

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 81-85 MAP 2009

**MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA, et. al,
Petitioners/Appellants**

v.

**PENNSYLVANIA LIQUOR CONTROL BOARD, et. al,
Respondents/Appellees**

Petitions for Allowance of Appeal Granted from the Orders of Commonwealth
Court, at Nos. 513 CD – 517 CD 2009, issued February 23 and March 2, 2009

**BRIEF OF APPELLANTS THE MALT BEVERAGE
DISTRIBUTORS ASSOCIATION, TANCZOS BEVERAGES, INC.,
BEER SUPER, INC., AND K.E. PLETCHER, INC.**

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 724, having granted the Petitions for Allowance of Appeal filed in this matter.

ORDERS IN QUESTION

1. Commonwealth Court's Order of February 23, 2009 in No. 513 CD 2009

(Bethlehem location) stated as follows:

AND NOW, this 23rd day of February, 2009, the order of the Pennsylvania Liquor Control Board is **AFFIRMED**.

Robert Simpson, Judge

Comparable orders were issued in the other cases.

2. The PLCB's Order of March 19, 2008 (Bethlehem store matter) states as follows:

The Board, after giving careful consideration to all of the facts established at the hearing, and in the exercise of its discretion, makes the following Order:

AND NOW, March 19, 2008, it is ordered and decreed that the application for "Intermunicipal" double transfer of Restaurant Liquor License R-18314 applied for by Wegmans Food Markets, Inc. for premises at 500 Wegmans Drive, Hanover Township, Bethlehem, Northampton County be and it is hereby granted prior approval. In the event an appeal is filed an Opinion will be issued.

PENNSYLVANIA LIQUOR CONTROL
BOARD

Patrick J Stapleton III
Chairman

Thomas F. Goldsmith
Member

Robert S. Marcus
Member

The PLCB issued two subsequent orders, the first clarifying the March 19, 2008 Order with respect to standing and a second denying Wegmans' Motion for Reconsideration. Neither Order is pertinent to the issues in this appeal. Again, comparable orders were issued in the other cases.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This appeal is taken from a decision of an administrative agency, the Pennsylvania Liquor Control Board. In that instance,

[t]he Court's review is prescribed in Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the constitutional rights of the petitioner, that it is not in accordance with law, that provisions relating to practice and procedure of Commonwealth agencies in Sections 501-508 of the Administrative Agency Law, 2 Pa.C.S. §§ 501-508, have been violated or that any necessary finding of fact is not supported by substantial evidence in the record. *See also Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002).

Reinert v. Workers' Compensation Appeal Board (Stroh Companies), 816 A.2d 403, 406 n.2 (Pa. Commw. 2003). Fundamentally at issue here are the PLCB's legal determinations. The review of an administrative agency's conclusions of law is plenary. *Universal Am-Can, Ltd. v. Pa. Workers' Compensation Appeal Board*, 762 A.2d 328, 331 n.2 (Pa. 2000).

STATEMENT OF QUESTIONS PRESENTED

Did the Pennsylvania Liquor Control Board improperly apply its “interior connection” and “other business” rules so as to circumvent the fundamental Liquor Code rules establishing the venues at which beer may be sold in Pennsylvania and thereby authorize a supermarket that has a “restaurant” area within it to sell beer, primarily in six and twelve packs and primarily for take-out consumption, to its supermarket customers?

Petitioners seek an affirmative answer to that question. Commonwealth Court answered that question in the negative. The PLCB did not directly address that question but implicitly answered it in the negative.

STATEMENT OF THE CASE

A. Procedural History

These consolidated appeals arise from the efforts of Wegmans Food Markets, Inc., a supermarket chain, to obtain restaurant (“R”) liquor licenses and thereafter sell beer, primarily for take-out, from its supermarket operations in Bethlehem, Easton, State College, Wilkes-Barre, and Williamsport.¹ Appellant Malt Beverage Distributors Association (“MBDA”) is the trade association for Pennsylvania’s “D Distributor” licensees, more commonly known as beer distributors. Appellants Tanczos Beverages, Beer Super, Inc., and K.E. Pletcher, Inc. are D Distributors and MBDA members operating in the Bethlehem, Wilkes-Barre, and State College, respectively.

The Appellants filed Motions to Intervene (632a-640a) in the various administrative licensure proceedings. Those Motions identified the issues the intervenors sought to address, primarily the proximity of, relationship to, and interconnections between the proposed licensed premises and the remainder of the Wegmans Supermarket. “Interconnections,” in PLCB usage, are an “inside passage or communication” between two distinct businesses, one licensed and one not; in more common parlance, they are where separate businesses, one licensed and one not, intersect.

The PLCB held day-long hearings before an appointed Hearing Examiner on each of the license applications in the period from November, 2007 through January, 2008. The issues at each hearing included the Petitioners’ standing and the “proximity/inter-relationship/interconnection” issues referenced above. The hearing record focused on intervenors’

¹ Wegmans also sought and obtained an “R” license for a store located in Scranton/Dixon City. There are distinct issues regarding that license and it is not part of this appeal.

standing, which is now an irrelevant issue.² As pertinent to these appeals, the record also contained discussion of Wegmans' planned beer operations, including the "economy of scope" economic model, discussed below, under which supermarkets operate. That latter testimony was presented by the Wegmans' store managers, its Pennsylvania Beverage Manager (David DeMascole), and a Wegmans' expert witnesses, John Dunham. A PLCB licensing analyst also testified in each case as to his inspection of the proposed licensed premises, as did MBDA representatives and D Distributors.

The PLCB approved the license applications by substantially identical Orders issued March 19, 2008. Appellants timely filed Petitions for Review (632a-640a), again substantially identical, and Wegmans exercised its right to intervene. The PLCB issued Opinions supporting its prior Orders on June 24, 2008. The PLCB first decided that Wegmans met the regulatory standards for a "restaurant";³ then, acting under 40 Pa. Code § 3.52(b),⁴ decided that it had discretion to allow the interconnection between the licensed premises and the remainder of the supermarket; and finally exercised that asserted discretion to allow the interconnection and grant the license. The PLCB also determined that intervenors had standing to participate in the proceedings.

² The PLCB found that intervenors had standing and Commonwealth Court affirmed. Wegmans sought to raise that issue via an untimely-filed cross-petition for allowance of appeal. Wegmans then filed a *Nunc Pro Tunc* Petition, which the Court denied. Accordingly, that issue is not before this Court. Notwithstanding that, Volumes III-IV of the Reproduced Record are comprised substantially of transcript related to those issues.

³ A "restaurant" is a "reputable place ... habitually and principally used for the purpose of providing food for the public, the place to have an area within a building of not less than four hundred square feet, equipped with tables and chairs, including bar seats, accommodating at least thirty persons at one time." 47 P.S. § 1-102.

⁴ 40 Pa. Code §3.52(b) states:

Licensed premises may not have an inside passage or communication to or with any business conducted by the licensee or other persons except as approved by the Board.

Commonwealth Court affirmed the PLCB both as to the issuance of the licenses and Appellants' standing. The Court treated the Bethlehem store location as the "lead case", issuing its Opinion on February 23, 2009. It issued shorter opinions in the other cases, on February 23 (Williamsport) and March 2, 2009 (Easton, Wilkes-Barre, and State College). Commonwealth Court viewed the issue as the PLCB had, *i.e.*, as involving the PLCB's discretion to permit interconnections between licensees and other businesses, and determined there was no abuse of discretion.

Appellants filed Petitions for Allowance of Appeal in all five cases, which this Court granted on September 29, 2009. The Court thereafter consolidated the appeals for all purposes.

B. The Factual Record: A Word of Explanation

Initially, a word of explanation: there is here a single factual record, comprised of the combined record in each of the six cases for which the PLCB held hearings, including the Scranton/Dixon City application that is not otherwise part of this appeal. *See, e.g.*, Bethlehem, Hearing Examiner, N.T. 10, 696a ("For all the reasons stated before, since we're treating this as *one record* . . .") (emphasis supplied).⁵ The parties agreed to this process for reasons of efficiency – it allowed them to incorporate certain testimony from hearing to hearing rather than repeating it – and because there are, at bottom, no meaningful differences between the various Wegmans locations. All Wegmans stores operate under common management and, as one would expect, a comparable business plan and physical lay out. Equally predictably, their current operations and future plans as to the sale of beer are quite similar. The same applies to

⁵ At the State College hearing (N.T. 153, 689a), the Hearing Examiner explained the process: Mr. Shepstone [a Wegmans' expert witness] testified previously, so . . . we're just incorporating all the testimony and exhibits into the record as a whole.

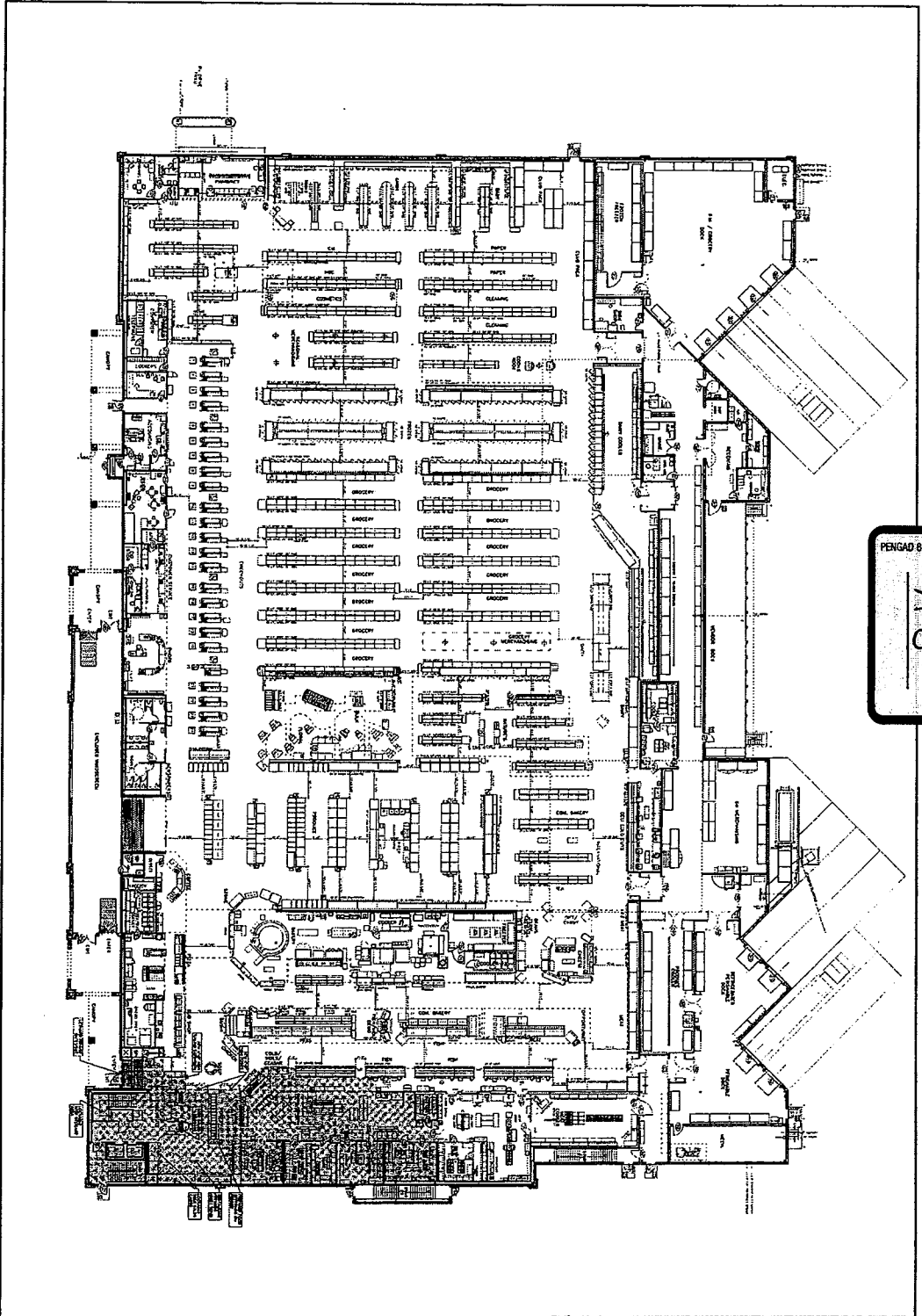
D Distributors; although each is independently owned, they too have substantially similar business models. They operate as state regulation and the marketplace have allowed or forced them to. In both instances, some details may differ, but they are just details.

C. The Factual Record: Wegmans' Planned Sale of Beer

Wegmans is a chain of upscale supermarkets, approximating 120,000 square feet in size. They have approximately 30,000 customer transactions/week. (Easton, McCue, N.T. 146, 714a). They include, in addition to standard supermarket fare, "Market Café" areas of approximately 6,000-9,000 square feet displaying prepared foods for take-out or in-store consumption, the latter in seating areas of 150 persons more or less. The Market Café at a typical Wegmans has most or all of: soup and salad bars, a wokery displaying a variety of Asian foods, a sub shop, a "chef's special" case, a coffee bar, and an area selling pizza, chicken wings and the like. The Market Cafés also sold soda, water, iced tea and other drinks, in single serve bottles; bulk soda and water was sold in the "beverage aisle." Now, the Café is where beer, almost exclusively packaged in 6 and 12 packs for take out, is displayed for sale.

A "whole store" exhibit used at each hearing (*e.g.*, Bethlehem, Exh. A-8, 701a) graphically shows the relative sizes of the proposed licensed and non-licensed areas, the latter dwarfs the former by approximately 15:1. That exhibit is reproduced on the following page: the shaded portion is the licensed premises, the entire picture the store.

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PENGAD 800-631-6989
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 EXHIBIT

	WEGMANS 1000	RESTAURANT/GRACE	SHOW LAB FLOOR <input type="checkbox"/> CHURCH <input type="checkbox"/> SERVICE <input type="checkbox"/> STORAGE <input type="checkbox"/> ...	<table border="1"> <tr><th>NO.</th><th>DESCRIPTION</th><th>DATE</th></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> </table>	NO.	DESCRIPTION	DATE										#97 BETHLEHEM DELINEATED RESTAURANT FOOTPRINT PROPOSAL FOR LICENSED PREMISE
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The Market Cafés are an integral part of a Wegmans Supermarket in the same way that the produce or meat departments or the soda or cereal aisles are, and no less so after licensure than before. The space they occupy is, of course, owned by Wegmans and is under the same roof as the remainder of the supermarket. The Market Café is not a distinct legal entity and the employees who work in that area of the supermarket are Wegmans’ employees.

The Market Cafés reflect Wegmans’ effort to sell “chef-inspired” prepared foods, as well as more conventional prepared foods, to its supermarket customers in addition to more typical supermarket fare. (Williamsport, DeMascole, N.T. 207-09, 651a-53a.)⁶ That effort reflects the economy-of-scope marketing strategy – broadening the array of products and services that are offered so that customers will, hopefully, buy more at any one shopping trip – that Wegmans, and supermarkets in general, follow. As its expert witness explained:

Wegmans is the type of store, much in the line of Wal-Mart, much like Target, . . . that relies on its ability to sell a large number of goods. It’s what we, in the economic profession, call economy [of] scope. They have a large scope of products that they offer. No one individual product is something that drives their business. Their business is driven by the fact that they have this range of offers to consumers.

. . . .

[With] economies of scope . . . you’re able to produce things at a lower deliver[ed] cost or a lower cost per unit by having a larger and larger pool of units. . . . Wegmans is as a whole doing business by having all kinds of different product lines. . . . It’s not just about the beer operation, it’s about the entire operation.

(State College, Dunham, N.T. 194, 208-09, 691a, 692a-93a; *see also* Easton, Shepstone, N.T. 207-08, 716a-17a.) As it has implemented that strategy, Wegmans, again like supermarkets in general, has broadened its product lines to include prepared food areas, a photo center, a

⁶ Wegmans offers the prepared foods for take-out or to eat on premises. (Williamsport, DeMascole, N.T. 244-45, 655a-56a)

pharmacy, a sushi bar, and a DVD rental area. “Delivered cost” as used in the quoted excerpt is an economic concept that factors in the customer’s non-price “costs,” such as time and effort, in assessing a purchaser’s true cost.⁷

Wegmans’ effort to sell beer is part of that economy-of-scope strategy. The following colloquy (State College, Dunham, N.T. 211, 694a) is illustrative:

Q. [By Appellants’ counsel]: [W]ith Wegmans, when they have a sushi bar, when they have a photomat, when they have a DVD rental, there’s a[n expanding] scope of product they can sell to their supermarket . . . customers, right?

A. [By Mr. Dunham]: That would be the case.

Q. And the concept here with the sale of beer is consistent with that strategy, that analysis, isn’t it?

A. It would make perfect sense.

That is precisely how Wegmans saw things. In a “press release” emailed to its customers months before the hearings, Wegmans explained its rationale for seeking to sell beer:

We’d like to make the experience of *shopping at Wegmans* even better, and certainly more convenient *by selling beer in our Market Café restaurant*.

(Williamsport, Exh. P-4, 665a) (emphasis supplied). Buying beer “in” the Market Café is “shopping at Wegmans.” Wegmans hopes, and expects, that its customers will add take-out beer to the soda and bottled water in the bottom of their shopping carts. Wegmans hopes that by bundling groceries and beer at a single location and thereby allowing their purchase at a single shopping trip, the sale of beer in the Market Cafés will make “shopping at Wegmans . . . more convenient.” Appellants could not have said it more plainly.

⁷ Mr. Dunham repeatedly discussed the concept of “delivered cost,” e.g., Dickson City, N.T. 235-36, 249, 258, 278a-79a, 680a, 681a. *See also* Easton, Greenstreet, N.T. 46-47, 708-09a.

Wegmans expected take-out beer sales to predominate and on-premises beer consumption to be minimal. *See, e.g.,* State College, Gallucci, N.T. 117-18, 687a-88a (“we don’t expect to have a lot of people drinking beer” at the Café); Wilkes-Barre, Grierson, N.T. 146-47, 673a-74a; Williamsport, Ruby, N.T. 349, 664a (answering “probably not” to whether he thought “you will have a lot of people buying beer and consuming it in the restaurant area”). Only “select varieties” of the beer available for take out would be available for on-premises consumption. (N.T. 346, 663a)⁸ Wegmans was not offering the services and conditions (draft beer, table service, happy hours, entertainment) that typically promote on-premises consumption. (State College, Gallucci, N.T. 117, 687a) It also had a policy, with signage, requiring the consumption of beer on the premises to accompany the purchase of Wegmans’ prepared food. (Easton, DeMascole, N.T. 167-68, 720a-21a)

Again reflecting the goal of selling beer to its supermarket customers, Wegmans’ beverage manager, Mr. Demascole, testified against legislation (HB 1637 of 2007) that would have required a floor-to-ceiling wall between a licensed premises and an adjoining business. Requiring separation of that nature “between *our* store and *our* restaurant,” he told a House Committee, “would destroy *our* business model” and “prevent” Wegmans from selling beer “within *our* market café restaurant.” (Williamsport, DeMascole, N.T. 252-55, 657a-60a) (emphasis supplied).

The Market Cafés may be the genesis of the ultimately licensed premises but the two differ in multiple respects. First, the licensed premises routinely exclude a portion of the areas, including areas that are part of the Market Cafés, in which the store displays “restaurant-

⁸ The manager meant that most beer would be displayed in 6 or 12 packs and only “select” packs would be broken out into single serving containers.

prepared food.”⁹ As an example, the wokery and salad bar at Williamsport both lie outside the licensed premises; a customer who wants either and wants to eat at Wegmans, with or without a beer, must leave the licensed premises, make a salad, and then return to the licensed premises to buy beer, pay and/or eat. (Williamsport, DeMascole, N.T. 242, 654a.) It is as if the dessert bar at a buffet restaurant were in plain sight but was part of a different business, although you could shop there and pay for what you selected back at the restaurant and even eat at the restaurant’s tables. Similarly, the Café’s manager oversees areas that lie outside the proposed licensed premises (typically areas where Wegmans displays prepared foods) but not some that are within it (as an example, the central “prep kitchen”). (Easton, McCue, N.T. 139-40, 712a-13a). It is as if a restaurant manager’s responsibilities included part of the adjacent business but less than all of the restaurant itself, including the kitchen.

These facts reflect that the boundary between licensed and unlicensed premises has no purpose other than to satisfy regulatory requirements. It is, at bottom, a border between what an applicant has determined to carve out from its pre-application floor plan so as to create, on paper, a “licensed premises”; that boundary between a supermarket and one of its component parts is no different than lines on the floor plan identifying the metes and bounds of the produce section. Its effect is to create the supermarket’s beer aisle.

Beyond those several basic points, the record discloses almost nothing as to how Wegmans plans to sell beer.

⁹ As licensed, the sub shop, coffee shop, and soup bar at the Easton store are located *outside* the licensed premises and the original Easton plan had no prepared food display area within the then proposed licensed premises. (Easton, Santilli, N.T. 21-22, 704a-05a; McCue, N.T. 138, 711a) The original Bethlehem location plans had *no food preparation* taking place within the proposed licensed premises. (Bethlehem Banzhoff, N.T. 31, 698a) The original State College plan placed none of the stations where customers pick up prepared food within the proposed licensed premises (State College, Spahr, N.T. 23, 685a) The sushi bar is rarely within the licensed premises.

SUMMARY OF ARGUMENT

Pennsylvania does not permit supermarkets to sell beer. The Legislature has repeatedly defeated amendments that would have allowed supermarkets to do so. The PLCB, dissatisfied with that legislative limitation, has allowed Wegmans to circumvent it, thereby improperly rewriting the Liquor Code rules on the venues that may sell beer.

The PLCB has here approved the sale of beer *by* a supermarket. The economic realities, from the “economy of scope” marketing strategy that supermarkets use to the common ownership and employees to the substantial preponderance of beer sales for take-out require that reasonable conclusion. Wegmans aptly summarized, in Exh. P-4: “selling beer in our Market Café restaurant” is “shopping at Wegmans.”

The concerns, analysis, and language in *MBDA v. PLCB*, 974 A.2d 1144 (Pa. 2009), fit here precisely. The “loophole” is the PLCB’s interconnection rules, through which the PLCB has expanded the retail sellers of beer “to encompass allow new commercial entities ... which do not currently engage in the sale of alcohol”; these results “were never clearly contemplated by the Legislature.” *Id.* at 1154. As there, this violates the fundamental principle that the Legislature establishes the core rules and administrative agencies must operate within them. *Insurance Federation of Pennsylvania, Inc. v. Commw.*, 889 A.2d 550 (Pa. 2005).

Alcohol, with few and minor exceptions beyond consumption as part of a meal, has always been sold in settings that are both specialized and separated. The PLCB has enforced these principles by prohibiting, subject to limited exceptions, interconnections between a licensed premise and an adjacent business, including, in the sole reported case, the seemingly innocuous combination of a bakery and gift shop sharing premises and interconnection with a licensed restaurant/country inn. The PLCB’s decision turns these principles on their head.

For these various reasons, the PLCB’s Order should be reversed.

ARGUMENT

I. THE PLCB’S ISSUANCE OF “R” LICENSES TO WEGMANS VIOLATES THE LIQUOR CODE PROVISIONS ESTABLISHING THE ENTITIES AND VENUES THAT MAY SELL BEER AND MALT BEVERAGES

A. In Pennsylvania, A Supermarket Cannot Sell Beer

Some states allow supermarkets to sell beer and other alcoholic beverages. Some do so by explicit statutory language. *See, e.g.:*

- *New York* – N.Y. Alco. Bev. Cont. § 54 (License to sell beer at retail for off-premises consumption available only to “*grocery store*, drug store, or duly licensed supply ship operating in harbors in Lake Erie”);
- *North Carolina* – N.C. Gen. Stat. §§ 18B-1000(1, 3) (authorizing on-premises and off-premises malt beverage permit for “Food business”, defined to “include *grocery stores*, convenience stores, and other establishments ... where food is regularly sold....”);
- *Indiana* – Ind. Code § IC 7.1-3-4-4 (authorizing beer retailer’s permit to “drug store, *grocery store*, confectionery”);
- *Kentucky* – Ky. Rev. Stat. Ann. § 243.280 (exempting from ban on issuance of malt beverage license to premises selling gasoline unless they maintain \$5,000 of inventory of “food, *groceries*, and related products”); and
- *Wisconsin* – Wis. Stat. § 125.51(1) and 125.32(3M)(c) allowing license for “retail sales of intoxicating liquor” to “combination grocery store and tavern”;

Other states do so by authorizing a retail license without imposing limitations on the licensee’s business. *See, e.g.*, Massachusetts, Mass. Gen. Laws Ch. 138, § 15 (license for sale at retail); South Carolina, S.C. Code Ann. §§ 61-6-100, 61-6-20 (issuance of retail licenses); Florida, Fla. Stat. Title XXXIV, §§ 561.14(3), 561.15-.19 (establishing category of “[v]endors licensed to sell alcoholic beverages at retail only” and imposing no limitations on the businesses in which licensees may engage); Oregon, Or. Rev. Stat. Title 37 § 471.186 (authorizing “Off-premises sales license”).

Pennsylvania's liquor regulation, in every iteration from 1933 to the present, fits neither model.¹⁰ First, there is no express authorization to grocery stores or similar establishments to obtain a liquor license of any kind. Second, Pennsylvania precisely identifies what kinds of businesses may obtain liquor licenses: restaurants, hotels, and clubs, (47 P.S. § 4-401); airports (§ 4-406); railroad, pullman or steamship companies (§ 4-408); public venues (§ 4-412); performing arts facilities (§ 4-413); continuing care retirement communities (§ 4-414); eating places/retail dispensers (§ 4-432); golf courses (§ 4-472.5) and economic development zones (§ 4-461(b.1)).

Indeed, Pennsylvania has repeatedly rejected legislative efforts to amend the Liquor Code so as to allow grocery stores to obtain liquor licenses, beginning as far back as 1937 and continuing through 2003. Act 343, printers number 275, § 2(o) of 1937 sought to establish a licensing category for "package retailers," defined as "persons engaged in the retail sale of groceries food" and licensed to sell "malt brewed beverages not for consumption on the premises" *See also* House Bill 1327, PN 1634 (2003); Senate Bill 920, PN 1051 (1979); House Bill 606, PN 661 (1977); House Bill 1994, PN 2558 (1975); and House Bill 1396, PN 1742 (1969), all of which, in some fashion, sought to create a "grocery store license," a "Retail Food Store License," or a "Retail store licensee," the latter two categories defined so as to include supermarkets. None of those bills was enacted.¹¹

¹⁰ The present Liquor Code was enacted in 1951, Act of April 12, 1951, P.L. 90. That enactment essentially consolidated two Acts from 1933, enacted as the country emerged from Prohibition — the Pennsylvania Liquor Control Act, Act of Nov. 29, 1933, P.L. 15, and the "Beverage License Law," Act of May 3, 1933, No. 91, P.L. 252. The Beverage License Law regulated beer and wine as sold under a "retailers' license" available to hotels, clubs and "eating places" (but not "restaurants") and the Liquor Control Act governed the issuance of "liquor licenses" and the creation of state stores.

¹¹ The 1937 and 1969 bills are not accessible on-line but the remainder are, as follows:

House Bill 1327, PN 1634 (2003): accessible at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2003&sessInd=0&billBody=H&billTyp=B&billNbr=1327&pn=1634>;

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This brief survey frames the central issue in this case: has the PLCB exceeded its statutory grant of authority in awarding “R” licenses to Wegmans supermarkets?

B. The Proper Roles of the Legislature and the PLCB

The core principles that govern this case are simply stated and firmly established. Administrative agencies must act within the authority delegated to them. *Small v. Horn*, 722 A.2d 664 (Pa. 1998). The Legislature, via enacted legislation, establishes the core rules and policies that govern the Commonwealth’s agencies and the programs they administer. Agencies implement and apply those rules and policies on a day-to-day basis, always constrained to act within the legislatively-established rules and delegated powers. *Insurance Federation of Pennsylvania, Inc. v. Commw.*, 889 A.2d 550, 555 (Pa. 2005); *Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Insurance Guaranty Association*, 829 A.2d 297, 304 (Pa. 2003); *Blackwell v. State Ethics Commission*, 567 A.2d 630, 636 (Pa. 1989). See also Pa. Const., Article II, § 1.

There are many reasons why those principles have developed and remain important. First and foremost is the notion that elected, accountable officials should make the basic and important decisions. Second, a legislative inquiry has the opportunity to marshal a broader set of facts than an administrative record or court proceeding typically permits. Third, all interested parties have an opportunity to participate in the legislative arena. Fourth, legislation has a better

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Senate Bill 920, PN 1051 (1979): accessible at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1979&sessInd=0&billBody=S&billTyp=B&billNbr=0920&pn=1051>;

House Bill 606, PN 661 (1977): accessible at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1977&sessInd=0&billBody=H&billTyp=B&billNbr=0606&pn=0661>;
and

House Bill 1994, PN 2558 (1975): accessible at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1975&sessInd=0&billBody=H&billTyp=B&billNbr=1994&pn=2558>.

chance of arriving at or near a consensus in which all interested parties win something and lose something; in contrast, litigation typically results in an “all or nothing” resolution. It may be easier for an administrative agency to “change the law” without awaiting legislative action, but effecting change in that fashion is, for all of these reasons, improper.

This Court’s recent decision in *Malt Beverage Distributors Association v. PLCB*, 974 A.2d 1144 (Pa. 2009), *affirming* 918 A.2d 171 (Pa. Commw. 2007) (“*Sheetz*”), addressed precisely this issue – the PLCB’s issuance of licenses outside the legislative framework – in a related context. This Court there rejected the PLCB’s issuance of a retail distributors license to an “eating place” license applicant that sought to sell beer solely for off-premises consumption. Commonwealth Court had previously determined that the PLCB’s construction violated the pertinent licensing statute and infringed on the niche occupied by D Distributors to sell beer in quantity for off-premises consumption. In doing so, Commonwealth Court noted the varying roles of the legislature and the agency:

It is sufficient for current purposes to observe that a potential consequence of the PLCB’s interpretation is a *significant transformation* of the character of outlets for the sale of malt or brewed beverages, to include grocery stores, convenience stores and other commercial establishments with some small area for eating. While such a transformation may be in the public interest, *it should be based on legislative intent rather than on a strained administrative reading of statutory language.*

918 A.2d at 177 (emphasis supplied). In its Opinion affirming, this Court agreed, addressing this point at length:

As recognized by the Commonwealth Court, such holding would expand the character of retail dispenser beer sale outlets to encompass commercial entities, unlike hotels, restaurants, clubs, and eating places, which do not currently engage in the sale of alcohol.¹¹ *While a policy determination in this regard may well be accomplished by our legislature, it is not our role to sanction such a momentous transformation.*

While the General Assembly could have more carefully drafted the statutory provision at issue in order to close the current loophole utilized by the PLCB to justify the issuance of a license to Ohio Springs, *we refuse to adopt the PLCB's hypertechnical interpretation given the wide-ranging ramifications of doing so.* As noted earlier, under such an interpretation, far more commercial facilities, which were never clearly contemplated by the Legislature to sell beer through any provision of the Code, could be licensed to sell six-packs. Again, such a *sea change in the sale of alcoholic beverages in this Commonwealth must be sanctioned by the Legislature.*

Id., 974 A.2d at 1154 (emphasis supplied).

Shortly thereafter, three dissenting Commonwealth Court judges, aptly we believe, summarized *Sheetz's* core holding: “Our Supreme Court has cautioned against an agency ushering in a new regulatory regime that is directly contrary to a long-standing prior regulatory position, without authorizing legislation.” *Cash America Net of Nevada, LLC v. Commw., Dept. of Banking*, 978 A.2d 1028, 1043, (Pa. Commw. 2009) (Leavitt, J., Cohn Jubelirer, J., and Simpson, J., dissenting).¹²

Compared to the issue in *Sheetz*, the issue here has far broader “ramifications” for and constitutes far more of a “sea change” in the manner in which beer has been sold in Pennsylvania, literally since Pennsylvania’s post-Prohibition regulation of alcohol began in 1933. Wegmans’ business model is one that has already proliferated;¹³ if given this Court’s imprimatur, the model will likely become more widespread yet. Nor will the new market

¹² The *Cash America* majority did not disagree with the dissent’s summary but instead decided the case without discussing *Sheetz*.

¹³ 14 Petitions for Review filed by MBDA from licensure actions are pending in Commonwealth Court:
Wegmans: Nos. 371-72, 617-18, 899, 901, 965, and 1261, all CD 2009, relating to stores in Erie (2), Downingtown, Mechanicsburg, Allentown, Collegeville, Warrington, and Malvern.
Club Partners: No. 900 CD 2009, Dallas PA
Whole Foods: No. 2003 CD 2009, Plymouth Meeting
Giant Eagle: No. 2138 CD 2009; Pittsburgh area
Weis Markets: Nos. 1381-82, and 2148 CD 2009, Wyomissing, Williamsport, and Easton.

entrants it likely be limited to additional supermarkets; other large stores may enter the beer market as well, appending the sale of beer to a small eating area that satisfies the relatively lax regulatory standards for a “restaurant” or “eating place.” Merely recognizing the range of potentially qualifying businesses likely predicts the future once the PLCB starts down this path. Anyone who has ever shopped in a supermarket in Pennsylvania (other than in the past several years) knows that what the PLCB has authorized here is novel and that any effort to depict it as part of a long-standing pattern ring hollow.¹⁴

The Court’s concerns and words in *Sheetz* – that the PLCB was using a “loophole” to accomplish results “which were never clearly contemplated by the Legislature” and to effect the expansion of retail sellers of beer “to encompass commercial entities ... which do not currently engage in the sale of alcohol” – fit the situation here almost more precisely than they fit in *Sheetz*. The PLCB has manipulated its rules, cloaked itself in discretion it does not have, and ignored the central tenets of the Liquor Code. That path, both at its beginning and certainly as it will likely progress, is far removed from the statutory model and its underlying principles.

C. This Is The Sale Of Beer At and By A Supermarket

The Statement of the Case, Part C, states the facts that Appellants believe compel the conclusion that the sale of beer contemplated by Wegmans is the sale of beer by and at a supermarket. Correspondingly, Appellants believe it is pretense to assert and believe that the restaurant is making the sale. The PLCB, because its analysis made these facts irrelevant, made no findings on these issues. Commonwealth Court recognized the argument (“MBDA contends buying beer ‘at’ the Market Café is ‘shopping at Wegmans,’ part and parcel of

¹⁴ The PLCB issued an “R” license to a Weis Markets restaurant-within-a-supermarket and an “E” license to a comparable operation located within a Vidalia Supermarket, both post-2005. Neither license involved a contested proceeding nor resulted in an articulated, reasoned decision from the PLCB, let alone from a court.

Wegmans’ ‘economy of scope’ marketing strategy,” *Malt Beverage Distributors Association v. Pa. Liquor Control Board*, 965 A.2d 1254, 1265. (Pa. Commw. 2009) but did not otherwise address it.

That the PLCB has sanctioned “sale *at* a supermarket” is indisputable given the location of the licensed premises under the Wegmans’ roof. The “sale *by*” conclusion simply requires the Court to place reality ahead of legal form. The economic realities – from the “economy of scope” marketing strategy to the substantial preponderance of beer sales for take-out, and as aptly summarized by the “shopping at Wegmans” press release – allow no other reasonable conclusion.

Form should not be permitted to trump substance. Many cases reject efforts, sometimes creative ones, to avoid statutory mandates. Some efforts to “comply” with a statute by avoiding its triggering requirements amount to “circumvention” and will not be permitted; courts recognize and enforce the line between the two even if they cannot easily describe why it is where it is. The focus is typically on the economic reality of the matter, and the legal approach is typically to define the underlying statute, and primarily its exceptions, narrowly.

This Court’s decision in *Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Board*, 947 A.2d 724 (Pa. 2008), speaks to this point. There, the Borough had characterized a road improvement project as “maintenance” so as to avoid the impact of the Prevailing Wage Act. This Court held that this characterization was an improper and illegal effort to evade the Act because it was incompatible with the Act’s central purposes and intentions:

given the clear purpose of the Act to protect workers from receiving substandard wages on public works projects, these modifiers cannot be interpreted to mean that only when a structure or other facility is, through a public works project, enlarged, reduced, or replaced with an entirely new material is the project non-

maintenance, no matter how extensive the work.^[1] Such an interpretation would be completely incompatible with the clear and significant legislative intent of ensuring that workers on public works projects be paid at least the prevailing minimum wage. The exception does not eviscerate the rule.

947 A.2d at 731-32 (footnote omitted). *See also Lycoming County Nursing Home Ass'n v. Department of Labor and Ind., Prevailing Wage Appeal Bd.*, 627 A.2d 238, 244 (Pa. Commw. 1993) (finding improper “circumvention of the [Prevailing Wage] Act and its purpose.”); *Greater Fourth St. Assocs. v. Smithfield Township*, 816 A.2d 388, 393-94 (Pa. Commw. 2003) (rejecting effect of transaction that would have avoided competitive bidding requirements and thereby “eviscerate[d] an important and long-standing statutory mandate”).

The principle that “substance should prevail over form” is applied to distinguish tax avoidance (legal) from tax evasion (illegal). *See, e.g., Brown v. U.S.*, 329 F.3d 664, 671 (9th Cir. 2003). In determining whether to take a taxpayer’s characterization of a transaction “at face value,” courts consider whether the transaction, as structured, reflects “economic reality” and whether the transaction is fairly characterized as “an end-run around” a statutory provision. *Stewart v. C.I.R.*, 714 F.2d 977, 987-88 (9th Cir. 1983); *Brown v. U.S.*, 329 F.3d at 674. That analysis also appears in the employment context in which a determination of employment status – *e.g.*, independent contractor vs. employee – does not depend on the labels the parties provide but on the nature of their relationship. *Feller v. New Amsterdam Casualty Company*, 70 A.2d 299 (Pa. 1950); *Romanski v. Prudential Property and Casualty Insurance Co.*, 514 A.2d 592 (Pa. Super. 1986).

As yet another example, the PLCB itself refused to allow form to trump substance in the *Sheetz* proceedings when it required a separation between Sheetz’s gasoline operations and the remainder of the site. The Liquor Code, 47 P.S. § 4-432(b), prohibits the sale of liquid fuels from the same location as a licensed premises. Sheetz, seeking to satisfy this

requirement, subdivided the property on which it built the restaurant/convenience store and gasoline operations so as place the licensed premises and gasoline operations on technically separate, adjoining, locations. The PLCB rejected this effort at technical compliance, focusing on the reality on the ground:

In essence, Applicant contends that the fuel pumps are at a different location than the building housing the restaurant, because it is on a different parcel of land, separately deeded, owned by different corporations, with payment for the gasoline occurring at the pumps. However, it seems apparent . . . that, despite their technical, legal separation, there is still a connection between these parcels of land, at least in the view of the public. Outward appearances indicate one . . . parcel of land. There is no physical barrier or division between the pumps and the building. There are Sheetz signs on the gas pumps, the parking lot, and the building. The gasoline sold is Sheetz gasoline, carried in Sheetz tankers, and marked as Sheetz gasoline. While the pumps are supposed to be self-contained as far as payment, a customer still has to go inside the building to obtain change for a large bill, or cash a check, or take care of payment problems, should they arise. The company that owns the fuel pumps is connected to Sheetz, Inc. and does not have any separate employees on site. Video-monitoring of the pumps and gas transactions occurs inside the restaurant. Cigarettes, which are sold in the restaurant, are advertised on the pumps. Clean-up of the pump area is performed by restaurant employees. Because there is nothing that indicates to the public a subdivision of the property, the Board finds the entire property to be a *de facto* single location under the Liquor Code.

Therefore, despite Applicant's creative attempt to conform to the Liquor Code, the reasonable and practical interpretation of "location" indicates that liquid fuels would be sold at the same location as the proposed licensed premises.

In Re Ohio Springs, Inc., No. 04-9056, LID No. 52614, Decision at 35-37.

Here, in contrast, the PLCB, because it wanted the result, simply declined to apply reality and deferred instead to a legal fiction.

D. The PLCB’s “Interior Connection” Rules and How the PLCB Has Misused Them Here

The PLCB analyzed the license applications quite differently than have appellants in this Brief. Instead, the PLCB first decided that Wegmans satisfied the regulatory standards for a “restaurant” and then decided to exercise discretion under 40 Pa. Code § 3.52(b) to allow the interconnection between the licensed premises and the remainder of the grocery store. Continuing in this analysis, the PLCB determined that Wegmans had structured its business to satisfy, even if hypertechnically, the rules about who can (a restaurant) and cannot (a supermarket) sell beer, and that the PLCB could not, and certainly need not, reject the application.¹⁵

The PLCB discussed this analysis in a single paragraph of its 147 page opinion. First, the PLCB described what it termed its “over seventy (70) years of policy that has given the Board discretion to approve interior connections between restaurant or eating place licenses and commercial establishments, such as department stores, convenience stores, delicatessens, and grocery stores;” the PLCB specifically referenced licenses issued to restaurants located within John Wanamakers and Boscov’s, to Sheetz (since reversed) and to a Weis Market (which resulted from an application in which neither MBDA nor anyone else contested). *See Bethlehem Opinion at 116.*¹⁶ The Board then applied discretion: “Given [the] evidence, the Board sees no reason to not approve an interior connection between the proposed licensed premises and the

¹⁵ Wegmans, going further yet, argued that given what it viewed as “the PLCB’s longstanding history of approving such connections,” the PLCB would have “abused its discretion” had it not approved the interior connection. *See* 965 A.2d at 1266.

¹⁶ Almost every point in that discussion of past history is either entirely erroneous, unsupported, or inapposite. There is no 70 year history of allowing supermarkets to sell beer, or even of allowing interconnections between restaurant licensees and other businesses. Quite to the contrary, the PLCB’s policy, applied consistently until quite recently, has *disapproved* interior connections in most situations, including with supermarkets. The PLCB’s unsupported assertion of its regulatory history was an issue in *Sheetz*. Appellants expect to discuss this issue more thoroughly in their Reply Brief.

unlicensed grocery store.” *Id.* at 117.¹⁷ The PLCB did not otherwise discuss the issues Appellants had raised.

Commonwealth Court also adopted that analysis. Commonwealth Court first identified several facts the PLCB had identified as the basis for its exercise of discretion, such as that “[a]ll beer purchases will be restricted to the licensed portion of the premises, at dedicated cash registers.” 965 A.2d at 1267.¹⁸ Relying on those facts, Commonwealth Court concluded that “[n]o abuse of discretion is apparent in the PLCB’s decision to allow the proposed interior connection between the licensed Market Café restaurant area and the unlicensed grocery store.” 965 A.2d at 1267.

That analysis is incorrect on several bases, one straightforward, the other quite lengthier to discuss and explain.

1. First, and simplest: any exercise of an agency’s authority under a regulation must be consistent with the underlying statute. *Tire Jockey Service, Inc v. Com, Department Of Environmental Protection*, 915 A.2d 1165,1186 (Pa. 2007); *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 52-53 (Pa. 2006); *PICPA Foundation for Educ. & Research v. Com., Bd. of Finance and Revenue*, 634 A.2d 187, 189-90 (Pa. 1993). If the Court accepts the two central points of this Brief to this point – (1) Pennsylvania law does not allow sale of beer by a supermarket, and (2) this is the sale of beer at and by a supermarket – then Appellants have

¹⁷ The PLCB has no regulations, nor even a Statement of Policy, that guide its exercise of discretion. (Williamsport, Stuffick, N.T. 47, 648a)

¹⁸ In fact, each of those facts was something the PLCB regulations required a licensee to do if allowed an interconnection. For example, the requirement referenced in the text (“beer purchases will be restricted to the licensed portion of the premises”) reflects that only a licensee can sell beer. An agency surely does not properly exercise its discretion when it relies as a basis for doing so on actions that are required, and a court likewise errs in approving that exercise of discretion.

demonstrated that, at least in this instance, the PLCB's approval of an interconnection violates the Liquor Code. That conclusion ends this case in Appellants' favor.

In this respect, many if not most interconnections between licensed and unlicensed premises do not raise Liquor Code concerns of this kind. The PLCB repeatedly references Wanamakers and Boscov's, which had restaurants with liquor licenses that interconnected to the department store proper. Those interconnections would concern appellants only if there was evidence, as there is here, that the arrangement was an artifice intended to allow the department store to sell beer to its customers. Not only is there no supporting evidence in this record, *i.e.*, that Wanamakers' Crystal Tea Room was an effort to sell take-out beer to department store customers, but anyone who has been in those stores knows it was not correct. We do not doubt that the Crystal Tea Room and its Boscov's analogue sought, at least in part, to sell a meal, including alcohol if desired, to the Department store customers. But that is quite different than the marketing strategy and the relationship between the licensed premises and supermarkets that is at work here.

2. The PLCB action conflicts not merely with the specific listing of what businesses may obtain liquor licenses but also with the broad principles underlying the Liquor Code. From 1933 on, in all its versions, the Code's purpose "has always been to restrain the sale of liquor, not to promote it." *Application of El Rancho Grande*, 437 A.2d 1150, 1155 (Pa. 1981); *Comm. v. West Philadelphia Fidelio Mannerchor*, 175 A. 434, 436 (Pa. Super. 1934).¹⁹ See also 47 P.S. § 1-104(c) ("Except as otherwise expressly provided, the purpose of this act is to prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take

¹⁹ The 1933 Liquor Control Act was explicitly intended to "regulate and restrain the sale, importation, and use of alcohol."

place in this Commonwealth, ... and every section and provision of the act shall be construed accordingly.”)

Thus it is that alcohol, with few and minor exceptions beyond consumption as part of a meal, has always been sold in settings that were both specialized and separated. For the retail purchase of wine and hard liquor, the Commonwealth established “state stores” selling those items and essentially nothing else, 47 P.S. § 3-301,²⁰ and until recently kept them separated from other stores. For the purchase of beer in quantity for home consumption, the Liquor Code established beer distributors who, again, sell beer and very little else; the D Distributors testified uniformly that customers come to their store to purchase beer and for no other purpose. Wilkes-Barre, Shipula, N.T. 73, 670a.²¹ In both cases, the separation and limited offerings were intended to further the central statutory purpose – “regulate and restrict” – by preventing impulse purchases. Persons wanting to purchase alcohol needed to seek it out specifically rather than happen upon it.²²

We turn to the “interior connection” rule, now codified at 40 Pa. Code § 3.52(b)(2), which the PLCB applied to permit the licensed premises to locate within the supermarket. Initially, we note that § 3.52(b)(2) establishes a flat prohibition – a licensed premises “may not have an inside passage or communication to or with any business” – subject to an exception –

²⁰ A 2003 Liquor Code amendment allowed state stores to sell corkscrews, wine and liquor accessories, wine- or liquor-scented candles, trade publications and wine sleeves. *See* Act of July 17, 2003, P.L. 63, No. 15, and Act of Dec. 30, 2003, P.L. 423, No. 59, codified at 47 P.S. § 3-305(h).

²¹ D Distributor witnesses testified uniformly that all products other than beer that they are permitted to sell constitute a very small percentage of sales. As an example, beer sales make up 87% of the revenue of Beer Super. (Wilkes-Barre, Shipula, N.T. 76, 671a). The co-owner of an Easton distributorship testified that everything he sold other than beer had “little or no importance” to his business, adding “We are a beer store.” (Easton, Greenstreet, N.T. 33, 707a). Shipula added that “for the most part,” customers shop at his store for beer and not for any other reason. (Wilkes-Barre, Shipula, N.T. 76, 670a).

²² Other Liquor Code provisions, such as those establishing license quotas, likewise reflect the goal of restraint. *Application of El Rancho Grande*, 437 A.2d at 1155.

“except as approved by the Board.” The prohibition itself and its language date back to at least 1952, when the PLCB promulgated predecessor regulations, §§ 103.01, 103.02 (666a), and via statute to 1933.

What is easily overlooked today is that the interconnection prohibition *had a purpose*; unfortunately, the PLCB does not identify that purpose here or in any case of which Appellants have knowledge, and the Rule predates modern day notice and comment rulemaking. Nonetheless, Appellants believe, ironically given their present use, that the PLCB’s “interior connection” rules were part and parcel of the PLCB’s armamentarium of “controlling access to liquor” rules. They were intended, as were the creation of state stores and beer distributors, to limit the casual and unintended movement from unlicensed to licensed premises while allowing exceptions in circumstances presenting a sound rationale.²³ In the sole reported decision under these provisions, *Liquor Control Board v. Ripley*, 529 A.2d 39 (Pa. Commw. 1987), the PLCB refused to allow the seemingly innocuous combination of a bakery/antique/gift shop operating under the same roof as a country inn, instead requiring the owner, as a condition of licensure, to close the hallways that led from one to the other. *See Id.* at 43.²⁴ The PLCB has never explained how its actions in *Ripley* and this case are consistent.

The separated nature of liquor retailers was part of the Liquor Code from its inception. There was a single exception: §11(h) of the Beverage License Law seemingly allowed “eating places” licensed under that Law to conduct a separate business on the licensed

²³ The exception, under established principles, is to be construed narrowly. *Borough of Youngwood, supra*, 947 A.2d at 732-733.

²⁴ The PLCB’s *Ripley* Opinion (*see* Exhibit C hereto) noted that “[t]he proposed licensed premises have interior connections with other businesses conducted by Applicants.” The PLCB’s Brief in *Ripley* in Commonwealth Court (*see* Exhibit D hereto) noted (at 15) that “the evidence indicated that the Applicants will operate an antique shop, bakery, and a lodging facility, all of which will be connected with the restaurant” and that the PLCB therefore “disapproved of the application.”

premises.²⁵ There was no comparable provision in the Beverage Law as to any other licensee nor any such provision at all in the 1933 Liquor Control Act.

A 1937 book entitled *Digest of the Liquor Control System of Pennsylvania Including The Complete Regulations Of The Pennsylvania Liquor Control Board* (Telegraph Press, 1937), described the Board's actions to that point this way:

The Board has been reluctant to grant retail liquor licenses to restaurants connected in any way with any other type of business, such as a grocery store, barber shop, beauty parlor, etc.

In cases where restaurants carried on an extensive business of candy, ice cream and soda, liquor licenses would be withheld until this business had been eliminated, because of the fact that it attracted minors. The extensive sale of tobacco, cakes, canned goods and miscellaneous merchandise had to be eliminated before a liquor license was granted.

Id. at 6.

The history disfavoring interconnections has one consistent exception: delicatessens. It is difficult in 2009 to decipher the rationale for this exception, but the PLCB has historically permitted interconnections at traditional delis between the licensee (typical a small eatery holding an "E" license) and the small grocery store, offering a limited number of items, with

²⁵ Conducting a separate business on the licensed premises is technically distinct from "interconnections" but raises some similar concerns.

Section 11 of the Beverage Law concerned "Application for Retailers Licenses" and subsection (h) required an applicant to provide "a full history" if "any other business is to be conducted concurrently with the sale and distribution of beverages," including "the nature thereof, [and] the length of time it has so previously been conducted by the applicant ... at such location." The PLCB, in turn, issued a regulation in 1937, R-37-27 (667a), requiring that an "eating place (as defined in the Beverage License Law)" at which another business was operating have at least 300 square feet – the minimum required of an "eating place" – exclusively devoted to the eating place operations.

R-27-37 is the regulation that the PLCB describes, and mischaracterizes, when it references (Bethlehem Opinion at 115) "over seventy (70) years of policy that has given the Board discretion to approve interior connections between restaurant or eating place licenses and commercial establishments, such as department stores, convenience stores, delicatessens, and grocery stores." R-27-37 had nothing to do with interconnections and dealt only with "eating places."

which it shared space; the deli counter served both the restaurant and take-out customers. Allowing that to continue was the likely focus – the “other business ... to be conducted concurrently with the sale and distribution of beverages” – of §11 of the Beverage Law. It seems most likely that delis were an existing business model in 1933 that already combined those two distinct businesses, one of which (the eating place) wanted to serve beer with its sandwiches. Section 11(h) of the Beverage Law allowed that to happen without swallowing the rule that liquor was to be otherwise sold in separated businesses.²⁶

A “restaurant” located in the midst of a 120,000 square feet supermarket is the antithesis of the sale of alcohol in separate and separated stores that focus narrowly on the sale of alcohol. Allowing a licensed premises to interconnect with a commonly owned supermarket – or more accurately in terms of marketing strategy, *vice versa* – turns the “interior connections” rule on its head. Instead of being a rule designed to minimize incidental purchases of alcohol, § 3.52(b) becomes the vehicle to facilitate them. Doing so circumvents Liquor Code limitations and policies.

This leads directly to several final points concerning the PLCB’s asserted exercise of discretion here via application of its “interconnection rules.” First, as noted earlier, the application must be consistent with the governing statute. Second, when the discretion relates to avoiding the force of a regulation, the exercise must be consistent with the particular goals the regulation sought to promote, or there must be countervailing benefits; the latter is akin to requiring an applicant to show “good cause” supporting its entitlement to the exception.²⁷

²⁶ It should come as no surprise that not every Liquor Code provision reflects a consistent or principled approach to the sale of beer and the “deli rules” may be such a deviation.

²⁷ For example, the Department of Health allows exemptions to its health facility licensing regulations when an applicant demonstrates that “the policy and objectives contained” in the regulations “are otherwise

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Third, the exercise must be generally consistent with the prior history of the application of the regulation in similar situations or there must be a rational explanation for the departure.²⁸

Those criteria are inherent in a proper exercise of discretion; they are measuring rods for determining that the agency has acted properly. *See Slawek v. State Bd. of Med. Educ. & Licensure*, 586 A.2d 362 (Pa. 1991).²⁹ The PLCB satisfied none of them here.

CONCLUSION

The PLCB's actions licensing Wegmans rewrite the Liquor Code rules on the venues at which beer may be sold in Pennsylvania so that, after 75 years of contrary law and without legislative change, a supermarket – and a large number of other stores that have, incidentally, prepared food for sale within them and a small eating area – can now sell beer.

When a restaurant can append itself to a supermarket or, more accurately in terms of the marketing strategy here, *vice versa*; when that single, commonly-owned and -operated legal entity can sell beer in quantity for take-out consumption from what to the customer is as

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met”; that “compliance would create an unreasonable hardship”; and that granting an exception “would not impair or endanger the health, safety or welfare of a patient or resident.” 28 Pa. Code § 51.31.

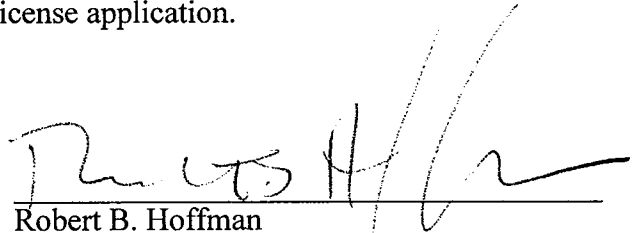
²⁸ A regulation's interpretation cannot simply reverse course as Board members, and/or their personal views, may change. If an agency believes a regulation's original purpose is no longer valid, or wants to change course when the regulatory language does not permit it to do so, the proper action is to repeal and revise the regulation. That task may be cumbersome, but it is appropriate.

The legal *bona fides* of an agency's changed position was at issue in *Cash America Net, supra*, 978 A.2d at 1037 (“Although the Department formerly endorsed a contrary interpretation of that section, the Court is convinced that the Department's current interpretation is the correct one.”). In that instance, the Department of Banking had published a Pennsylvania Bulletin Notice explaining its former and new positions and the reason for the change. *Id.* at 1030-31. The PLCB has done nothing comparable.

²⁹ *Slawek* involved a challenge to the length of a license revocation the Medical Board had imposed in a situation in which it “had no discretion to abuse.” 586 A.2d at 364. Unlike this case, the Medical Board there had identified the principles it was seeking to further (“tak[ing] into account mitigating factors, yet, deter[ring] others from engaging in similar conduct, and maintain[ing] public confidence in the integrity of the medical profession”) and the legitimate factors that guided its decision (*see* the discussion of alternatives considered and why the Board rejected them). *Id.* at 365-66. A reviewing court could *review* that situation and fairly find proper agency action.

much part of the supermarket as the produce section; and when the separation between the licensed and unlicensed premises is virtually undetectable and fundamentally irrelevant, the PLCB has made meaningless the legislative rules on the venues at which beer can be lawfully sold in Pennsylvania.

For these many reasons, MBDA, Beer Super, Inc., Tanczos Beverages, Inc., and K.E. Pletcher, Inc. respectfully submit that this Court should reverse the PLCB's grant of a licensure and direct the PLCB to reject the license application.



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