IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA, et al Petitioners	:	
v.	:	No. 517 CD 2008 (Bethlehem Location)
PENNSYLVANIA LIQUOR CONTROL BOARD et al Respondents	:	

REPLY BRIEF OF PETITIONERS THE MALT BEVERAGE DISTRIBUTORS ASSOCIATION AND TANCZOS BEVERAGES, INC.

Petition for Review from the Order of March 19, 2008 by the Pennsylvania Liquor Control. Board at No. 07-9158, LID No. 57990

Robert B. Hoffman
WolfBlock LLP
I.D. No. 23846
213 Market Street, 9th Floor
P. O. Box 865
Harrisburg, PA 17108-0865
(717) 237-7182

TABLE OF CONTENTS

INTRODUCTORY NOTE ....

ARGUMENT ....

I. THE PLCB'S AWARD OF AN "R" LICENSE TO WEGMANS' BETHLEHEM STORE VIOLATES THE STATUTORY RULES ESTABLISHING THE VENUES AT WHICH BEER CAN AND CANNOT BE SOLD IN PENNSYLVANIA ....

A. The *Real* History Of The PCLB's Approval of "Similar" Interconnections ....

B. The PLCB's Rationale: "No Reason To Not Approve" ....

C. The Respondents Avoid MBDA's Issues And Recast Its Arguments ....

D. Wegmans' Central Defense: The Four Foot High Partitions..............................

E. Misuse Of Statutory Construction Principles ....

F. What Are the Fair Implications Of The PLCB's Decisions?...............................

II. MBDA AND INDIVIDUAL PETITIONERS HAVE STANDING ....

A. Introduction...

B. The Governing Principles Of Standing...

C. The Facts Pertinent To Standing..

1. Wegmans' Beer Sales ....

2. Intervenors' Operations ....

3. The Predicted And Predictable Adverse Impacts Of Wegmans' Beer Operations On D Distributors ....

D. Wegmans' "Anti-Standing" Arguments Are Legally And Factually Flawed ....

1. Pennsylvania Law On Standing Does Not Require Persons Challenging Government Action To Conduct An Economic Impact Analysis ....

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

3. Businesses Take Steps To Avoid Co-Locating With Competitors ....

E. Petitioners Have Standing To Participate In These Proceedings.........................

CONCLUSION...

EXHIBIT A: PLCB Opinion in *In Re: Application of Lewis H. Ripley, Jr. for New Restaurant Liquor License*

EXHIBIT B: Excerpts, PLCB Brief in Commonwealth Court in *Pa. Liquor Control Board v. Ripley*, 529 A.2d 39 (Pa. Cmwlth. 1987)

TABLE OF AUTHORITIES

CASES:

Application of El Rancho Grande, 437 A.2d 1150 (Pa. 1981) ....

Application of the Family Style Restaurant, Inc., 468 A.2d 1088 (Pa. 1983)..............................

Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Board, 947 A.2d 724 (Pa. 2008) ....

Capital Blue Cross v. Pa. Ins. Dept., 937 A.2d 552 (Pa. Cmwlth. 2007)...................................

Centrum Prime Meats, Inc. v. PLCB, 455 A.2d 742 (Pa. Cmwlth. 1983)..................................

Comm. v. Charles, 411 A.2d 527 (Pa. Super. 1980)...

Freedman v. PLCB, 20 D.&C. 2d 353 (Mont. Cty. 1959)..

In Re Levin, 175 A.2d 336 (Pa. Super. 1961) ....

In Re Ohio Springs, Inc., No. 04-9056, LID No. 52614...

Latella v. UC Bd. of Review, 459 A.2d 464 (Pa. Cmwlth. 1983) ....

Liquor Control Board v. Ripley, 529 A.2d 39 (Pa. Cmwlth. 1987)...

Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, 881 A.2d 37 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 895 A.2d 1264 (Pa. 2006) ....

Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, 918 A.2d 171 (Pa. Cmwlth. 2007) ....

Pa. Bankers Ass'n. v. Pa. Dept. of Banking, 893 A.2d 864 (Pa. Cmwlth. 2006) ....

PLCB v. Richard E. Craft American Legion Home Corp., 718 A.2d 276 (Pa. 1998)...

Tacony Civic Ass'n v. PLCB, 668 A.2d 584 (Pa. Cmwlth. 1995) ....

Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975).......................

PENNSYLVANIA STATUTES AND REGULATIONS:

47 P.S. § 1-102 ....
47 P.S. § 4-404 ....
47 P.S. § 4-431(b) ....

6 Pa. Code § 15.161(a) ....
28 Pa. Code § 51.31 ....
40 Pa. Code §§ 3.52-3.54 ....
40 Pa. Code § 3.52(b) ....
40 Pa. Code § 17.2(a) ....
52 Pa. Code § 57.86(a)(1) ....

Chapter 400, Regulation 103, §§ 103.01-103.02 ....

INTRODUCTORY NOTE

In its primary Brief, MBDA used the Bethlehem case (No. 517 CD 2008) as the "lead case," writing a full brief in that case and incorporating substantial parts of that Brief into the others (Dickson City, Easton, State College, Wilkes-Barre, and Williamsport) by reference. MBDA continues that practice in this Reply Brief. All parties' Briefs are, in the main, identical from store (and appeal) to store. This reflects the facts that the Wegmans' stores and D Distributors are quite similar in all material respects from location to location, and that the parties created a single evidentiary record.

Wegmans' Brief, in addition to addressing the merits of the controversy, also argues at great length that Petitioners lack standing. Because the PLCB ruled for Petitioners on that issue, MBDA's primary Brief did not address standing. This Brief does so. In this Court, the PLCB supports its decision that Petitioners have standing.

ARGUMENT

I. THE PLCB'S AWARD OF AN "R" LICENSE TO WEGMANS' BETHLEHEM STORE VIOLATES THE STATUTORY RULES ESTABLISHING THE VENUES AT WHICH BEER CAN AND CANNOT BE SOLD IN PENNSYLVANIA

MBDA's central argument is that the real world seller of beer here is the Wegmans' *supermarket,* operating under its "economy of scope" marketing strategy; the notion that the Market Café is the seller is a legal fiction to which no one should give credence. Wegmans, in a "press release" emailed to its customers months before the hearings, accurately described its contemplated sale of beer as "shopping at Wegmans" (*see* Exh. P-4 (185a)), and the hearing record strongly supported that conclusion.[1] The PLCB, by treating that legal fiction as fact, has authorized what Pennsylvania law does not permit: the sale of beer at and by a supermarket.

The PLCB's decision to approve the interconnection has two articulated bases: (1) the asserted lengthy history of issuing licenses in "similar" circumstances; and (2) the PLCB's conclusion that was "no reason to not approve" (Opinion at 117) the interior connections between the Market Café and the Supermarket. The first conclusion is revisionist history and the second reflects fundamental flaws in the manner in which the PLCB approaches its decision-making on this issue. At the same time, the PLCB decision and Respondents' Briefs ignore the central issue, described above, that MBDA has raised; debunk arguments MBDA has not made; and misapply statutory construction principles.

A. The *Real* History Of The PCLB's Approval Of "Similar" Interconnections

The PLCB and Wegmans seek, quite understandably, to make the PLCB decision here seem unremarkable, a part of a long history of comparable licensure approvals. The PLCB (Bethlehem

---

1 The email states more fully that "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."

Brief at 4, 9, 10, 12, 14, 15, 19) repeatedly refers to its "half century" long practice of approving interior connections "to grocery stores, supermarkets, delicatessens, bakeries, and convenience stores." Wegmans (Brief at 5, 10, 31, 32, 46-48) likewise repeatedly reminds the reader of this same history ("PLCB has approved numerous interior connections [to] grocery stores, department stores, convenience stores and delicatessens") and extends it to "more than seventy years." Based on that history, all Respondents argue that the PLCB's decision and statutory construction warrant this Court's deference and, more broadly, that this case is far less remarkable or ground-breaking than MBDA asserts. Going even further, the PLCB suggests (Bethlehem Brief at 13) that a contrary decision here would upset countless established businesses and long-standing interconnections while Wegmans makes this argument a centerpiece in its anti-standing argument. The real history is quite different.[2]

Initially, anyone who has ever shopped in a supermarket in Pennsylvania or is minimally familiar with the manner in which beer has been sold in Pennsylvania knows that what the PLCB has authorized here, whether or not illegal, is novel and not part of a long-standing pattern. This Court recognized that novelty in *Malt Beverage Distributors Association v. PLCB,* 918 A.2d 171, 177 (Pa. Cmwlth. 2007) ("*MBDA II*"), describing the sale of beer at "grocery stores, convenience stores and other commercial establishments with some small area for eating" as a "significant transformation." The grant of restaurant licenses to six restaurant/supermarket configurations is

2 Wegmans asserts (Brief at 39) that all issues raised by MBDA concern whether the PLCB "abuse[d] its discretion in approving the interior connection between the Wegmans Market Café restaurant and its grocery store." To the contrary, at issue are legal interpretations of the Liquor Code and regulations. Wegmans cites *PLCB v. Richard E. Craft American Legion Home Corp*., 718 A.2d 276, 278 (Pa. 1998), to support its proposition. In that case, this Court reversed the PLCB's "clearly erroneous" construction of the pertinent statute and the case has no pertinent discussion of judicial deference to the PLCB's discretionary decision-making.

new in every meaningful respect, and predicts a future that will follow, and broaden, this business model.

The PLCB supports its "half century" history with four case citations, which we discuss individually below. To summarize, none of the cases is remotely on all fours (or even twos) with this one, a point that itself suggests serious problems with the veracity and viability of the claim. Indeed, the PLCB ends up supporting its 50 year practice of approving interior connections to "grocery stores, supermarkets, delicatessens, bakeries, and convenience stores" only as to delicatessens.

First, the PLCB misdescribes (Bethlehem Brief at 11-12) a 50 year old Common Pleas Court decision (*Freedman v. PLCB*, 20 D.&C. 2d 353 (Mont. Cty. 1959)) as having approved the issuance of a retail dispenser license to a "location selling grocery items and gasoline." The accuracy of that characterization seems unlikely to begin with, because the sale of gasoline and alcohol from the same location is an indisputable violation of 47 P.S. § 4-404.[3] In fact, the issue in *Freedman* was whether a lease provision restricting the use of premises to a "general store and gas station" permitted its use as an "eating place." *See* 20 D.&C. 2d at 356 (describing the question presented as "what nature of business is embraced in the term 'general store'"). *Freedman* says almost nothing about what business was contemplated to take place at that location. More important, *Freedman* says nothing at all about the PLCB's history because the PLCB, treating the case "pretty much in the nature of a deed restriction case," *id*. at 354, had rejected the application. So much for the history as to "grocery stores."

---

3 The PLCB (Brief at 10 n.8) notes this explicit prohibition, although it then goes on to misstate its significance. We discuss the latter issue in Part I(E) below.

At least two of the four cited cases, *Centrum Prime Meats, Inc., v. PLCB*, 455 A.2d 742 (Pa. Cmwlth. 1983), and *Tacony Civic Ass'n v. PLCB*, 668 A.2d 584 (Pa. Cmwlth. 1995), involve "delicatessens."[4] Both cases were decided on issues unrelated to those raised here. But, more important, delicatessens, as we discuss more fully below, do appear to be the one business model in which the PLCB has historically allowed interconnections. *See* MBDA's prior Brief at 24 n.23. Delicatessens differ dramatically from a supermarket, and PLCB action as to them cannot fairly support the assertion that it has approved interior connections "similar" to the ones approved here.

Finally the PLCB gets the result backwards in the fourth cited case, *Liquor Control Board v. Ripley*, 529 A.2d 39 (Pa. Cmwlth. 1987). The PLCB suggests (Brief at 12) that *Ripley* approved an "interior connection to a bakery and gift/antique shop" when the PLCB did exactly the opposite. The PLCB's *Ripley* Opinion (*see* Exhibit A hereto) noted that "[t]he proposed licensed premises have interior connections with other businesses conducted by Applicants." The PLCB's Brief in *Ripley* in this Court (*see* Exhibit B 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."

The PLCB apparently intended *Ripley* to support the "bakery prong" of its long history of approving "similar" interconnections. Clearly, it does not do so but reflects, instead, a PLCB decision and construction totally at odds with the history and result it advocates now. *Ripley* was

---

4 *Freedman* may also have involved a delicatessen. *See* 20 D.&C. 2d at 356 (former operator of the business and property had "used the premises for sundry purposes including a delicatessen store").

not an aberrant decision. It was the way the PLCB did business for years upon years, applying a rule of "no interconnections" except for delis and other narrow and limited circumstances.[5]

Later (Brief at 15-16), the PLCB suggests that *Ripley* did not involve interior connections at all but rather whether the antique/gift shop, bakery, and licensed restaurant were components of a "single business." The licensee did present this "single business" argument, and this Court rejected it. But the Court needs to understand *why* the applicant presented that argument: it did so because the PLCB's established practice, having found a *distinct* business interconnecting with the licensee, was to prohibit the interconnections.[6] The "single business" theory sought, unsuccessfully, to circumvent that problem and the PLCB saw it for the artifice it was.[7]

The PLCB's Opinion discusses this history with fewer citations yet, treating the issue, inappropriately, as a *fait accompli*. The Opinion references twice (at 3-4 and verbatim at 125) "the Board's historical policy of approving such connections when appropriate," citing to *Freedman* and *Tacony Civic Association* but to no other cases as support and giving no substance to "when appropriate." Thus, the PLCB cites as support for its historical policy one case (*Freedman*) that

---

5 Reflecting this general antipathy to interconnections, the PLCB argued in 1961 in Superior Court that even a foyer between a licensee and another business provide insufficient separation under a statute prohibiting "passage or communication" between a licensee and specified businesses; the PLCB contended, instead, that the statute required "use of a public highway" to move from one to the other. *In Re Levin*, 175 A.2d 336, 338 (Pa. Super. 1961).

6 Sheetz/Ohio Springs raised the analogous argument before the PLCB that the convenience stores/restaurant were all part of the same restaurant business. The PLCB disagreed. *In Re Ohio Springs, Inc.*, No. 04-9056, LID No. 52614.

7 Wegmans' discussion of *Ripley* (Brief at 40) is equally off point, citing it as upholding the PLCB's decision "whether a location constitutes two separate businesses." The PLCB did not address that issue here and it has no particular expertise in performing that task. Needless to say, deciding whether a restaurant and a antique/gift shop and bakery are one business is not normally a difficult task.

does not support the point at all, and an inapposite "delicatessen case" (*Tacony Civic Association*). The PLCB, it seems, does not understand its own history.

Beyond these case citations, the PLCB (Opinion at 129, Brief at 12) and Wegmans (Brief at 40) reference the grant of "R" licenses, with interconnections, to Wanamaker's and Boscov's. Neither is an appropriate precedent. As far as the record discloses, neither Boscov's nor Wanamaker's employed a marketing strategy of selling take-out beer to the customers who were buying sofas, socks, or vacuum cleaners and, thus, nothing in their business operations implicates the concerns, statutory and otherwise, present in this case. Whatever beer Wanamaker's and Boscov's sold at their restaurants was, in all likelihood, sold by the restaurants to their customers during the course of a meal there, without efforts at cross-marketing.[8]

The PLCB's and Wegmans' recitation of history also rely on the PLCB's *Sheetz* opinion. But that is a shakier precedent yet in light of this Court's subsequent ruling in *MBDA II* and expressed concern about the "significant transformation" the PLCB's decision represented.[9]

The accurate PLCB history is this: the examples of PLCB action permitting interior connections "similar to the one at issue here" are few, recent, and without the imprimatur of a litigated administrative proceeding, let alone judicial review. The PLCB has twice, for the first

---

8 Wegmans complains (Brief at 49) that MBDA relies on "speculation, not evidence" in describing how Wanamaker's and Boscov's sold and marketed beer. That argument is fairly made. Indeed, MBDA argued against introduction of the Wanamaker's and Boscov's exhibits on the basis that they revealed nothing about the operations of Wanamaker's and Boscov's. The Hearing Examiner admitted the exhibits, but there is no testimony allowing anyone to conclude that the department stores' beer sales matched Wegmans' plans. The PLCB and Wegmans argue those exhibits for far more than the little they are worth.

9 Wegmans asserts (Brief at 49 n.16) that the interior connection in that issue is no longer at issue, chiding counsel ("as counsel for the MBDA . . . well knows") for suggesting to the contrary. Counsel responds: the Supreme Court argument largely focused on those broader issues, not the statutory construction issue. Regardless, this Court's "significant transformation" reference remains.

time in 2005, approved a supermarket/licensee interconnection.[10] No time-honored tradition, let alone a legally-tested one, supports those actions or those the PLCB has taken as to Wegmans. To the contrary, it is *Ripley*, prohibiting an interconnection between an R licensee and a gift shop and bakery, that typifies the PLCB history on this matter.

The history has one consistent exception: delicatessens. Although it is difficult in 2008 to decipher the rationale, the PLCB has historically permitted interconnections at delis between the licensee (typical an "E"/eating place license) and a separate business (typically a small grocery store centered around a deli counter that serves both the restaurant and take-out customers). It seems most likely that when the PLCB came into being post-Prohibition, delis were an existing business model that already combined those two distinct businesses, one of which wanted to be able to serve beer with its sandwiches. The interconnection rules allowed that to happen without swallowing the rule that liquor was to be otherwise sold in separated businesses.[11]

The PLCB's 1937 regulations (Bethlehem, PLCB Exh. B-9) (presumably the source for Wegmans' asserted 70 year history) reflect this deli exception but do not support any broader application. Under those regulations, the PLCB announced that it would license an "eating place," *i.e.*, an "E" licensee, even if it "operated in conjunction with other businesses" ("in conjunction" is essentially a different formulation of "interconnections") provided it satisfied certain

---

10 The PLCB Opinion (at 125) references a "Weis grocery store and restaurant," and the PLCB issued what Petitioners believe to be an "E" license involving a Vidalia Supermarket in Bucks County.

11 It should come as no surprise that not every Liquor Code provision reflects a consistent approach to the sale of beer, and the "deli interconnections" are such a deviation.

requirements.[12] There was no analogous exception for "R" licensees. Regulations that took effect in 1952 repeated verbatim the "eating place regulation" referenced above and quoted in footnote 12. Those regulations also added for the first time in regulation form the prohibition against "R" licensees having "an inside passage or communication to or with any other business" and the exception to that rule ("except as approved by the Board").[13]

B. The PLCB's Rationale: "No Reason To Not Approve"

The PLCB's errors go beyond asserting a long-standing history that, on minimal scrutiny, does not exist. Missing from the PLCB's discussion, both in the Opinion and Brief, is any reference to the purpose of the regulatory prohibition against interconnection, the general reasons and standards warranting an exception, and the specific reasons found adequate to grant an exception here – in short, a rationally stated and applied administrative system. Exceptions, under established principles, are to be construed narrowly. *Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Board,* 947 A.2d 724 (Pa. 2008). The PLCB's analysis here ("no reason not to approve") turns that logic on its head.

The reason supporting an exception cannot just be "whenever the PLCB so decides" or the equally vapid phrase – "no reason to not approve" – used here, but must follow the general

---

12 The regulation read:

> The Board will not issue a license to a person for an eating place (as defined in the Beverage License Law) operated in conjunction with other business unless such eating place has a total of not less than three hundred square feet in one or more rooms other than living quarters, in addition to the floor space used by such person in the operation of the other business conducted in conjunction with the eating place.

13 The regulations were then codified as Chapter 400, Regulation 103 ("Connection of retail licensed establishment with residence or other business"). Sections 103.01-103.02 addressed "R" and "E" licensees, respectively.

principles underlying the regulation and the exception.[14] Minimally, the exception must require a showing of "good cause" with the applicant presenting the grounds constituting that good cause and the PLCB weighing them and finding them sufficient. That is what makes for "government by law" and allows for a fair and uniform application of the law to all.

None of that is present here. Neither the PLCB Opinion nor Brief discusses at all *why* the PLCB granted the exception, merely that it found "no reason" not to. That lack of analysis and resort to unfettered discretion may be typical of the PLCB's history, but that long-standing tradition does not make it proper.

Belying these facts, Wegmans asserts (Brief at 6, 42, 49) that the PLCB "thoroughly and thoughtfully" reviewed Wegmans' application, subjected it to "excruciating review" in "exacting detail," and approved the interior connection "with caution and after a well articulated analysis." Indeed, Wegmans goes so far as to assert, hyperbolically we assume (Brief at 42), that a PLCB disapproval in light of that "long standing prior history" would have shown "impermissible, prejudice or bias." But "*no* analysis" cannot be "a well articulated analysis"; a discussion that ignores the issues raised is hardly "thorough"; and a decision that relies heavily on a misstated prior history warrants no positive characterization at all.

At the same time, Wegmans' Brief extensively quotes the Hearing Examiner's Opinion (*e.g.*, Brief at 41, discussing "interconnection" issues) in instances in which Wegmans prefers the recommended decision to the actual one. MBDA notes that it is the PLCB's decision that is before

---

14 For example, the Health Department has "exception" regulations to its "facility licensure regulations" under which it can "excuse compliance with a regulation," but there is a clearly stated standard: "when the policy and objectives contained [in the regulation] are otherwise met, or when compliance would create an unreasonable hardship and an exception would not impair or endanger the health, safety or welfare of a patient or resident." *See* 28 Pa. Code § 51.31. Other Departments have similar regulations, always with a standard. *See*, *e.g.*, 6 Pa. Code § 15.161(a) (Department of Ageing); 52 Pa. Code§ 57.86(a)(1) (PUC).

the Court, and the Hearing Examiner's decision has no weight, beyond the extent the Court might find it, equally with the argument of counsel, persuasive.[15] Wegmans' assertion (Brief at 41) that the PLCB's opinion was "based largely on the Hearing Examiner's Recommended Opinion" may or may not be generally accurate, but it is tautologically false in the particulars on which Wegmans' relies, or it would have certainly have cited to the PLCB Opinion instead.[16]

C. <u>The Respondents Avoid MBDA's Issues And Recast Its Arguments</u>

It is often far easier to debunk the arguments that a party's adversary has *not made* than the ones it *has*, easier to address an opponents' arguments after restating them so that they are less cogent and their failings more substantial and apparent. Litigants adopt this approach hoping that a court will, in turn, address and reject the restated arguments while ignoring the more-difficult-to-rebut real ones. The effort often reflects an inability to rebut the analysis the litigant has actually put forth.

MBDA's central argument, supported by Wegmans' own words and marketing strategy, is that the real world seller of beer here is the Wegmans' *supermarket*. *See* Williamsport, Exh. P-4, 185a ("We'd like to make the experience of shopping at Wegmans even better, and certainly more

---

15 In some administrative agencies, a Hearing Examiner issues a Recommended Decision that is distributed to the parties, who then file Exceptions that the administrative agency head reviews. At the PLCB, at least in the licensing context, the Hearing Examiner writes a decision but it is never officially released by the PLCB, let alone in advance of its own Order. No regulations describe this process. The only Order or Opinion with any official status is the PLCB's.

16 Wegmans (Brief at 41) cites the Hearing Examiner as having "pointed out" (as if the Hearing Examiner were citing to established principles) that "an important issue" in reviewing a requested interior connection "is not the actual make up of the adjoining business but whether the applicant/licensee is responsible." MBDA knows of no PLCB opinion or writing of any kind adopting that position; the PLCB did not adopt it in its Opinion or Brief; and it is, we believe, entirely wrong. Restaurant licensees must be "operated by responsible persons of good reputation." *See* 47 P.S. 1-102 (definition of "restaurant"). Thus, the Hearing Examiner's analysis all but repeals the provision he was seeking to apply and is irreconcilable with reported decisions, such as *Ripley* and *Levin*.

convenient by selling beer in our Market Café restaurant.”). Neither the PLCB’s Opinion nor its Brief addresses that central argument. The PLCB’s Bethlehem Opinion has 458 findings over 113 pages. Not one references Wegmans’ press release or its “economy of scope” marketing. It is as if those points were never raised.

Instead, the PLCB repeatedly misstates that and other MBDA arguments. MBDA’s argument is not, as the PLCB states it (Brief at 12), that “the Board cannot approve Wegmans’ request for an interior connection to its supermarket because ‘supermarkets do not sell beer.’” Our point is that the supermarket, not the technical licensee, is selling the beer and the interconnection is simply the mechanism that allows that to occur. Nor does MBDA argue that the Board cannot approve an interior connection to a business “that does not typically sell beer.” *But see* PLCB Bethlehem Brief at 12. Interior connections are almost always to a business that does not sell alcohol, and MBDA’s prior Brief said nothing to the contrary. What is atypical here, and what makes the interconnection impermissible, is the role the “other business” plays in the sale of beer.

Interestingly, Wegmans (Brief at 45-46) terms the conclusion that a supermarket cannot sell beer “misleading, at least where the grocery store . . . has an interior passage, communication or connection to a qualified restaurant, as is the case with Wegmans.” There, in a nutshell, is the dispute in this case. Can a supermarket, via its interior passage to a restaurant, sell beer? Wegmans, apparently joined by the PLCB, says “yes.” MBDA disagrees.

On this point, Wegmans criticizes (Brief at 46) MBDA’s argument as “no more logical than to conclude that a grocery store that houses a PLCB state liquor store, complete with interior connection, is in reality selling the wine and spirits paid for in the liquor store.” The differences here include not just common ownership but Wegmans’ use of beer sales as part of

its “economy of scope” marketing strategy. That the differences are not apparent to Wegmans, or to the PLCB, says a great deal about their approaches to the issues raised in this case.

Finally, Wegmans goes so far as to assert (Brief at 42, Heading “B”) that MBDA’s arguments are “inapplicable to the questions presented on this appeal.” Our arguments, whatever their merit, closely track the issues raised in the Petition for Review and Docketing Statement, and they define the questions presented on this appeal. Wegmans may not like the issues MBDA has raised, but that does make them inapposite to this appeal.

D. <u>Wegmans’ Central Defense: The Four Foot High Partitions</u>

MBDA wrote in its prior Brief (at 14):

> At the moment of their licensure, Wegmans Market Cafés were restaurants incidentally or besides the point, if at all. Far more accurately, they were part of a Wegmans Supermarket, no more or less so than the produce or meat departments or the bakery or cereal aisle. It is not merely that the Cafés have no host/hostess or waiter/waitress 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 irrelevant to how Wegmans operated. Wegmans intended, if licensed, to change none of that.

MBDA then referenced (Brief at 15) “the artificial and wholly-illogical nature of the boundary between licensed and unlicensed premises,” further describing it (*id*. at 15-16) as “a boundary between a restaurant and another business that has no meaning in practice, a boundary between what an applicant has determined to carve out from its pre-application floor plan to create, on paper, a ‘licensed premises.’” Wegmans’ Brief (at 43-44) quotes from those excerpts and then provides its core defense: regardless of pre-licensure operations and floor plans, the licensed premises will be physically distinct from the remainder of the supermarket.

As licensed, the Market Café will have multiple (the precise number varying slightly by store) points of entry, typically 4 feet wide, from the remainder of the supermarket with some form

of a separator – in Wegmans' words (Brief at 44) a combination of "four foot high walls, railings and food display cases" – at other places. These create "aisles of entry or exit." In Wegmans' view that separation changes everything: what was previously part and parcel of the supermarket is now a distinct, albeit commonly-owned, business. Continuing, Wegmans notes (*id.*) that the restaurant, rather than being centrally located, is to one side of the grocery store. Finally, Wegmans notes (*id.*) that the Market Café will produce distinct financial statements for the PLCB and State Police Bureau of Liquor Control.

We think Wegmans makes quite too much of this post-licensure "separation." First, the ability to produce financial statements is simply a function of computer software, and it is inevitably Wegmans – there is no Market Café, *Inc*. – that will produce them. Just as Wegmans can report how many stalks of celery it sold, or produce a profit and loss statement for the meat department, it can and will report the financials for the Market Café. Second, the Market Café is, in fact, typically located adjacent to the most popular and crowded upscale portions of the store (deli, bakery, prepared foods). (Easton, McCue, N.T. 147) Third, it is quite questionable that shoppers will intuit much, if anything, from the "separators." Wegmans remains Wegmans and "the experience of shopping at Wegmans" will simply include "selling beer in our Market Café restaurant." Any changes are purely cosmetic and do not change the reality on the ground.

E. Misuse Of Statutory Construction Principles

The PLCB misapplies the construction principle that "where certain things are specifically designated in a statute, all omissions should be understood as exclusions." Noting the specific prohibition against the sale of liquid fuels at licensed premises, the PLCB asserts (Brief at 10 n.8) that "it is clear that the General Assembly intended that products other than liquid fuels could sold at or in connection with licensed premises."

That construction principle only applies when the statutory listing is reasonably interpreted as exhaustive. This, in turn, typically requires either a series of listed criteria or legislative intent that is otherwise clear in context.[17] In those circumstances, the omission of other criteria is deemed purposeful. Here, there is no basis to conclude that the ban on the co-location of liquid fuels and a licensed premises addressed anything more than the co-location of liquid fuels and a licensed premises. Finally, that principle is inapposite here because the question is not what can be sold "at or in connection with licensed premises" but that the licensed premises is a sham.

F. <u>What Are The Fair Implications Of The PLCB's Decisions?</u>

It is proper, and indeed important, for a court to consider the reasonable implications of an administrative decision it is asked to review. In our view, the PLCB's Wegmans' decisions stand as clear administrative precedent authorizing the sale of beer for take-out in "big box" stores that have eating areas that satisfy the minimal statutory definition of a restaurant in 47 P.S. § 1-102.[18] MBDA expressed that view in its prior Brief (at 25).[19] Wegmans describes that (Brief at 49-50) as "hyperbole," "a scare tactic to which the Court should pay no heed," and an

---

17 In *Latella v. UC Bd. of Review*, 459 A.2d 464, 473 (Pa. Cmwlth. 1983), the primary case the PLCB cites on this issue, the context made the legislative intent clear ("since the Unemployment Compensation Law specified two classes of benefit year maximum entitlements, Part D and Part E, and Section 404(d) specifically mentions Part D, but not Part E, we can only conclude that the Legislature intended the omission of Part E to be an exclusion."). In *Comm. v. Charles*, 411 A.2d 527, 530 (Pa. Super. 1980), the second case the PLCB cites, Superior Court held that a breathalyzer refusal was inadmissible at trial because the statutory listing of sanctions were exclusive. In doing so, the Court particularly noted the requirement that police warn a driver of the listed sanctions ("It would be unfair to have the driver believe that refusal would have one consequence and then permit the state to assert an additional consequence.").

18 Doing so – having "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" – is not difficult

19 We wrote: "There is almost no business -- a big box store with a small food area, a movie theatre with a concession stand, or a bookstore with a coffee shop featuring pre-made sandwiches and salads -- that could not, with equal right, be an approved interconnection."

argument that "borders on the farcical." To Wegmans (Brief at 50), the size and professionalism of the Wegmans' operation provides a handy basis to distinguish its licensure from those MBDA predicts.

We agree that few future applicants will have restaurants that match Wegmans in size and, indeed, in quality. We simply do not see that as a relevant legal distinction. Once an applicant satisfies the minimal square footage and seating requirements, that issue disappears as a relevant factor. What we see instead is the commonality of a restaurant dwarfed in size and customers by its attached, albeit commonly-owned, "separate business" that is using its marketing power and strategy to sell additional products to its customers. We see that outcome as reasonable, not hyperbole. Once the PLCB has accepted the legal pretense that the restaurant, rather than the attached business, is selling the beer, it has little, if any, basis to reject an analogous application. Having allowed the tail to wag the dog, the PLCB will be hard pressed to return to a more reality-based analysis.

II. MBDA AND INDIVIDUAL PETITIONERS HAVE STANDING

A. Introduction

The PLCB found that Petitioners have standing to intervene in these proceedings and could, therefore, challenge Wegmans' licensure applications. In doing so, the PLCB hewed closely to this Court's "on all fours" ruling in *Malt Beverage Distributors Association v. PLCB*, 881 A.2d 37, (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 895 A.2d 1264 (Pa. 2006) ("*MBDA I*"). At bottom, the PLCB recognized that MBDA was an appropriate party to participate in proceedings in which substantial issues pertinent to the beer industry were to be decided. Indeed, it is clearly the case that if MBDA had not challenged the supermarket/restaurant configuration, nobody else,

including the PLCB, would have.[20] Accordingly, although this Court can more fully review the PLCB's standing determination, it should affirm that aspect of the holding without the need for extended analysis.

At the same time, the PLCB's findings that Wegmans' sale of beer would not harm D Distributors ignores the central undisputed facts in the record. Insofar as necessary, the Court should correct those findings.

B. The Governing Principles Of Standing

The applicable law of standing is well-established, including as applied to intervenors in Liquor Code matters. As we explain more fully below, no decision supports Wegmans' position that would-be intervenors must present evidence of harm that is derived from an economic impact analysis, and imposing that rule would dramatically impose the burden on citizen intervenors seeking to demonstrate they will be aggrieved by an agency ruling. Petitioners note that standing simply allows a party to participate in a proceeding; it does not guarantee a result and is not the basis for an award of damages. Accordingly, the quantum and specificity of proof required for standing should be – and is – considerably less than that necessary to support a damages award. Additionally, the standard of proof as to harm must be reduced when litigants are necessarily predicting the effects of future actions.

MBDA I, summarizes the applicable law. There, this Court found that Petitioners had standing on two distinct bases.

---

20 The PLCB licensing bureau's position at the hearing was limited to identifying the interconnections and addressing several other idiosyncratic issues. It submitted a 3 page post-hearing brief that stated in relevant part that "licensing a premises [with connections to a separate business] has been and remains a matter of Board discretion . . . ." This is not a criticism of PLCB counsel, but reflects the direction given them and the role the Licensing Bureau has taken vis-a-vis the Board.

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 n23. 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.

This Court then noted the evidence of harm in the *MBDA* record:

> 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, this Court found that MBDA had standing on both identified bases: (1) that MBDA had presented sufficient evidence of harm; and (2) the "new and very different nature of the application." It summarized:

> 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).

C. The Facts Pertinent To Standing

1. Wegmans Beer Sales

Petitioners' prior Brief (at 12-19) discussed "The Facts Concerning Wegmans and Its Beer Sales." Petitioners incorporate that discussion by reference and highlight here only the following two points:

- Wegmans plans to sell beer primarily for take-out in up to the legal maximum, however that might change in the future.
- Wegmans hopes, and expects, to sell that take-out beer to its existing customers. Wegmans' expert witnesses and store managers repeatedly stated that they did not expect the sale of beer to result in additional customers, certainly not in any appreciable amount.

2. Intervenors' Operations

D Distributors are small businesses, in general and certainly 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's size (100,000+ square feet). The owner typically works at the business, together with a few employees. None has a regional warehouse or distribution center, as does Wegmans. (Dickson City, Lynch, N.T. 54, 232a; Wilkes-Barre, Shipula, N.T. 119, 212a) Based on the sample in these proceedings, many D Distributors are literally "family businesses" as well, having been originally operated by the parents of the present owners. 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, 200a-01a; State College, Pletcher, N.T. 31, 257a; Bethlehem, Tanczos, N.T. 124-25, 321a-22a).

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 consumption. D Distributors sell beer and little else. Chuck Greenstreet, 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, 400a) More than 80% of the revenue of Tanczos Beer came from beer sales in 2006 (Bethlehem, Exh. P-3, 384a); Beer Super's sales are 85-87% beer (Wilkes-Barre, Shipula, N.T. 63, 206a). Most of a D Distributor's beer sales are by the case (*i.e.*, very few kegs) and most are of the several major national brands. Microbrews remain a 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 that the PLCB allows them to sell, such as soda (competition from supermarkets, particularly since the onset of non-returnable bottles) and cigarettes (competition from "cigarette discount shops" and the internet, *see* Wilkes-Barre, Shipula, N.T. 62, 205a). People come to beer distributors for beer and no other purpose, quite as the Liquor Code originally intended it to be; sales of non-beer items are typically impulse and always both small in amount and ancillary to the main business. (Wilkes-Barre, Shipula, N.T. 73, 210a) D Distributors routinely testified that their businesses had reduced in square footage and the scope of offerings over the past decade.[21] The contraction followed their

---

21 Brewers' Outlet downsized from 10,000 square feet to 6,500 and then to 3,800, reductions primarily correlated with the "fall[ ] off" in its soda sales. (Dickson City, Lynch, N.T. 99, 233a) *See also* Wilkes-Barre, Shipula, N.T. 54, 58, 199a-202a (from 12,000 square feet to 3,800, again due to severe decline in soda sales).

growing inability to profitably sell non-beer items, often following the opening of a nearby business selling that product (a matter we discuss in more detail later in this Brief).

Second, D Distributors must seek and receive PLCB approval to sell products other than those that have been pre-approved.[22] That process does not encourage entrepreneurial activities. The limitations are part of the Pennsylvania model of selling liquor separately, both apart from other stores and with few, if any, ancillary products.

In general, the D Distributors sell all the pre-approved products that they think they can profitably sell; 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 running and circumscribed by their size and location, even allowing D Distributors *carte blanche* to sell any product (TVs, jewelry, art) would likely make little difference; D Distributors' ability to profitably utilize that freedom is far more theoretical than real. In short, D Distributors have developed as the PLCB's regulation and marketplace have allowed or forced them to.

Because of their beer-centric sales, D Distributors cannot broadly cut their prices on beer; they lack sufficient other products to make that strategy successful. (Easton, Greenstreet, N.T. 40, 402a) Mr. Shipula explained it simply (Wilkes-Barre, Shipula, N.T. 74, 211a): "[i]f I were to sell the beer at cost or close to cost, I'd go out of business."

---

22 Pre-approved products are set forth in Circular #9, Exh. A-4, and include soda and bottled water, chips and pretzels, lottery tickets, ice and little more. Wegmans (Brief at 14-15) suggests that the array of non-beer items D Distributors can sell – "some distributors have been given permission from the PLCB to sell hot prepared food such as hot dogs and breakfast sandwiches"! – is broad. It is a wonder then why D Distributors' sales are so predominantly beer rather than breakfast sandwiches.

The D Distributors who testified appeared to be good businessmen and women, as even Wegmans' experts agreed. *See*, *e.g.*, State College, Shepstone, N.T. 158, 266a; Easton, Shepstone, N.T. 210, 418a; Bethlehem, Shepstone, N.T. 280, 340a.

3. The Predicted And Predictable Adverse Impacts
<u>Of Wegmans' Beer Operations On D Distributors</u>

The predicted and predictable impact of Wegmans' proposed beer operations on D Distributors was the major subject at the hearings, primarily via Wegmans' opposing testimony. The D Distributors, and Mary Lou Hogan, MBDA's Secretary and General Counsel, each testified, based on their lengthy experience and knowledge of their particular businesses and of the beer business, that D Distributors would lose sales to Wegmans. They focused on the "co-location" of the supermarket and the Market Café as essentially one business, with the inevitable (and encouraged) substantial influx of customers from one to the other, and the broad array of products sold by Wegmans that gave it a substantial marketing advantage vis-a-vis D Distributors. Indeed, the D Distributors recognized Wegmans' economy-of-scope business model without using, or probably knowing, the term. We summarize that testimony below.[23]

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 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,

---

23 Wegmans complains (Brief at 4-5) that "[n]one of the . . . evidence introduced by the MBDA . . . addressed or focused on the three questions presented by the MBDA in this appeal." It is simply unclear what that means. MBDA presented evidence of harm and, in the main, relied on cross examination of Wegmans' officials and the PLCB's representatives, as well as legal analysis, to develop its substantive opposition to the applications.

> [Wegmans] would be permitted to [sell][24] 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.
>
> . . . .
>
> [B]asically it's because a store like Wegmans, because of the variety of items that they can offer, which distributors can [not][25] 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, 161a, 162a) Other D Distributors testified to the same effect. (Dickson City, Lynch, N.T. 53, 231a; Williamsport, Schultz, N.T. 178, 170a ("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.")).[26]

Petitioners 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, 258a; Wilkes-Barre, Shipula, N.T. 74, 211a) Wegmans, as far as the record discloses, has not determined how it will 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,

---

24 The transcript says "buy," which cannot be correct.

25 The "not" is omitted in the transcript in what is clearly a transcription error.

26 Wegmans criticized and criticizes the D Distributors' testimony as the mere opinions of unqualified non-experts, but that testimony accurately described Wegmans' business model. The D Distributor witnesses may lack academic degrees, but they understood Wegmans' operation and its likely impact on their own businesses.

whether Wegmans or another chain, to own and operate multiple locations. (Wilkes-Barre, Shipula, N.T. 70, 208a; Dickson City, Lynch, N.T. 53, 231a) Some of those multiple locations (*e.g.*, Bethlehem and Easton, Wilkes-Barre and Dickson City) will typically 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, 329a) D Distributors are limited to one license.

Finally, almost every D Distributor witness, in discussing the harm to accrue, described one or more events in the past in which a new competitor locating nearby harmed some non-beer aspect of the business.

- **Beer Super** (Wilkes-Barre) lost its soda business as supermarkets moved into its area and tobacco sales when a cigarette outlet located 150 yards away. (Wilkes-Barre, Shipula, N.T. 60-63, 203a-06a) Its owner saw no benefits, only reduced sales, when competing businesses located near his business. (*Id.*, N.T. 63, 206a)
- **Brewer's Outlet** (Dickson City) lost soda, cigarette, and lottery business from competition from a Price Chopper supermarket, an A-Plus gas station/convenience store, and Sheetz. (Dickson City, Lynch, N.T. 47-49, 228a-30a) Its owner 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, 230a)
- **Home Service Beverage** (Williamsport) 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, 165a) Supermarkets "destroyed that profitability of soda" for **Valley Beverage** (also Williamsport) in the 1980's. (Williamsport, Schultz, N.T. 178, 170a)
- **Tanczos Beverage** (Bethlehem) formerly purchased three trailer loads of Coca Cola at a time; it now sells ever decreasing amounts of soda as the market has become "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, 325a-28a)

The D Distributors who testified were in general experienced in the beer business and in running their own business, and quite qualified to predict how events would likely affect their businesses. They had done precisely that as they managed their businesses over the years. Ms.

Hogan is likewise knowledgeable in the liquor industry, having practiced law in that field since 1977 and been MBDA's secretary and counsel since 1995. (Williamsport, Hogan, N.T. 60-61, 159a-60a) The question posed to Mr. Pletcher (State College, N.T. 40, 258a) 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.[27] It is difficult enough to predict the future, let alone to do so with mathematical precision. The testimony was, instead, relatively informed predictions of the future, based on experience and knowledge.

Wegmans' beer price may (or may not) be higher than at a D Distributor,[28] 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.[29] The typical Wegmans' customer may be a woman, 30-50, and arguably not a beer drinker, but, in the apt phrase of witness Chuck Greenstreet, many are the

---

27 The law requires a quantification of harm when the plaintiff seeks monetary damages. The situation here is more akin to an injunctive proceedings, in which the inability to quantify harm does not disqualify a party from relief.

28 Wegmans had not made any beer pricing decisions (*e.g.*, Williamsport, DeMascole, N.T. 259, 179a).

29 Expert witness Dunham repeatedly discussed the concept of "delivered cost," *e.g.*, Dickson City, N.T. 235-36, 249, 258, 242a-43a, 244a, 245a. Wegmans recognized this point when writing customers that it wanted "to make the experience of shopping at Wegmans . . . *more convenient* by selling beer in our Market Café restaurant." (emphasis supplied).

"purchasing agents" for their families. To them, the convenience of one-stop shopping – precisely Wegmans' economy-of-scope model – has value. (Easton, Greenstreet, N.T. 36, 46, 401a, 403a)[30]

Wegmans' sale of beer will not likely bring any new customers to Wegmans, let alone to the businesses, such as D Distributors, located nearby. Instead, Wegmans' strategy is to sell beer primarily for take-out to existing customers. Wegmans had not made any projections as to how much of its take-out sales will be in six packs as opposed to single servings, but it seems likely that a substantial part will be.[31] 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.*, the delivered cost analysis) of purchasing beer at Wegmans as they shop for groceries. But it seems indisputable that some will buy their beer at Wegmans; 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.

D. Wegmans' "Anti-Standing" Arguments Are Legally And Factually Flawed

Wegmans presented substantial expert testimony, at substantial cost, seeking to deny Petitioners the right to participate in these proceedings. The bulk of Wegmans' Brief likewise addresses standing. Wegmans is anxious to avoid review of the merits. The *Sheetz* proceedings show that an erroneous standing decision can insulate an incorrect decision from review.

---

30 Greenstreet (Easton, N.T. 46-47, 403a-04a) further explained the point we all know to be true in many families:

> the woman is the purchasing agent for the family. …[S]he'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.

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

Wegmans' primary anti-standing argument is a familiar refrain: the PLCB's 70 year "history of approving licenses for restaurants with interior connections to grocery stores, department stores, convenience stores and delicatessens." Thus, Wegmans argues (*e.g.*, Brief at 10, 28) that there is nothing novel about this matter that warrants granting associational standing; apparently, MBDA has gone to all this effort and expense for no reason at all. We have discussed previously and, we believe, firmly demonstrated the errors in that recitation of history. MBDA correctly understood the importance of the Wegmans' applications and acted accordingly.

Turning to its factual arguments, Wegmans' experts' testimony, despite its substantial length, distills to two basic points.

- **First**, a finding of harm to D Distributors requires expert testimony in the form of an economic impact analysis.[32] The testified-to expectations and predictions of business owners, supported by their previous experiences in analogous circumstances and their knowledge of the industry, was, Wegmans argued and continues to argue, worthless. *See, e.g.*, Wegmans' Brief at 15, 17, 18 ("economic analysis . . . would be necessary to reach the conclusion that Wegmans selling beer at its Bethlehem restaurant location would negatively impact Tanczos Beverage or other beer distributorships.").

- **Second**, co-location theory establishes that even competitors benefit from locating near each other. On that basis the experts concluded that Wegmans' sale of beer would, if anything, benefit the D Distributors and certainly would not harm them.

---

32 Although not precisely defined (and what follows is essentially tautological), an economic impact analysis involves examining, from an economic perspective and presumably by 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, 181a-82a)

Petitioners noted earlier that Wegmans appeared to have made few decisions as to how it would actually sell beer in Pennsylvania. That lack of detail would make it difficult, if not impossible, 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.

There are many reasons why that testimony is completely wrong and the PLCB erred in not disregarding it. First, Wegmans' position would dramatically increase the burden imposed on citizens seeking to challenge a government decision, creating a standard that few citizens' groups could satisfy. Second, the evidence reflects that businesses 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' experts' testimony is, by their own admission, wrong. We discuss each of those points below as well.

1. Pennsylvania Law On Standing Does Not Require Persons Challenging Government Action To Conduct An Economic Impact Analysis

MBDA does not dispute that an intervenor must typically present evidence of the expected harm warranting its participation. Petitioners did not stand mute on the issue of harm. MBDA as an association and the individual D Distributors presented testimony on predictable harm. Thus, the case stands in a far different posture from litigants who pled harm but made no effort to prove any.

Wegmans' argument is that Petitioners' evidence of harm is insufficient and inadmissible because it was not presented by experts after performing an economic impact analysis of the kind described in footnote 32 above. Wegmans also relies on the substantial expert testimony it commissioned. No Pennsylvania case has imposed on citizen intervenors seeking to demonstrate they will be aggrieved by an agency ruling to present or debunk expert testimony of this nature, nor required such specificity of harm when what is at issue are, necessarily, future effects.

In *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), the seminal standing case, the plaintiffs challenging a parking tax were primarily parking operators who apparently planned to 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 to demonstrate, for example, the elasticity of the demand for parking in response to price changes to 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. at 1153. It seems highly unlikely that the Tioga County tavern owners, the intervenor there, 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. Nothing in *Capital Blue Cross v. Pa. Ins. Dept.*, 937 A.2d 552 (Pa. Cmwlth. 2007), or *Pa. Bankers Ass'n. v. Pa. Dept. of Banking*, 893 A.2d 864 (Pa. Cmwlth. 2006), is to the contrary.

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 1090-91 (emphasis supplied). 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 1091.

Wegmans foresees (Brief at 35) a bleak future in which standing will be available on the basis of spurious and/or entirely speculative allegations of harm and interest and in which, presumably, intervention will be commonplace. We think Wegmans doth protest too much. It is the unusual situation – when it sees its members' interests as at risk – in which a trade association will incur the costs of intervention. In the common course of events, trade associations, including MBDA, do not do what MBDA has done here and in the *Sheetz* litigation.[33] We see instead, should the Court adopt Wegmans' position, a dramatic chilling effect on citizen participation in administrative proceedings resulting from the substantial increases in the costs of doing so. We see a future in which well-financed applicants can, as Wegmans sought to do here, use their resources to try to prevent opponents from having the opportunity to protect their perceived interests.

It is one thing to require an intervenor (or a party) to present evidence of its asserted standing and quite another to establish requirements that they cannot reasonably meet. In this case, even cost aside, MBDA could not likely have satisfied the test Wegmans seeks to establish. MBDA

[33] *MBDA I* noted the infrequency with which MBDA had, as of then, participated in a license application – once in the prior thirty years or longer.

did not have access to information about Wegman's plans (which, as per the record were inchoate), sales data, or customers demographics, all of which an economic analysis would require.

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

Wegmans' fact-based standing argument focused on "co-location" theory, which posits that grouping businesses together, as in a mall, results in increased customer traffic from which all businesses, even competitors, benefit. Mr. Dunham described it this way:

> 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.

(State College, N.T. 195, 273a) The central benefit from the businesses' perspective is the increased customer traffic. Again, Dunham (State College, N.T. 214-15, 278a-79a) 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 . . . ?
>
> ***
>
> 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 JC Penney 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.

Here, the experts' necessary premise is that Wegmans' sale of beer would attract additional customers to Wegmans, and some of those customers would then buy beer from the near by D Distributor. 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:

- **Bethlehem** (N.T. 276-77, 338a-39a): "it is unlikely that the sale of beer by Wegmans would produce any meaningful amount of new customers to Wegmans."
- **Dickson City** (N.T. 211-12, 238a-39a): the sale of beer at Wegmans "would have, at most a small effect in increasing . . . the number of customers at Wegmans."
- **Easton** (N.T. 207-08, 416a-17a) "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."
- **State College** (N.T. 171, 267a): "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."
- **Wilkes-Barre** (N.T. 209-10, 215a-16a): the sale of beer at Wegmans in Williamsport would be providing an additional convenience for customers who were doing their shopping at the store.

Mr. Dunham agreed (State College, N.T. 211, 277a; Dixon City, N.T. 258-59, 245a-46a) as did every Wegmans' store manager who addressed the subject (State College, Gallucci, N.T. 118, 263a (anticipating "no meaningful increase" in customers); Bethlehem, Shelley, N.T. 222, 335a).

Witness Shepstone further distinguished the present situation from what occurred when a Wegmans' store first opened and drew a substantial number of new customers into the area. "[T]hat influx" of people would have had a "nice positive spillover effect on restaurants and other businesses that were . . . proximate to Wegmans location." (State College, Shepstone, N.T. 172-73, 268a-69a) Thus, a newly-opened Wegmans presented 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 D Distributors, Wegmans' proposed expansion into beer sales presents only the negatives, since there will be no increase in customer traffic.

That evidence 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, based on the experts' admissions, incorrect. No (or few) new customers to Wegmans means *no* benefits, only negatives, to D Distributors in the area.

3 Businesses Take Steps To Avoid Co-Locating With Competitors

Many businesses, by their actions, 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, and necessarily near each other, 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 their competitor but instead draws customers to the area from which they can benefit. (Bethlehem, Dunham, N.T. 347-48, 343a-44a) Yet another common co-location was between a supermarket and stores selling products (beer) or services (*e.g*., dry cleaning) the supermarket did not sell. Mr. Shipula testified (Wilkes-Barre, N.T. 71, 209a) and Mr. Dunham agreed (*id*., N.T. 244, 218a) that Mr. Shipula's distributorship 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 many different brands of beer on tap.

But it is equally true, as even Mr. Dunham agreed (Bethlehem, N.T. 348, 344a), 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. Businesses in malls commonly seek and obtain "exclusive use" lease provisions and use other legal strategies that prevent competing businesses, however defined, from also locating in the mall. (Bethlehem, Weinstein, N.T. 53-56, 64-78, 297a-300a, 301a-15a, and Exh. P-2, 347a) Those provisions appear in 80% of the 100 mall leases on which witness

Weinstein had worked, and the 20% that did not typically involved less sophisticated lessees. *See also* Bethlehem, Goldstein, N.T. 111, 319a. It is unlikely that these businesses, many of them sophisticated national or regional businesses, are operating out of misinformation. 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, 205a-06a, 207a)

Witness Lee Goldstein (Bethlehem, N.T. 110, 318a) listed the typical stores in several shopping centers that 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, 168a-69a) It is simply not correct that the influx nearby of a new competitor necessarily, or even commonly, benefits the existing business.

E. <u>Petitioners Have Standing To Participate In These Proceedings</u>

The applications here clearly satisfy the "novelty of issue" prong. 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 the potential to transform how beer is and will be sold in quantity in Pennsylvania. These are the first litigated cases on that issue. Petitioners are the only ones who have challenged that transformation here and, as review of the record makes clear, the PLCB Licensing Bureau played a fundamentally passive role at the hearings. The PLCB's history is not as the PLCB and Wegmans have described it, *i.e.*, supported by abundant and long-standing precedent.

The evidence of harm, outlined above, is, if anything, more fully developed than the comparable material judged sufficient in *MBDA I*. The nature of the harm asserted here – lost business from a competitor – is the same harm this Court found in *MBDA I* to satisfy the "substantial, direct, and immediate" standard.

Wegmans' substantial effort (Brief at 27-31) to distinguish *MBDA I* is unavailing. The differences between the cases is the substantial effort and expense Wegmans undertook here to rebut Petitioners' evidence of harm. Wegmans also distorts the record differences, asserting (Brief at 29-30) inaccurately that "there is *no evidence* that the MBDA or Tanczos would be harmed or adversely affected in anyway if the PLCB approved the license to Wegmans" and contrasting that to the substantial evidence of "catastrophic consequences" presented in the Sheetz case. Wegmans' unstated assumption is that the impact on D Distributors from a supermarket pales in comparison to that of a convenience store. We think not.

For these reasons, the Petitioners have standing. The PLCB correctly granted standing. At the same time, the PLCB's findings as to harm ignore the record evidence and impose a burden that few intervenors could meet.

CONCLUSION

For these many reasons, Petitioners respectfully submit that this Court should reverse the PLCB decision and direct the PLCB to deny the application for licensure.

____
Robert B. Hoffman
WolfBlock LLP
213 Market Street, 9th Floor
P. O. Box 865
Harrisburg, PA 17108-0865
(717) 237-7182