

BEFORE THE PENNSYLVANIA LIQUOR CONTROL BOARD

In Re: Wegmans' License Transfer :
Applications for Stores Located in: :
Williamsport : No. 07-9145; LID No. 57946; License No. R-13137
Wilkes-Barre : No. 07-9147; LID No. 58048; License No. R-14938
Dickson City : No. 07-9148; LID No. 57887; License No. R-14953
State College : No. 07-9144; LID No. 57935; License No. R-11694
Bethlehem : No. 07-9158; LID No. 57990; License No. R-18314
Lower Nazareth : No. 07-9170; LID No. 57985; License No. R-2455

**CONSOLIDATED POST-HEARING BRIEF
OF THE MALT BEVERAGE DISTRIBUTORS
ASSOCIATION AND INDIVIDUAL INTERVENORS**

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TABLE OF CONTENTS

INTRODUCTION	1
I. SUMMARY OF THE RECORD EVIDENCE	2
A. WEGMANS’ PRESENT AND CONTEMPLATED OPERATIONS	2
B. INTERVENORS’ OPERATIONS.....	8
C. THE PREDICTED AND PREDICTABLE ADVERSE IMPACTS OF WEGMANS’ BEER OPERATIONS ON D DISTRIBUTORS	10
1. The Fundamental Basis Of Wegmans’ Experts’ Testimony Is, By Their Own Admission, Wrong.....	12
2. Although Businesses Often Co-Locate With Other Businesses, They Take Steps When They Can To Avoid Co-Locating With Competitors.....	14
3. Intervenors Have Presented Sufficient Evidence, Based On Their Experience And Knowledge, As To The Predictable Adverse Consequences To Their Businesses, Thus Allowing Them To Participate In These Proceedings	16
II. THE GOVERNING LAW AND ITS APPLICATION	20
A STANDING: THE INTERVENORS HAVE IT.....	20
B. THE MERITS: WEGMANS’ APPLICATIONS MAKE A MOCKERY OF PENNSYLVANIA RULES ON WHO CAN AND CANNOT OBTAIN A LICENSE TO SELL BEER	26
1. Supermarkets Cannot Sell Beer In Pennsylvania.....	26
2. The Interior Connection Rules And Why They Are Inapplicable Here.....	27
3. Can Form Trump Substance?.....	30
CONCLUSION.....	33

TABLE OF AUTHORITIES

CASES:

<i>Application of El Rancho Grande</i> , 437 A.2d 1150 (Pa. 1981)	24,28
<i>Application of the Family Style Restaurant, Inc.</i> , 468 A.2d 1088 (Pa. 1983).....	25
<i>Greater Fourth St. Assocs. v. Smithfield Township</i> , 816 A.2d 388 (Pa. Cmwlth. 2003).....	31,32
<i>In Re Ohio Springs, Inc.</i> , No. 04-9056, LID No. 52614.....	31
<i>Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Insurance Guaranty Association</i> , 829 A.2d 297 (Pa. 2003).....	29
<i>Lycoming County Nursing Home Ass'n v. Department of Labor and Ind., Prevailing Wage Appeal Bd.</i> , 627 A.2d 238 (Pa. Cmwlth. 1993)	31
<i>Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board</i> , 881 A.2d 37 (Pa. Cmwlth. 2005)	20,21,22,23,25
<i>Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board</i> , 918 A.2d 171 (Pa. Cmwlth. 2007)	28
<i>The Morning Call, Inc. v. Lower Saucon Township</i> , 627 A.2d 297 (Pa. Cmwlth. 1993).....	32
<i>Wm. Penn Parking Garage, Inc. v. City of Pittsburgh</i> , 346 A.2d 269 (Pa. 1975).....	24

PENNSYLVANIA STATUTES AND REGULATIONS:

40 Pa. Code §§ 3.52-3.54.....	26
40 Pa. Code § 3.52(b)	27
40 Pa. Code § 17.2(a).....	32
47 P.S. § 1-102.....	3
47 P.S. § 4-431(b).....	30

The Malt Beverage Distributors Association (“MBDA”) and the individual D Distributor intervenors in the six Wegmans transfer applications submit the following consolidated Post-Hearing Brief, addressing all of the applications. MBDA is the trade association for the D Distributors and other intervenors or D Distributor witnesses are MBDA members who operate D Distributorships in the areas served by the various Wegmans. (Williamsport, Hogan, N.T. 60-63). We do not submit proposed findings of fact and conclusions of law but rather address in brief form the salient points adduced from the hearing record and the pertinent legal issues.¹

INTRODUCTION

Even beyond the incorporation of the wholly generic testimony from hearing to hearing, what stands out is the similarity of the *non-incorporated* testimony, as the same or similar witnesses provided testimony arising from or applied to what are, at most, minor differences in facts. At the same time, that commonality is understandable. All Wegmans stores have far more similarities than differences, and the current operations and future plans at each are quite similar. The same applies, only slightly less rigorously, to the D Distributors; they have all developed in parallel fashion as state regulation and the marketplace have allowed or forced them to. Businesses, whether in State College or Bethlehem, typically locate in predictable and repetitive patterns, *i.e.*, restaurants *en masse* will locate in or adjacent to downtown business districts so they can serve lunch to the people who work there, supermarkets will locate within driving distance of where their anticipated customers live; and, with some important limitations, businesses will locate where other

¹ Certain named intervenors (in Williamsport and Nazareth) did not testify and their claims do not therefore proceed. That is of no more than technical significance in these cases.

businesses have located or will locate. Few businesses want to locate 12 miles out a windy dirt road (*e.g.*, Bethlehem, Dunham, N.T. 347).

We discuss the pertinent evidence below, substantially by organizing it according to three basic categories: (1) Wegmans' present and contemplated operations; (2) intervenors' operations; and (3) the predicted and predictable impact of the former on the latter. Discussion of the legal issues follows.

I. SUMMARY OF THE RECORD EVIDENCE

A. WEGMANS' PRESENT AND CONTEMPLATED OPERATIONS

Wegmans are upscale supermarkets, approximating 120,000 square feet in size. They are "destination" stores, drawing customers from farther away than most supermarkets. They include, in addition to standard supermarket fare, "Market Café" areas of approximately 6,000-9,000 square feet with seating for 150 persons more or less. The "whole store" exhibit used at each hearing (*e.g.*, Wilkes-Barre, Exh. A-7) graphically shows the relative sizes of the proposed licensed and non-licensed areas, the latter dwarfs the former by approximately 15:1.

Prior to these applications, Wegmans Market Cafés were restaurants almost incidentally or besides the point, if at all. Far more accurately, they were, and will be even if licensed, part of a Wegmans Supermarket, no more or less so than the produce or meat departments or the bakery. It is not merely that the Cafés have no host/hostess or waiter/waitress or service or that Wegmans owns the entire space and hires all of the employees. More fundamentally, the existence of a defined restaurant, with carefully measured metes and bounds and distinct employees, was and is irrelevant to how Wegmans has operated and will operate, if licensed.

In this respect, Wegmans heavily promotes its chef-inspired prepared foods² and other more conventional prepared food areas, such as the typically-present sub shop, coffee area, salad and soup bars, and wokery. Prepared food is available for supermarket customers at various locations in the supermarket at large, some displayed within the proposed licensed premises and some not. Tables are available in the Market Café and customers can eat the prepared food they have bought (whether they bought it inside the proposed licensed premises or not) at the available tables and chairs, or not. As Mr. Demascole agreed that “whether you buy the chef’s special or the pizza or the salad bar or a sub, you as a customer can buy it, take it to the seating area, sit down or you can buy it, put it in some sort of a takeout container and hop out the door” (Williamsport, DeMascole, N.T. 244-45). Wegmans is indifferent as to which the customer does.

Each of the proposed store configurations, as modified, has food available within the proposed licensed areas (and thus satisfies the applicable legal requirement, *see* 47 P.S. § 1-102 (definition of “restaurant”).³ But it is noteworthy that several of the original proposed licensed premises did not have any prepared food displayed and available within it, and it is the case that none of the proposed licensed premises includes all the areas in which the store displays “restaurant--prepared food” for sale.⁴ It is as if part of a buffet restaurant were in plain sight but

² Wegmans touts itself as hiring executive chefs to direct the prepared food operations. (Williamsport, DeMascole, N.T. 208-09).

³ The Liquor Code definition of “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. The board shall, by regulation, set forth what constitutes tables and chairs sufficient to accommodate thirty persons at one time.”

⁴ The sub shop, coffee shop, and soup bar at the Nazareth store are located outside the proposed licensed premises and the original plan for Nazareth had no prepared food display area within the proposed licensed premises. (Nazareth, Santilli, N.T. 21-22, McCue, N.T. 138). The wokery and salad bar at Williamsport are both outside the proposed licensed

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simply was not part of the restaurant, at least for legal if not practical and real world purposes (although you could shop there and pay for what you selected back at the restaurant).

The proposed licensed premises is fundamentally an artifact, created by boundaries drawn on a supermarket floor plan to satisfy regulatory requirements and to distinguish and separate out floor space that was never before distinguished. Reflecting this point, Wegmans stores have a Café Manager, who is responsible for the operations of the Market Café. The Café Managers' operational domain includes areas that are outside the proposed licensed premises (typically some of the areas where prepared foods are displayed) and excludes some that are (the central prep kitchen being an example). (Nazareth, McCue, N.T. 139-40). It is akin to a political gerrymander, with boundaries tweaked to accomplish its purposes.

This leads to the fundamental point that the Market Café is an integral part of a busy and successful supermarket that has, conservatively, more than fifteen thousand customers/week.⁵ As we discuss later in this Brief, this goes far beyond the fact that in Liquor Code terms there are multiple “interior connections” between the Market Café and the remainder of the supermarket.⁶ As Wegmans stated in a news release, “We’d like to make the experience of *shopping at Wegmans*

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premises. (Williamsport, DeMascole, N.T. 242). At Dickson City, the salad, fruit, and soup bars are outside the proposed licensed premises. (Dickson City, Grossi, N.T. 159). Various floor plan exhibits reflect that the sushi bar is rarely within the licensed premises.

⁵ Testimony at the Nazareth hearing established that that store had approximately 30,000 customer transactions/week. (Nazareth, McCue, N.T. 146).

⁶ Each of the PLCB witnesses, on direct examination, described multiple interior connections between the licensed and unlicensed premises, and the standard “licensed premises sketch” (Exh. P-1) reflected their locations. *See, e.g.*, Williamsport, Stuffick, N.T. 16; Nazareth, Santilli, N.T. 11.

even better, and certainly more convenient by selling beer in our Market Café restaurant.” (Exh. P-4, emphasis supplied).⁷

Wegmans operates, as its own experts opined, under an economy-of-scope principle: it seeks to broaden the array of products and services it offers so that its customers will buy more at any one shopping trip (*e.g.*, State College, Dunham, N.T. 194, Shepstone, 209).⁸ Thus, as various exhibits reflected, each of the stores has, in addition to the more typical supermarket fare, a photo center, pharmacy, sushi bar, and a DVD rental. Wegmans’ focus on their extensive array of chef-prepared foods is part of that economy-of scope strategy.

And so, quite clearly, is the sale of beer. (State College, Dunham, N.T. 211).

Although originally touted as necessary to enable Wegmans to compete with what it stated were its restaurant competitors (TGIF, Applebee’s, and others of that ilk),⁹ Wegmans soon all but

⁷ Inexplicably, Exhibit P-4 is referenced in the Exhibit listing for the Williamsport hearing (N.T. 4) and is clearly discussed (N.T. 260) but is not referenced in the transcript. We suspect a transcription error.

⁸ Mr. Dunham (State College, N.T. 194) explained it this way:

Wegmans is the type of store ... 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.

He further explained (State College, N.T. 208-09):

[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.

⁹ See Williamsport, DeMascole, N.T. 212:

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abandoned that purpose. Ultimately it became clear that Wegmans expects minimal beer to be consumed on the Market Café premises, thus substantially debunking the TGIF/Applebee's analogy. All store managers testified to that effect. Not only will Wegmans not offer the type of services and conditions (draft beer, table service, smoking, happy hours, entertainment) that typically promote beer consumption, but it will have a fairly strict policy, with signage, that requires the consumption of the beer at the premises to accompany the purchase of Wegmans' prepared food. (Nazareth, DeMascole, N.T. 167-68).

In fact, Wegmans' plan is to sell beer, primarily for take-out and to its existing customers. Beer will be available in configurations ranging from individual bottles to the largest amount allowable by law (which is for all practical purposes by the case).¹⁰ But Wegmans' staff expect sales of individual bottles for consumption on the premises to be, if not as rare as hen's teeth, a small minority of sales. *See, e.g.*, State College, Gallucci, N.T. 117-18 (agreeing that "we don't expect to have a lot of people drinking beer" at the Café). Wegmans hopes, and expects, that its existing customers will add take-out beer, in quantities up to the legal limit (however that may change in the future), to the other items in their shopping carts. As per the press release, quoted

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What we believe ... is that we're at a disadvantage now to other restaurants that we're competing with. In particular, if we would compare ourselves back to those Applebee's or TGI Fridays, although some of the offerings might be the same, you know, if any of us went to one of those stores, we would have the option to get a glass of beer and we wouldn't have that option at Wegmans

¹⁰ Under the *Gittings* opinion, a customer can purchase two six packs of beer, hand them to an acquaintance standing beside him, and purchase another two six packs. There is no requirement that the first two six packs leave the premises before the second sale, although Wegmans states that it will require that be done. Fundamentally, the *Gittings* rule allows retail dispensers to sell in case quantity. *See* PLCB Op. No. 02-464, available at http://www.lcb.state.pa.us/webapp/legal/PublicAdvOpnDisplay.asp?opinion_year=2002&opinion_sequence=464.

earlier, Wegmans wants to make “the experience of *shopping at Wegmans* even better, and certainly more convenient by selling beer in our Market Café restaurant.” Wegmans’ beer price may (or may not) be higher than at a D Distributor,¹¹ but the delivered cost (which factors in convenience, *i.e.*, the customer’s non-price “costs,” in making a purchase) will likely be at least comparable.¹² The typical Wegmans’ customer may be a woman, 30-50, but, in the apt phrase of witness Chuck Greenstreet, many are the “purchasing agents” for their families, To them, the convenience of buying more things at one stop -- precisely Wegmans’ economy-of-scope model -- matters. (Nazareth, Greenstreet, N.T. 36, 46).¹³

Beyond those several basic points -- Wegmans will sell beer mostly for take-out and mostly to its existing customers -- we know almost nothing as to how Wegmans plans to sell beer.

Wegmans has been involved in the licensing process since early 2007 at the latest (the filing date of the earliest applications); license applications for six stores have gone to hearing (with the Erie and Downingtown stores waiting in the wings); it hired two experts who spent 400 hours combined on their projects and testimony; it has a seemingly well-qualified regional beverage coordinator; and it hired experienced counsel who heavily staffed the proceedings. Yet, the record reflects that

11 Wegmans had not made any beer pricing decisions (*e.g.*, Williamsport, DeMascole; N.T. 259).

12 Expert witness Dunham repeatedly discussed the concept of “delivered cost,” *e.g.*, Dickson City, N.T. 235-36, 249, 258.

13 He further explained:

the woman is the purchasing agent for the family. If she’s anything like my wife, she’s got a long list of things to accomplish every day, a lot of errands. If she can stop at one stop and knock four things off that list without any extra driving or any extra time or loading the kids in or out of the car, that’s what she’s going to do.

(Nazareth, Greenstreet, N.T. 46-47).

Wegmans has done no marketing (or economic impact) study on how it plans to successfully sell beer in Pennsylvania, *e.g.*, quantifying and/or analyzing such things as estimated sales, pricing strategies, or what varieties of beer it will sell, both in packaging and brand. Minimally, nobody who testified was aware of any such study. Whether this was a litigation tactic designed to avoid inquiry or just the way Wegmans does business, the net result is that the record, (over)lengthy in most regards, is quite limited on how Wegmans plans to sell beer in Pennsylvania.¹⁴

B. INTERVENORS' OPERATIONS

D Distributors are small businesses, in general and as compared to Wegmans. They range from 4,000-10,000 square feet (the larger size typically when there is warehouse space for wholesale operations); many are smaller than the Market Cafés and all are a tiny fraction of the supermarket size. The owner typically works the business, together with a few employees. None has a regional warehouse or distribution center. (Dickson City, Lynch, N.T. 54; Wilkes-Barre, Shipula, N.T. 119). Based on the sample in these proceedings, many D Distributors are literally “family businesses” as well, having been operated by parents and passed on to a second generation. The fathers of the current owners founded Beer Super (in 1949), K.E. Pletcher (in 1956) and Tanczos Beverages (1960) (Wilkes-Barre, Shipula, N.T. 55-56; State College, Pletcher, N.T. 31; Bethlehem, Tanczos, N.T. 124-25).

Under Pennsylvania’s established beer distribution system, D Distributors are granted the market niche of selling to consumers in bulk (case or larger) for home use. D Distributors sell beer and little else. Chuck Greenstreet, co-owner of a Nazareth distributorship, testified that everything

¹⁴ That failure insulated Wegmans from any scrutiny on that issue. It also made it difficult for any D Distributor to perform the economic impact analysis that Wegmans asserted was necessary. One can imagine the cross-examination as to any assumptions made in that analysis as to Wegmans’ planned pricing, product variety, advertising, etc.

he sold other than beer had “little or no importance” to his business, adding “We are a beer store.” (Nazareth, Greenstreet, N.T. 33). At Tanczos Beer, 82.5% of its revenue were from beer sales in 2006 (Bethlehem, Exh. P-3); Beer Super’s sales are 85-87% beer (Wilkes-Barre, Shipula, N.T. 63). Most of a Distributor’s beer sales are by the case (very few kegs) and most are of the several major national brands. Microbrews remain an interesting niche product.

There are two reasons for this focus/reliance on beer sales. First, D Distributors face great difficulties in competing in other product lines, such as soda (competition from supermarkets, particularly in the age of non-returnable bottles) and cigarettes (competition from “cigarette discount shops” and the internet, *see* Wilkes-Barre, Shipula, N.T. 62). People come to beer distributors for beer and no other purpose, and sales of non-beer items are either impulse or small ancillary sales. (Wilkes-Barre, Shipula, N.T. 73). D Distributors routinely testified that their businesses had changed over the past decade -- almost exclusively to contract in square footage and the scope of offerings -- as they lost the ability to profitably sell almost any item other than beer. Often, the loss of sales in a product line followed the opening of a new competitor (a matter we discussed in more detail later in this Brief).¹⁵ Second, D Distributors must seek and receive PLCB approval to sell products other than those that have been pre-approved. That process does not encourage entrepreneurial activities.

In general, the D Distributors sell all the pre-approved products that they think they can make a profit from selling; are open the hours during which they can make a meaningful number of sales; and operate their businesses intelligently. At this stage, with their businesses already up and

¹⁵ Testimony graphically showed this contraction in size. Barbara Lynch downsized her store from 10,000 square feet to 6,500 and then to 3,800 and explained that the reduction primarily correlated with the “fall[] off” in her soda sales. (Dickson City, Lynch, N.T. 99). *See also* Wilkes-Barre, Shipula, N.T. 54, 58 (from 12,000 square feet to 3,800, again due to severe decline in soda sales).

running and circumscribed by their size and location, even allowing D Distributors *carte blanche* to sell any product (TVs, jewelry, art) would likely have little impact because they would have little ability to take advantage of that new freedom, let alone profitably. D Distributors have developed as the state's regulation and marketplace have allowed or forced them to.

With their high percentage of beer sales, D Distributors cannot broadly cut their prices on beer, either as a loss leader or simply to attract customers. They lack sufficient other products to make that strategy successful. (Nazareth, Greenstreet, N.T. 40). Mr. Shipula testified (Wilkes-Barre, Shipula, N.T. 74) to the reason Beer Super could not do so: "if I were to sell the beer at cost or close to cost, I'd go out of business."

The D Distributors who testified appeared to be good businessmen and women. Wegmans' experts, even as they were criticizing the D Distributors' judgments as to the predicted impact Wegmans would have on their businesses, recognized their business acumen. *See e.g.*, State College, Shepstone, N.T. 158; Nazareth, Shepstone, N.T. 210; Bethlehem, Shepstone, N.T. 280.

C. THE PREDICTED AND PREDICTABLE ADVERSE IMPACTS OF WEGMANS' BEER OPERATIONS ON D DISTRIBUTORS

The predicted and predictable impact of Wegmans' proposed beer operations on D Distributors was the subject of the great bulk of the testimony and exhibits. Wegmans, at substantial cost, hired two experts to address this topic, and they spent many hours doing so at, and before, the hearing. Despite that length, their testimony fairly distills to two basic points. First, the Board can make no finding of harm to the D Distributors unless and until the D Distributors presented testimony from a hired expert, like Messrs. Dunham and Shepstone, who had performed

an economic impact analysis.¹⁶ The testified-to expectations and predictions of business owners, supported by their previous experiences in analogous circumstances and their knowledge of the industry, was, in Wegmans' view, worthless. Second, they testified that co-location or cluster theory establishes that businesses, even competitors, all benefit from locating near each other. On that basis they concluded that Wegmans' sale of beer would, if anything, benefit the D Distributors and certainly would not harm them.

There are many reasons why that approach is wrong, which we outline here and discuss individually below. First, case law has never imposed on citizens claiming to be harmed by a government decision, and thus to have standing to challenge it, the evidentiary burden Wegmans asserts here. Each D Distributor has presented sufficient evidence, based on experience and knowledge, as to the predictable and adverse consequences to their businesses. Indeed, they recognized Wegmans' economy-of-scope business model without using, or probably knowing, the term. Second, the evidence reflects that businesses, although they often co-locate with other businesses, also take steps when they can to avoid co-locating with certain other businesses, *i.e.*, those they perceive as their competitors. Third, the fundamental basis of Wegmans' expert testimony is, by their own admission, wrong.

¹⁶ Although not precisely defined (and what follows is essentially tautological), an economic impact analysis involves examining, from an economic perspective and presumably by expert economists, the predicted effect of a particular decision on a specific area or business. It includes gathering data on the specific facility or industry that is taking the action being examined, cleaning the data, and running it through a series of models, such as input/output analysis. (Williamsport, Dunham, N.T. 300-01).

1. The Fundamental Basis Of Wegmans' Experts' Testimony Is, By Their Own Admission, Wrong

The premise of co-location theory is that grouping businesses together, as in a mall, results in increased customer traffic from which all businesses benefit. As Mr. Dunham testified (State College, N.T. 195):

You find Staples located with a JC Penney located with a Wegmans located with a Fox Pizza Place. These businesses decided by co-locating together they'll have a larger customer base that they can all rely on and all profit from, that will grow the business available to all them.

The central benefit from the businesses' perspective is the increased customer traffic. Again, Dunham (State College, N.T. 214-15) isolates this point:

Q. And the concept [in a mall or shopping center] is by having all these businesses together, they draw in more customers than any one or two or even three of them would by themselves, and a rising tide raises all boats ...?

A. There's that, as well as clustering of like businesses together help all those businesses as well.

Q. But the concept is, though, that the clustering brings in additional customers?

A. Yes, sir.

Q. And so if we had a shopping center that had two department store anchors and was adding a third and they brought in a Macy's to match out a JCPenney and a Sears or something like that, the assumption would be that bringing ... the third one would bring in a whole new set of customers and would be to the benefit of everybody?

A. Absolutely.

For the experts' theory to make any sense as applied here, Wegmans' sale of beer would have to attract additional customers, some of whom would buy their beer at the D Distributors' businesses. Yet Wegmans' experts testified over and over that Wegmans' sale of beer would *not*

attract additional customers beyond, if at all, in extremely meaningless amounts. The following are examples from Mr. Shepstone's testimony on this point:

- **Wilkes-Barre** (N.T. 209-10): agreeing that the sale of beer at Wegmans in Williamsport would be providing an additional convenience for customers who were doing their shopping at the store.
- **Dickson City/Dickson City** (N.T. 211-12): agreeing that the sale of beer at Wegmans "would have, at most a small effect in increasing the customer -- the number of customers at Wegmans."
- **State College** (N.T. 171): agreeing again that "it was unlikely that Wegmans would attain any meaningful amount of new customers by virtue of extending in to the sale of beer" and adding "I don't see this as generating a lot of new customers for them. I see this as getting existing customers spending more money in the store by offering additional services."
- **Bethlehem** (N.T. 276-77): agreeing "as I think you have, in almost every other previous day we had the pleasure of talking to each other, that it is unlikely that the sale of beer by Wegmans would produce any meaningful amount of new customers to Wegmans."
- **Nazareth** (N.T. 207-08): agreeing that "the sale of beer would add few if any customers" and "would be more in the nature of adding a convenience, a new service, for the existing customers."

Mr. Dunham agreed (State College, N.T. 211; Dixon City, N.T. 258-59) as did every store manager who addressed the subject (State College, Gallucci, N.T. 118 (anticipating "no meaningful increase" in customers); Bethlehem, Shelley, N.T. 222).

Shepstone further distinguished this situation from what occurred when Wegmans first opened a new store. At that time, Wegmans brought a substantial number of new customers into the area in which it had located.¹⁷ "[T]hat influx" of people would, at that time, "have a nice positive spillover effect on restaurants and other businesses that were ... proximate to Wegmans location." (State College, Shepstone, N.T. 172-73). Thus, a newly-opened Wegmans presented

¹⁷ Given the size of a Wegmans store and related parking, Wegmans almost necessarily has to locate in a large undeveloped plot.

both positives (in the form of more customer traffic) and negatives (in the form of increased competition) to, for example, neighboring pizzerias, Chinese restaurants or DVD rental stores. Today, to the D Distributors, Wegmans' proposed expansion into beer sales presents only the negatives, since there is no anticipated increase in customer traffic.

MBDA has discussed this evidence in detail because it reveals a very serious flaw in Wegmans' presentation. It undercuts, in a single stroke, the import and validity of hundreds of pages of expert opinion that Wegmans' sale of beer would benefit, or at least not harm, the D Distributors. That opinion is incorrect. No (or few) new customers means no benefits to D Distributors in the area.

2. Although Businesses Often Co-Locate With Other Businesses, They Take Steps When They Can To Avoid Co-Locating With Competitors

Intervenors do not dispute that businesses, by their actions, often show that they see benefits in locating near another business or other businesses. Malls and shopping centers are one example. Restaurants cluster in a downtown business district because that is where their customers, at least for lunch, are located. Another example, noted commonly in these proceedings, is the location of restaurants near a Wal-Mart; they presumably recognize that Wal-Mart is not a competitor to them and they can benefit from Wal-Mart's draw of customers. (Bethlehem, Dunham, N.T. 347-48). Mr. Shipula testified (Wilkes-Barre, N.T. 71) and Mr. Dunham agreed (*id.*, N.T. 244) that Beer Super benefited from the location nearby of a restaurant licensee that did not sell take-out beer and of a pub across the street that had 20-50 different brands of beer on tap.

But it is equally true, as even Mr. Dunham agreed (Bethlehem, N.T. 348), that businesses, by their actions, sometimes indicate that they do not want to be nearby a business that in whole or in part competes with it. As Mr. Shipula believed his business was helped by the proximity of certain businesses (described in the paragraph above), so he testified that the presence of a low-

price cigarette store and a pizza/take-out beer operation had hurt his business. (Wilkes-Barre, N.T. 62-63, 66). Businesses in malls commonly seek and obtain “exclusive use” lease provisions that prevent competing businesses, however defined, from also locating in the mall. (Bethlehem, Weinstein, N.T. 53-56, 64-78, and Exh. P-2). Eighty percent of the 100 mall leases witness Weinstein had worked on had those provisions, and those that did not were typically the less sophisticated lessees. *See also* Bethlehem, Goldstein, N.T. 111. It is possible that these businesses, many of them sophisticated national or regional businesses, are operating not merely out of self-interest but out of misinformation. But not likely.

A Burger King may locate nearby an existing McDonalds. That clearly announces that Burger King believes it can operate profitably at that location. That does not mean that doing so improves McDonalds’ sales or that McDonalds is happy with its new neighbor. It is unlikely that Burger King brings any substantial new customers to the area, let alone those, who despite being drawn in by Burger King (“I want a Whopper”), end up eating at McDonalds (“OK, I’ll have a Big Mac”). Similarly, McDonalds recently announced it will add coffee bars to many of its stores. It is unlikely that Starbucks views that positively. Witness Lee Goldstein (Bethlehem, N.T. 110) listed the typical stores in shopping centers his company operates: “the typical pizza shop, Chinese restaurant, dry cleaner, pet food store, drug store. It’s almost in every center you go to.” Those are, quite obviously, non-competing businesses (with the possible exception of a slight overlap in the pizza shop and Chinese restaurant). The opening of the Williamsport Wegmans cost the local Giant supermarket 25% of its business. (Williamsport, Schultz, N.T. 174-75). So much for the universal benefits of co-location.

3. Intervenor's Have Presented Sufficient Evidence, Based On Their Experience And Knowledge, As To The Predictable Adverse Consequences To Their Businesses, Thus Allowing Them To Participate In These Proceedings

In Part I(C)(1) of this Brief above, MBDA reviewed the record evidence that Wegmans' sale of beer will not likely bring any new customers to Wegmans, let alone to the businesses, such as D Distributors, located in its general vicinity. In Part I(A), MBDA discussed the record evidence demonstrating that Wegmans will sell beer primarily for take-out to existing customers.¹⁸ We do not know how much of Wegmans' take-out sales will be in six packs as opposed to single serving containers because Wegmans has not made any projections, but it seems likely that a substantial part of those take-out sales will be in six packs.¹⁹ We cannot know precisely how many customers of the D Distributors who testified, and of the MBDA members who did not, are Wegmans' customers, and we cannot know precisely how many will find attractive the convenience (*i.e.*, delivered cost analysis) of purchasing beer at Wegmans as they shop for groceries.²⁰ But it seems indisputable that some will, that their doing so will harm the D Distributors' business, and that there will not be any compensating or overriding benefits. That is all that is necessary to confer standing. We note that standing simply allows a party to participate; it does not guarantee a result and is not the basis for an award of damages, which might well require quite different (and quantifiable) testimony.

The D Distributors, and Ms. Hogan, each testified, based on their experience and knowledge of their particular businesses and of the beer business, that the D Distributors would lose sales to

¹⁸ In Part II, to follow, we demonstrate that case law does not impose on citizens claiming standing the evidentiary burden Wegmans asserts here.

¹⁹ The logic is that sales for on-premises consumption would more likely be by the bottle, and Wegmans expects little on-premises consumption.

²⁰ It seems likely that the intervenors' "economic impact study," to satisfy Wegmans, would need to address all of those issues.

Wegmans. They focused on the “co-location” of the Supermarket and the Market Café as essentially one business, with the inevitable (and contemplated) substantial influx of customers from one to the other.

Ms. Hogan began, focusing on the unfair competition between a supermarket and a D Distributor arising from the broad and narrow, respectively, scope of products they can and do sell:

people who go to Wegmans are going there to buy groceries. [That is] something that beer distributors can’t sell. But at the same time, [Wegmans] would be permitted to [sell]^[21] in direct competition with distributors.

Q. What is it about the fact that they [supermarket customers] can buy groceries that has an economic impact on their beer decision?

A. Well, it isn’t just groceries, but it’s the multitude of items that any supermarket can sell.

basically it’s because a store like Wegmans, because of the variety of items that they can offer, which distributors can [not]^[22] offer, means that the grocery store entity of Wegmans is going to be attracting customers to the take-out beer sales. And there’s simply no way that a D-distributor can compete with that

(Williamsport, Hogan, N.T. 64, 79). Others testified to the same effect. (Dickson City, Lynch, N.T. 53; Williamsport, Schultz, N.T. 178 (“Well, basically, it’s --- I don’t have 50,000 items to offer somebody to come to my store to want them to come there. I only basically have beer to sell them.”)).

Interestingly, that testimony closely echoes the “economy-of-scope” principle, only without the terminology. It is, thus, quite ironic that the testimony that Wegmans aggressively opposed as

21 The transcript says “buy,” which cannot be correct.

22 The “not” is omitted in the transcript in what is clearly a transcription error.

the opinions of unqualified experts accurately describes Wegmans' business model. The D Distributor witness may lack degrees, as Wegmans pointed out repeatedly, but they got this one exactly right.

The intervenor witnesses also focused on Wegmans' ability to price beer at or near cost if desired; that is something D Distributors, because of their reliance on a single product, cannot do. (State College, Pletcher, N.T. 40; Wilkes-Barre, Shipula, N.T. 74). Nobody, of course, knows how Wegmans plans to price beer, so this concern may not, or may, prove out. But it is certainly not speculative that Wegmans has this potential pricing power and the D Distributors do not. In this respect, the D Distributors also noted the ability of a supermarket, whether Wegmans or another chain, to own and operate multiple locations. (Wilkes-Barre, Shipula, N.T. 70; Dickson City, Lynch, N.T. 53). Some of those multiple locations (*e.g.*, Bethlehem and Nazareth, Wilkes-Barre and Dickson City) will be within the territory of a single Importing Distributor, thus giving rise to potential buying power that D Distributors do not have. (Bethlehem, Tanczos, N.T. 140). D Distributors are limited to one license and have no regional distribution centers.

Finally, almost every distributor witness could draw on one or more comparable events in the past in which co-location -- a new competitor locating nearby -- harmed various aspects of their business.

- **Beer Super** lost its soda business as supermarkets moved into his area and tobacco sales when a cigarette outlet located 150 yards away. (Wilkes Barre, Shipula, N.T. 60-61, 62-63). He saw no benefits, only reduced sales, when competing businesses located near his business. (*Id.*, N.T. 63).
- **Brewer's Outlet's** lost soda, cigarette, and lottery business from competition from Price Chopper, an A-Plus gas station/convenience store, and Sheetz. (Dickson City, Lynch, N.T. 47-49). Ms. Lynch too saw no benefits from "the location relatively proximate to [Brewer's Outlet] with somebody who is selling competing lines in some of [its] ancillary products." (*Id.*, N.T. 49).

- **Home Service Beverage** lost beer and cigarette sales in the mid 1990's with the growth of six pack shops and Tobacco Outlets and lost soda sales to K Mart and Wal-Mart when they opened near her. (Williamsport, Wheeland, N.T. 147).
- **Tanczos Beverage** once purchased three trailer loads of Coca Cola at a time; it now sells ever decreasing amounts of soda as the market became "diluted" with grocery stores, gas stations, and even office products stores aggressively selling soda. It has lost cigarette sales to convenience stores and stopped selling lottery tickets when a nearby grocery store, 7-Eleven, and drug store all added lottery machines. (Bethlehem, Tanczos, N.T. 129-32).
- "[S]upermarkets destroyed that profitability of soda" for **Valley Beverage** in the 1980's. (Williamsport, Schultz, N.T. 178).

The D Distributors who testified were in general experienced in the beer business and in running their own business, and quite able and qualified to predict how events would likely affect their businesses. They did precisely that as they managed their businesses over the years. Ms. Hogan has practiced in the liquor law field since 1977 and has been the MBDA secretary and counsel since 1995. (Williamsport, Hogan, N.T. 60-61). The question posed to Mr. Pletcher (State College, N.T. 40) is relatively typical of the basis on which the witnesses discussed the potential impacts of Wegmans on their businesses:

Based upon your 30 years of involvement in the beer business, making decisions without the help of an expert it appears, to determine how to run your own business profitably and anticipate impacts [and] the like, and your involvement in the MBDA these past ten years, what kind of concerns do you have about the impact of Wegmans on your operations?

Their testimony, although it did not and could not quantify the harm, was not speculation. It was, instead, rather relatively informed predictions of the future, based on experience and knowledge.

Separate and apart from the supposed benefits of co-location, Wegmans presented two additional reasons why Wegmans' sale of beer might benefit D Distributors. First, some D Distributors are also wholesalers, almost always of microbrews, and Wegmans might purchase product from those wholesalers. But Wegmans' failure to present any meaningful information as to its plans makes that relationship entirely speculative. If Wegmans purchases product from those

wholesalers it will help those wholesalers. If Wegmans does not, it will not. Second, Wegmans suggested that shoppers, leery of buying a case of a microbrew, might purchase a six pack at Wegmans and then, having tasted that product, purchase a larger quantity from a D Distributor. Again, that scenario depends on what Wegmans will do if licensed, which the record does not disclose. In any event, it is far from clear how that scenario helps a D Distributor; it appears to assume, without foundation, that the hypothetical microbrew buyer would, absent the Wegmans' purchase, make no beer purchase at all.

II. THE GOVERNING LAW AND ITS APPLICATION HERE

A. STANDING: THE INTERVENORS HAVE IT

The applicable law of standing is well understood, including as applied to intervenors in Liquor Code matters. *Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board*, 881 A.2d 37, 40-42 (Pa. Cmwlth. 2005), states it well:

Parties who do not have standing to intervene in a Board proceeding under Section 464 of the Liquor Code, but who will be aggrieved by an adverse Board decision, may nevertheless petition to intervene in the proceeding under 40 Pa. Code § 17.12-17.13 To satisfy the requirements of these sections, Petitioners must demonstrate that they are aggrieved; in other words, they must have a direct and substantial interest in the adjudication and must show a sufficiently close causal relation between the decision and their asserted injury to qualify their interest as immediate. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

The Court has stated further:

An interest is “substantial” when there is a discernible adverse effect to an interest of the aggrieved individual that differs from the abstract interest of the public generally in having others comply with the law; it is “direct” when the aggrieved person can show a causal connection between the alleged harm to his or her interest and the matter complained of; and it is “immediate” when

the causal connection is not too remote. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver, 827 A.2d 550, 554 (Pa. Cmwlth. 2003). Concerning the standing of an association, the Court has said:

An association, as a representative of its members, may have standing to bring a cause of action even in the absence of injury to itself; the association must allege that at least one of its members is suffering immediate or threatened injury as a result of the challenged action. *Pennsylvania School Boards Ass'n v. Commonwealth Ass'n of School Administrators, Teamsters Local 502*, 696 A.2d 859 (Pa. Cmwlth. 1997).

Id. In *North-Central Pennsylvania Trial Lawyers Ass'n* the Court concluded that the association had standing to challenge a statute that was intended to restrict the venues in which medical malpractice claims might be brought, where one attorney individually and members of the association who practiced medical malpractice law would be directly and substantially affected by the change in venue rules.

MBDA stresses that the Supreme Court has stated that “standing will be found more readily where protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be ‘aggrieved.’” *Wm. Penn Parking Garage*, 484 Pa. at 198, 346 A.2d at 284. Standing is conferred on persons who are “arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 198 n.23, 346 A.2d at 284 n.23. In *MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Commission*, 827 A.2d 580 (Pa. Cmwlth. 2003), the Court held that an owner of racetracks, including one located very close to a newly approved racetrack, had standing to appeal where the commission found that the proposed racetrack would have a detrimental impact on the existing track and the appellant also demonstrated that development of a new racetrack in Erie would result in a direct dilution of attendance and revenue at its own racetracks.

The Court in *MBDA* then noted the evidence of harm:

MBDA notes that Hogan testified that there would be “catastrophic consequences,” N.T at 85, to its members if the “niche” given by the Liquor Code to beer distributors in Pennsylvania to sell beer to the retail consumer were altered so that others such as Sheetz, with whom they cannot effectively compete, were able to do so as well. She testified: “This Sheetz will affect distributors in Blair County.” *Id.* at 95. She stated that there was a member retail distributor, Robert’s Beverage, “across the road” from the Sheetz. *Id.* at 99. In addition, MBDA argues that the system for selling alcoholic beverages is highly regulated and interconnected, with restrictions on one class important to the functioning of the entire system and the authority granted to other classes. Hogan noted that MBDA had not participated in a license application proceeding in at least thirty years; however, this application involves potential approval of a new business model.

Id. at 40-42.

Finally, the Court found that MBDA had standing on two distinct bases: (1) that MBDA had presented sufficient evidence of harm; and (2) the “new and very different nature of the application.” It wrote:

First, even under the narrowest interpretation of association standing principles, MBDA presented evidence in the form of the testimony of Hogan and Shipula that retail sales of beer by this Sheetz store will be damaging to any nearby D distributorship because the Sheetz will offer many items that the distributor cannot offer, including food for consumption on the premises, gasoline and convenience store items. If beer for takeout is available as well, it will likely be purchased by customers who went there originally for some other purpose, thereby taking sales from distributors. Hogan testified that the results would likely be catastrophic for a nearby D distributor and that there was such a member distributor across the road from the Sheetz. An association need only allege that one member is suffering immediate or threatened injury. *North-Central Pennsylvania Trial Lawyers Ass’n.*[]

More generally, however, the Court also agrees that the Board should have exercised its discretion to grant standing to MBDA because of the new and very different nature of the application. As MBDA points out, even in *Application of El Rancho Grande*, 496 Pa. at 508, 437 A.2d at 1156, the Supreme Court referred to a statement of the

United States Supreme Court in *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970), that where statutes are concerned “the trend is toward enlargement of the class of people who may protest administrative action.” In *MEC Pennsylvania Racing* the applicable regulation permitted consideration of the best interests of horse racing generally, and the Horse Racing Commission concluded there that granting the application was in the best interest of racing. The Court stated that MEC had standing akin to that of the “local community” in *Cashdollar v. State Horse Racing Commission*, 600 A.2d 646 (Pa. Cmwlth. 1991), which had standing to appeal where the statute required consideration of the public interest and the Court held that when an agency was directed in its enabling statute to consider the effect of its decision on a particular class of individuals, then they might have standing to challenge a decision on the ground that the agency did not fulfill its statutory duty.

With 400 beer distributor members, MBDA certainly is integrally involved in the regulated distribution of beer and malt beverages generally.[] The Liquor Code created the D Distributor class and to some extent protects that class. A statewide trade association, such as MBDA, is likely much better suited than any individual distributor to represent the interests of the class when a proposal is made that has the potential to alter dramatically the current balance under applicable statutory provisions. Hogan stated that there is a quota system for D Distributors and that to the best of her knowledge there are no unused slots in Blair County.

881 A.2d at 42-43 (footnotes omitted).

The evidence of harm, as outlined earlier in this Brief (*e.g.*, Part I(C)), is, if anything, more fully developed than the comparable material judged sufficient in *MBDA*. The nature of the harm asserted here -- lost business from a competitor -- is the same harm found in *MBDA* to satisfy the “substantial, direct, and immediate” standard. The applications here also satisfy the “novelty of issue” component. There can be no genuine dispute that the Wegmans’ effort to sell beer from a supermarket setting, regardless of how one decides the legality of that effort, has potential to transform how beer is and will be sold in quantity in Pennsylvania. These are the first litigated cases on that issue.

It is, of course, Wegmans' view that any evidence of harm is insufficient and inadmissible unless presented by experts after performing an economic impact analysis of the kind described in footnote 16 above. No Pennsylvania case has imposed that burden on citizen intervenors seeking to demonstrate they are aggrieved by an agency ruling. Adopting that rule would likely have a dramatic chilling effect on citizen participation in administrative proceedings because it would drive up, substantially, the cost of meeting the evidentiary burden.

In *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), the plaintiffs who were challenging a parking tax were primarily parking operators who could presumably pass the tax through to their patrons. They alleged as their harm that they "believe and therefore aver that they will suffer substantial losses of net income due to a reduced patronage of their facilities." The Supreme Court found that they had standing. *Id.* at 288. There is no suggestion that the parking operators intended or needed to present an economic impact in support of their claimed harm.

Application of El Rancho Grande, 437 A.2d 1150 (Pa. 1981), is the most directly applicable case. There, the Supreme Court held that liquor licensees within a county had standing to intervene in proceedings to award a restaurant license. It summarized the evidence on harm:

They allege that they are the closest licensees to Applicant's proposed establishment, and that certain of them are located at distances of one to three miles from the new licensee. The record contains testimony sufficient to support a finding that one or more of the individual appellants would be driven out of business by the presence of an additional licensee. Thus, the alleged injury is clearly both substantial and particular to appellants.

Id., 437 A.2d at 1153. It seems highly unlikely that the Tioga County tavern owners presented an economic impact in support of their claimed harm and there is no indication that they did anything more than testify as to their expectations of the harm to their businesses from the award of an additional license.

Application of the Family Style Restaurant, Inc., 468 A.2d 1088 (Pa. 1983), applied the *El Rancho Grande* decision to a situation in which competing licensees “presented no evidence at the Board hearing that any of its members would suffer direct and substantial harm as a result of the approval of a new liquor license.” *Id.* at 1091-92. The Supreme Court summarized:

Aside from the testimony of one Association witness who stated that the granting of an additional license might adversely affect some of his competitors' businesses, though not his own, all of the Association witnesses' testimony concerned the questions of whether any customers would want to drink alcoholic beverages with a "family style" Pennsylvania Dutch meal and whether any area restaurants were presently equipped to serve both family style meals and alcoholic beverages. In its “Petition on Appeal” to the court of common pleas, the Association alleged simply that it was “aggrieved.” And in its brief to this Court, the Association has alleged only that the granting of an additional license will cause it economic injury as an association, without explaining how the Association will be financially harmed by the approval of the license application of a potential new member of the Association. In short, unlike the individual tavern owners in *El Rancho Grande*, the Association has failed to establish, on either its own or its members' behalf, the type of substantial, direct, and immediate interest in the Board's action necessary to confer standing to appeal under the Administrative Agency Law.

Id. at 1092.

Of course, Commonwealth Court’s Opinion in *MBDA* also accepts without question or comment the sufficiency of the testimony on harm.

Intervenors have standing.

**B. THE MERITS: WEGMANS' APPLICATIONS MAKE A
MOCKERY OF PENNSYLVANIA RULES ON WHO
CAN AND CANNOT OBTAIN A LICENSE TO SELL BEER**

The merits of the controversy, from MBDA's perspective,²³ focus on the linkage and proximity between the Wegmans supermarkets and the Market Cafés. MBDA's Intervention Motions identically described three intertwined issues that each relates to that point:

- Does the Wegmans application in reality contemplate and would it, if granted, permit sales of beer by a supermarket in violation of the Liquor Code?
- Will grant of the application improperly invade the role reserved for D Distributors under the Liquor Code?
- Does Wegmans violate the "other business" rules established under 40 Pa. Code §§ 3.52-3.54, and/or is it appropriate under the facts of this case to allow a separate business to be operated as contemplated? More specifically, does the separate business rule contemplate and permit a situation in which the premises sought to be licensed is a small part of the main business at that site and the contemplated customers of beer and malt beverages are, in every meaningful respect, in overwhelming proportion customers of the main business. In that circumstance, the licensed restaurant operations cannot serve as the platform for the sale of beer and malt beverages without destroying the "separate business" rule and destroying the operations of D distributors.

Intervenors seek, and believe the law requires, "yes" answers to these questions.

1. Supermarkets Cannot Sell Beer In Pennsylvania

Indisputably, supermarkets cannot sell beer in Pennsylvania. The reality here is that is precisely what will happen if Wegmans Market Cafés sell beer. Again, it is *not* merely that the supermarket and Market Café are commonly owned and share employees. It is *not* merely that the Market Café connects to what would become the unlicensed supermarket premises. It is that the Market Café, now and if licensed, is part and parcel -- and indistinguishably so -- of a Wegmans store. It is not that customers do not likely understand that the Market Café is distinct from the

²³ We understand that the PLCB has its own issues.

produce or meat departments. It is that the distinction goes no further than that. The proposed licensed premises is nothing more than lines drawn on a map that are meaningless in the real world, drawn for no other purpose than to attempt to satisfy the legal prohibition against supermarkets selling beer.

The discussion of Wegmans' economy-of-scope business strategy -- selling a broader array of products to supermarket customers on a single shopping trip -- confirms the reality that the Wegmans supermarket is the entity that will be selling beer, and to its customers. So too does the Wegmans' press release (Williamsport, Exh. P-4, emphasis supplied): "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." Wegmans seeks to create the licensed premises by carving out space from the supermarket that was, and will remain, an integral part of it.

The question becomes, so what -- hasn't Wegmans structured its business to satisfy, albeit hypertechnically, the rules about who can (a restaurant) and cannot (a supermarket) sell beer?

That is, of course, Wegmans' argument: that the supermarket *per se* (or, more accurately, the remainder after the Market Café carve-out) will not be selling beer and is simply a physically connected separate business operated under the same roof as the licensed premises. The relative size of the licensed and connected businesses is, Wegmans argues, irrelevant (referencing the Boscov's and Wanamaker's license exhibits). Completing the analysis, Wegmans argues that the Board can and should exercise its discretion under 40 Pa. Code. § 3.52(b) to allow the connection between the two businesses

2. The Interior Connection Rules And Why They Are Inapplicable Here

MBDA believes that Wegmans' analysis makes a mockery of the legislative scheme establishing and controlling the beer distribution system. Wegmans will be using the "interior connection" and "other business" regulations to circumvent the statutory rules on who may sell

beer. The clear public perception, endorsed and encouraged by Wegmans, is that there is a single business -- Wegmans -- doing business at that location. Again, MBDA does not dispute that, relative size aside, the Market Cafés are an important part of Wegmans. Indeed, that is precisely the point: the Market Cafés are and will remain an important part of Wegmans. Wegmans will, if licensed, be selling beer to its supermarket customers who have, both without knowing or caring, pushed their grocery carts across the relatively invisible boundary between unlicensed and licensed premises. Visitors are welcome, no passports or visas required.

The “other business/interior connection” rules arose from the goal of keeping the sale of beer apart from other businesses, so there would not be casual purchases. It was part of the oft-stated and occasionally-followed principle that “[t]he purpose of regulatory legislation in this area has always been to restrain the sale of liquor, not to promote it.” *El Rancho Grande*, 437 A.2d at 506. The prohibition has, no doubt, modified somewhat from its original restrictive origin. But allowing it to authorize the arrangement here is, literally, to abandon all limits on how Pennsylvanians can purchase beer.

Merely recognizing the range of businesses -- from Target to Borders to Wal-Mart -- that have, or can easily have, a sufficient restaurant to qualify for an R or E license outlines the future if the PLCB starts down this path. Doing so and effecting the resulting changes may, or may not, be a desirable development, depending on one’s perspective. But that type of transformative change requires legislative change. As Commonwealth Court wrote in *Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board*, 918 A.2d 171, 177 (Pa. Cmwlth. 2007), holding that the PLCB had improperly allowed a convenience store to sell beer:

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.*

(emphasis supplied). The Legislature may well wish to revise the rules on who can and cannot sell beer, but it is the Legislature, not an administrative agency, that must do so. *Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Insurance Guaranty Association*, 829 A.2d 297, 304 (Pa. 2003) (declining to impose occurrence-based limitation in PIGA statute while recognizing that “adjustments by the General Assembly to the PPCIGA scheme will at some point be necessary in order to maintain its fiscal integrity ...”).

The Wegmans’ application, beyond the size disparity between licensed and unlicensed premises, is quite unlike the Wanamakers’ and Boscovs’ situations. Neither Wanamakers nor Boscovs employed, at least as far as this record discloses, a marketing strategy of selling take-out beer to the customers who were buying sofas, socks, or vacuum cleaners.²⁴ Whatever beer Wanamakers and Boscovs sold at their restaurants was sold, in all likelihood, to legitimate customers of the restaurants, not to shoppers during their occasional trip to the department store.

Mr. Dunham’s repetitive example of a restaurant licensee presently located near a supermarket (*e.g.*, Wilkes-Barre, Dunham, N.T. 219 and Exh. A-9, discussing relative proximity of a Price Chopper supermarket and a retail licensee named Nightcap’s) sought to show that what Wegmans seeks to do is altogether typical. Restaurants and supermarkets are, Dunham notes, commonly found near each. But the relevant differences between the Price Chopper/Nightcap’s

²⁴ The Hearing Examiner will recall MBDA counsel’s objection to the Wanamakers’ and Boscovs’ exhibits was that, unaccompanied by testimony as to business operations, the exhibits showed nothing of relevance. Beyond showing that the PLCB has granted restaurant licenses when the licensed premises adjoined a much larger business, the exhibits show nothing.

scenario and this one are apparent and dwarf the fundamentally irrelevant similarities: the restaurant and supermarket in his example are not jointly owned, do not market themselves under a single trade name, do not aggressively seek to have supermarket customers shop at the restaurant, and have no interior connection that facilitates the flow of customer traffic from one to the other. Wegmans differs in each respect.

3. Can Form Trump Substance?

The question becomes whether form can trump substance? MBDA respectfully answers “no.”

The PLCB 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.²⁵ In so doing, the PLCB rejected Sheetz’s argument that it had subdivided the property (it had) and was thus in technical compliance with the statute, *i.e.*, the licensed premises was not on the “same location” as the gasoline operations. The PLCB wrote:

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.

²⁵ The Liquor Code prohibited gasoline from being sold from the same location as a licensed premises. 47 P.S. § 4-431(b).

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.

Many cases hold that when statutory requirements are involved, form cannot overcome substance. The cases do not, however, yield any clear governing principle, beyond the simple notion that some efforts to "comply" with a statute amount to "circumvention" and will not be permitted; courts usually recognize the line between the two even if they cannot easily describe why it is where it is.

For example, in *Lycoming County Nursing Home Ass'n v. Department of Labor and Ind., Prevailing Wage Appeal Bd.*, 627 A.2d 238 (Pa. Cmwlth. 1993), Commonwealth Court held that a county nursing home had to comply with the Prevailing Wage Act, which applied only to "public work" projects, even though the County had established a separate private non-profit association to own and operate the nursing home. Commonwealth Court explained why it ignored the technical inapplicability of the Act:

the public policy advanced by the Act would be defeated if we allow the County to rely on the independence of the [non-profit nursing home] Association. Moreover, by empowering the County to use the Association to build a project, such as the nursing home at issue here, we would condone the *circumvention of the Act and its purpose*.

Id. at 244 (emphasis supplied).

In *Greater Fourth St. Assocs. v. Smithfield Township*, 816 A.2d 388 (Pa. Cmwlth. 2003), legislation authorized the sale of a parcel of land to Smithfield Township, which created a non-

profit corporation, STEDCO, to which it assigned the property. STEDCO then sought bids for the development of the property, but did not follow competitive bidding requirements on the basis that they were inapplicable to a private entity. Commonwealth Court reversed stating:

Were we to accept the Township's interpretation of Section 1503 and allow governmental units to avoid the competitive bid process by the use of straw parties or similar devices, we would *eviscerate an important and long-standing statutory mandate*. We do not believe the legislature intended such a consequence.

Id. at 393-394 (emphasis supplied). *See also The Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297 (Pa. Cmwlth. 1993) (township could not avoid application of Right-to-Know Act by routing settlement in civil rights action through insurer).

If a restaurant can append itself to a supermarket; when that single legal entity can sell beer in quantity for take-out consumption from coolers located in what to the customer is an indistinguishable part of the supermarket; 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 who can and cannot hold a license to sell beer.

The notion that the licensed entity will be selling the beer is true only in its most technical and meaningless cash register sense. Thus, the "separate business" rule, under which the PLCB broadly prohibits but can approve the operation of a business sharing space with the licensed premises, becomes, improperly, the means to obliterate the structure and relatively clearly drawn lines of the beer distribution system that has been in effect since the 1930's. MBDA believes that to be wrong and illegal. Accordingly, the PLCB would abuse its discretion if it authorized the type of interior connection Wegmans proposes.²⁶

²⁶ MBDA recognizes that the intervention petition in one case, Dickson City, was filed more than 30 days after the posting. *See* 40 Pa. Code § 17.2(a). The Board has discretion to waive that non-compliance. The parties and Hearing Examiner have properly treated these

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CONCLUSION

For these many reasons, MBDA respectfully submits that the Hearing Examiner and the Board should reject the various Wegmans' applications at issue in these proceedings.

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Continued from previous page

cases as a unified record, and the same principles should govern the decision of all 6 applications. It makes no sense under those circumstances to exclude MBDA from the Dickson City case. Alternatively, the Hearing Examiner should treat the MBDA's arguments as that of an *amicus curiae* as to that case.