

December 4, 2013

Telephone: (717) 783-9454

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Kevin Wolfel
Elk Mountain Winery
24670 Bennetts Valley Highway
Weedville, PA 15868

**Re: Food Requirements and Sale of Food Items for a Restaurant License
at a Limited Winery**

Dear Mr. Wolfel:

ISSUE: This is in response to your e-mail sent November 12, 2013, in which you re-submitted your question regarding the type of food you sell at your restaurant. In June of 2013, you advised that your restaurant premises was inspected by an officer from the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“BLCE”), who questioned whether you had enough food on the premises to feed thirty (30) people. You advised this office that you keep on stock at all times a selection of meats, pepperoni trays, crackers, and a large variety of cheeses of different styles, and always have enough on stock for fifty (50) to sixty (60) people at all times. You indicated that the BLCE officer suggested you write to this office to clarify whether these food items qualify as a permitted food, to determine if your restaurant is in compliance with the applicable statute and regulations.

Because this office believed that there was an open citation pending against you, and the Pennsylvania Liquor Control Board (“Board”) serves as the appellate body from such citations, this office declined to address your question in its response dated July 18, 2013. However, in your e-mail of November 12, 2013, you advise that the BLCE officer asked you to re-submit your question in order to receive an Advisory Opinion on this matter.

You also indicate in your November 12th e-mail that, in addition to providing the above-described meats and cheeses for consumption on the premises, you also sell such items for carry out. In a telephone conversation with this office, you explained that some of the items are individual servings that are prepackaged for sale, but that the items can be purchased in larger quantities. Some of the items are stored in a cooler located in the restaurant, and some are located in a cooler in the limited winery sales area.

Records of the Board indicate that Shawn P. Zimmerman and Kevin J. Wolfel, doing business as Elk Mountain Winery, hold Limited Winery License No. LK-296 (LID 63269) and Restaurant Liquor License No. R-18967 (LID 65138) for the premises located at 24670 Bennetts Valley Highway, Weedville, Pennsylvania.

OPINION: Section 102 of the Liquor Code, in pertinent part, defines a restaurant as follows:

a reputable place operated by responsible persons of good reputation and **habitually and principally used for the purpose of providing food for the public**, the place to have an area within a building of not less than four hundred square feet, equipped with tables and chairs, including bar seats, accommodating at least thirty persons at one time.

[47 P.S. § 1-102 (emphasis added)]. Pennsylvania courts have concluded that an establishment is not a *bona fide* restaurant when there is insufficient food or facilities to feed thirty (30) people. See Appeal of Albud, 149 A.2d 163 (Pa. Super. 1959) (*the kitchen was ten (10) feet by four (4) feet; there were twelve (12) sandwiches available, which could be served on ten (10) pieces of china*); Pennsylvania Liquor Control Bd. v. Dobrinoff, 471 A.2d 941 (Pa. Cmwlth. 1984) (*the food supply on hand consisted of two (2) pounds of chicken necks, a half-pound of cheese, a gallon of pickles, and three (3) cans, each, of sauerkraut and tomato sauce*); Mitchell v. Pennsylvania Liquor Control Bd., 476 A. 2d 479 (Pa. Cmwlth. 1984) (*a liquor control enforcement officer visited the licensed premises on four (4) occasions and ordered a sandwich each time, but the licensee was never able to serve the officer a sandwich; the officer never saw a menu or any other patrons eating*).

In the instant matter, however, there is no question that you have sufficient food on hand to feed thirty (30) people. The issue is whether the type of food you offer your customers is sufficient. The statute does not provide that a certain type of food or a certain number of courses must be provided. This office considers the type of food you offer to be sufficient to meet the requirements of providing “food for the public” as set forth in section 102 of the Liquor Code.

The information you provided in your e-mail of November 12, 2013, raises a second issue with regard to the food items you sell for consumption off the premises. Please be advised that section 3.52 of the Board’s Regulations precludes a licensee from operating or permitting another person to operate another business on licensed premises without Board approval. [40 Pa. Code § 3.52(c)]. Recently, the Board

denied a request by a restaurant licensee to sell cheese and other food in bulk quantities to its customers. Therefore, your restaurant may only sell food for consumption on the premises or individual portions of such food, as in the manner of “take-out.”

However, limited wineries have independent authority to sell food for consumption either on or off the licensed premises. [47 § 5-505.2(a)(6.1)]. Therefore, the sale of food items in portions larger than an individual portion would have to occur on the licensed winery premises.

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,
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. 13-512