

November 28, 2012

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Pete Gaeth

RE: Ownership Interest

Dear Mr. Gaeth:

ISSUE: This office is in receipt of your e-mail of October 24, 2012, in which you seek to verify certain information regarding ownership interests of licensees. Specifically, you state that you currently own one-third of a bar and you also own a six percent (6%) interest in a brewery pub in Pennsylvania. You state that one (1) of your bar co-owners, also holding a one-third interest, told you that he is required to sell his stake in the bar if he wishes to maintain above ten percent (10%) ownership interest in a brewery pub. It is not clear from your correspondence whether your brewery pub interest is in the same entity as that in which your bar co-owner holds an interest. It is your present understanding that, in accordance with new laws in Pennsylvania, if you have less than ten percent (10%) ownership interest in the brewery pub, then you “do not have to be put on their license” and you can lawfully be involved in both entities.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that you are a co-President and Stockholder of Bayfront Brewing Co., trading as Roff School Tavern, which entity holds Restaurant Liquor License No. R-19563 (LID 60261) for premises located at 13388 Leslie Road in Meadville, Pennsylvania. You are not listed as an officer of any other current Board licensee; nor are any of your current co-officers.

OPINION: There are two (2) issues to be addressed in responding to your inquiry: the ability of one (1) person to hold both a restaurant license and a brewery pub license and the level of involvement permitted by someone other than a named licensee in that license.

A brewery pub (“GP”) license allows the holder of a brewery (“G”) license to operate a restaurant or brewery pub within or immediately adjacent to the brewery premises. [47 P.S. § 4-446]. It allows sales for on-premises consumption of the beer produced and owned by the brewery, and sales for off-premises consumption of its products not

to exceed one hundred ninety-two (192) fluid ounces in a single sale. Holders of GP licenses are also permitted to sell limited winery-made wines for on-premises consumption. [47 P.S. § 4-446(2)].

Pursuant to section 3.92 of the Board's Regulations, the Board is authorized to issue a GP license to the holder of a G license. [40 Pa.Code § 3.92 (emphasis added)]. The holder of a brewery pub license shall have all the rights and be subject to the same conditions and qualifications as those imposed on holders of an eating place licensee ("E") license, except as set forth in section 3.92(b). [Id.]. The brewery pub license may be issued to premises immediately adjacent to, but separate and distinct from, the brewery premises. [Id.].

Sales of alcoholic beverages at the brewery pub premises are limited to sales of malt or brewed beverages produced at and owned by the brewery adjacent to it or a brewery which is under common control with the brewery pub. [Id.]. A brewery pub licensee may also sell, for on-premises consumption, wine manufactured by the holder of a Pennsylvania limited winery license. [Id.]. As noted, the regulation requires that a GP license can only be granted to the holder of a G license. This mandates the same ownership for both licenses. [Id.].

You should also be aware that the Liquor Code imposes strict interlocking business prohibitions. Thus, under section 411 and 443 of the Liquor Code, no manufacturer – including a brewery – and no officer or director of any manufacturer, shall maintain any financial interest whatsoever in a hotel or a restaurant license. Likewise, no manufacturer or officer, director, stockholder, agent or employee of a manufacturer shall have any direct or indirect interest in any ownership or leasehold of any property or equipment of any property or have a mortgage lien on any property located on hotel, restaurant or club licensed premises. [47 P.S. §§ 4-411(c), 4-443(d)].

These two (2) sections make it clear that the purpose of the prohibitions is to separate the financial and business interests between manufacturers and restaurant licensees. A new exception to this prohibition was enacted on December 22, 2011, when Governor Corbett signed House Bill No. 242 (PN 2815) into law. Now known as Act 113 of 2011, the relevant exception allows that a person who holds a five percent (5%) or less interest in a publicly or privately-held entity owning a restaurant or eating place retail dispenser license is not deemed to have a "financial interest" and is not subject to the interlocking business prohibitions if the person is not an officer or employee of, nor has an interest in, nor exercises any control over any other licensed entity that engages in any sales to or from the restaurant or eating place retail dispenser licensee. [47 P.S. §§ 4-411(e), 4-443(g)].

It should be explicitly stated that a six percent (6%) ownership interest such as yours would be prohibited unless it falls into the second exception known as a “couplet,” which, by your explanation, also does not seem to apply. Nonetheless, the information is being provided for your convenience. A “couplet” is an entity that has both a manufacturer’s license and a hotel, restaurant or retail dispenser license for use at the same location. A single entity may have more than one (1) location licensed in such a manner. Further, such licenses and a person’s interest in the licenses or in the entity holding the licenses are not subject to the prohibition on interlocking businesses. [47 P.S. §§ 4-411(e), 4-438(c)].

Next, the Liquor Code prohibits any entity other than the licensee from having a pecuniary interest in the licensed business. [47 P.S. § 4-404]. Section 1.1 of the Board’s Regulations defines “pecuniary interest” as “an interest that sounds in the attributes of proprietorship.” [40 Pa. Code § 1.1]. Such an interest is one (1) of substantial control of a licensed premises, evidenced by participation in the profits, assumption of liability, decision-making authority and purchasing, employment and other elements of ownership. Appeal of E-J Westside Inn, Corp., 68 Pa. Cmwlth. 323, 449 A.2d 93 (1982)]. The licensee's discretion includes control of the manager's hiring, firing, discipline, salary and duties. The manager must be an agent of the licensee. [40 Pa. Code § 5.23(j)].

There is a rebuttable presumption of a pecuniary interest when a person receives ten percent (10%) or more of the proceeds of the licensed business or when control is exercised by one (1) or more of the following:

- i. Employing a majority of the employees of the licensee.
- ii. Independently making day-to-day decisions about the operation of the business.
- iii. Having final authority to decide how the licensed business is conducted.

[40 Pa. Code § 1.1].

It may be this concept to which your colleague is referring when noting that he must divest an ownership interest in one (1) of his licenses. It may also be that, because changes in ownership of less than ten percent (10%) do not need to be reported to the Board, any changes of such lesser interests would be outside the Board’s knowledge in the normal course. [40 Pa. Code § 5.91.]

In short, it is the licensee who must have the ultimate financial and operational control of the licensed establishment. While nothing in the Liquor Code sets forth a bright line as to the amount of sales profits that must be retained by the owner, if someone

other than the owner receives more than ten percent (10%) of the business proceeds, the Board or the Bureau will investigate to determine if that person is exercising control over some or all aspects of the business.

Finally, as previously noted, please be advised that section 5.91 of the Board's Regulations requires a Board-licensed corporation having officers, directors, or stockholders to report a change in officers, directors, or stockholders within fifteen (15) days. [40 Pa. Code § 5.91(a)]. Change of officer forms for changes of corporate officers other than clubs shall be accompanied by a fee of two hundred dollars (\$200.00) when the change of officer does not constitute a change in majority/controlling interest. [40 Pa. Code § 5.91(d)]. If the change of corporate officer constitutes a change in majority/controlling interest, fees will be assessed in accordance with section 614-A of The Administrative Code of 1929 (71 P. S. § 240.14A). [Id.]. Control is defined as the power or authority to manage, direct, govern, administer or oversee the operation of the licensed business. [40 Pa. Code § 5.91(a)].

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police,
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