

March 7, 2013

Telephone: (717) 783-9454

FAX: (717) 787-8820

Scott G. Hoh, Esquire
Berkshire Law Group, LLC
645 Penn Street, Suite 501
Reading, Pa 19601

Re: Proposed Microbrewery Location

Dear Mr. Hoh:

ISSUE: This office is in receipt of your e-mail of January 9, 2013, wherein you advise that you represent a fire company, whose relief association holds a license from the Pennsylvania Liquor Control Board ("Board"). You advise that next door is a vacant single bay fire station. You advise that a church is also nearby. You state that a developer wants to purchase the vacant fire station and open a microbrewery and tavern.

You advise that you have researched the Liquor Code and concluded that the developer would have a difficult time obtaining a license for this property due to the proximity of other licensees or restrictive institutions. You request an advisory opinion.

Board records indicate that Oakbrook Fire Company No. 14 Relief Association holds Club Liquor License No. C-1626 (LID 1022) for use by it at premises located at 630 Park Avenue, Reading, Pennsylvania.

OPINION: You ask three (3) questions, which will be addressed in turn:

- 1) As the proposed premises are located within two hundred feet (200') of an existing licensee and within three hundred feet (300') of a church would a new license be prohibited?

As you may be aware, section 431 of the Liquor Code authorizes the Board to issue manufacturer/brewery licenses, which entitle the holders thereof "to produce and manufacture malt or brewed beverages, and to transport, sell and deliver malt

or brewed beverages from the place of manufacture only in original containers, in quantities of not less than a case or original containers containing one hundred twenty-eight ounces or more which may be sold separately anywhere within the Commonwealth.” [47 P.S. § 4-431(a)].

However, unlike other sections of the Liquor Code, section 431(a) does not contain any proximity limitations on the location of a brewery license. Therefore, the proximity limits mentioned in your question are not applicable to the establishment of a brewery. Further, proximity limits are not applicable for the establishment of a brewery pub, as described more fully in response to question 2 below.

Please note, however, that the Liquor Code does permit the holder of a brewery license to obtain a restaurant or retail dispenser license for use at the same location. [47 P.S. §§ 4-411; 4-438(c)]. If the proposed brewery were to seek such a retail license, proximity would be relevant. Section 404 of the Liquor Code [47 P.S. § 4-404] does state that the Board has the discretion to grant or refuse the transfer or extension of a hotel, restaurant or club license if the proposed licensed premises is within three hundred (300) feet of any church, hospital, charitable institution, school, or public playground, or within two hundred (200) feet of any other licensed premises.

- 2) What requirements exist under the Liquor Code governing "micro-breweries" and the manufacturing and brewing of beer for retail and wholesale sale?

A licensed brewery may sell its malt or brewed beverages in any container or package of any volume to individuals for off-premises consumption. [47 P.S. § 4-440]. A brewery may sell its malt or brewed beverages for on-premises consumption only in compliance with section 446(a)(1). That section requires a brewery that wishes to sell beer for on-premises consumption to acquire a brewery pub license. Pursuant to section 446(a)(1), a licensed brewery pub may sell any malt or brewed beverages produced by the brewery, as well as wine produced by a licensed limited winery, to individuals for consumption on the licensed premises in any container or package of any volume. [47 P.S. § 4-446(a)].

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 a malt and brewed beverage retail dispenser license, except as set forth in section 3.92. [40

Pa. Code § 3.92]. 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.]. Therefore, in order to operate a brewery pub on the brewery premises, where a brewery may sell the beer it produces, it must acquire a brewery pub license.

Please note, that there are certain requirements for obtaining a brewery pub license. As noted above, such licenses are issued subject to the same conditions and qualifications as those imposed on holders of malt and brewed beverage retail dispenser licenses. An eating place is defined in section 102 of the Liquor Code as:

a premise where food is regularly and customarily prepared and sold, having a total area of not less than three hundred square feet available to the public in one or more rooms, other than living quarters, and equipped with tables and chairs, including bar seats, accommodating thirty persons at one time. The board shall, by regulation, set forth what constitutes tables and chairs sufficient to accommodate thirty persons at one time.

[47 P.S. § 1-102]. A brewery wishing to obtain a brewery license must submit an application to the Board's Bureau of Licensing ("Licensing"), together with payment of a one (1)-time seven hundred dollar (\$700.00) application fee. Licensing will conduct an investigation to determine whether the brewery pub meets the Board's requirements before on-premise sales may begin.

3) Is there a separate microbrewery or small brewery license and what type of tavern or bar is permitted under this type of establishment? Does this require a separate liquor license?

No, there is no separate microbrewery or small brewery license. As mentioned *supra*, the holder of a brewery license may also obtain a brewery pub license. Further, sections 411 and 443 of the Liquor Code generally prohibit an entity from simultaneously holding an interest in both a retail license and a manufacturing license. [47 P.S. §§ 4-411; 4-443]. Please note, however, 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)]. Section 438(c) of the Liquor Code prohibits a person from possessing more than one (1) class of license. [47 P.S. § 4-438(c)]. However, sections 411 and 438 provide an exception as follows:

an entity may acquire both a manufacturer's license or a limited winery license and a hotel, restaurant or retail dispenser license *for use at the same location* and more than one location may be so licensed. The licenses and a person's interest in the licenses or in the entity holding the licenses shall not be subject to this section.

[47 P.S. §§ 4-411; 4-438(c) (emphasis added)].

As noted above, a licensed brewery may sell its malt or brewed beverages in any container or package of any volume to individuals for off-premises consumption. [47 P.S. § 4-440]. A brewery pub license allows the holder of a brewery 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 brewery pub licenses are also permitted to sell Pennsylvania-made wines for on-premises consumption. [47 P.S. § 4-446(a)(2)].

Further, the holder of a brewery license may apply for and hold a hotel liquor license, a restaurant liquor license or a malt and brewed beverages retail license to sell for consumption at the restaurant or brewery pub on the licensed brewery premises, liquor, wine and malt or brewed beverages regardless of the place of manufacture, under the same conditions and regulations as any other hotel liquor license, restaurant liquor license or malt and brewed beverages retail license. [47 P.S. § 4-446(a)(4)]. However, the brewery must brew at least two hundred fifty (250) barrels per year. [*Id.*]. Additionally, the holder of a brewery license who receives a retail license to operate a brew pub shall not sell directly to any licensee. Rather, the sale must be through specific importing distributors who shall have first been given distributing rights for such products in designated geographical areas

through the distribution system required for out-of-State manufacturers under section 431(b). [Id.]

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 BOARD 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,
Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 13-097