 471.001(10) (emphasis added). Thus, each  
10 of GOI's licenses permit it to "keep wine with the intent to sell it" only on the premises  
11 described in that license. That includes the O license for the Clackamas facility: under  
12 that license, GOI is permitted to keep wine at the facility only for sale at that facility. In  
13 sum, we conclude that the OLCC did not err in determining that GOI's practice of storing  
14 wine at its Clackamas facility and transporting it for sale at its retail stores was not  
15 permitted and that, consequently, the restrictions on GOI's O license for the Clackamas  
16 facility were lawful.<sup>14</sup>

17           Our conclusion in that regard also disposes of GOI's argument regarding

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sales privilege license, ORS 471.227; and warehouse license, ORS 471.242. This further demonstrates the legislature's intent not to permit such activities under an O license.

<sup>14</sup> GOI does not contend that, even if, as we have concluded, the OLCC correctly ruled that GOI's operation is not permitted, the license restrictions are nonetheless unwarranted for some other reason.

1 the need for formal rulemaking. Specifically, GOI's thesis is that "[a]bsent a statutory  
2 prohibition [on GOI's practice of storing wine at its Clackamas facility and transferring it  
3 to its retail stores], the OLCC's new position on 'central warehousing' constitutes [a rule  
4 under ORS 183.310(9)], which can only be adopted by formal rulemaking (assuming the  
5 OLCC even has the authority to adopt such a rule)." (Emphasis added.) As just  
6 explained, GOI's practice is prohibited by ORS 471.405(1), ORS 471.406, and ORS  
7 471.305. Accordingly, we reject GOI's thesis.

#### 8 IV. CONCLUSION

9 The OLCC did not err in (1) ordering that GOI is not authorized to continue  
10 its practice of receiving and storing wine at its Clackamas facility for delivery to GOI  
11 retail stores and (2) granting GOI an O license for its Clackamas facility with the  
12 restrictions described.

13 Affirmed.