

March 18, 2014

Telephone: (717) 783-9454
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Larry Goettler

RE: Sale of E-Cigarette by Licensee

Dear Mr. Goettler:

ISSUE: This is in response to your e-mail of January 29, 2014, in which you state that you currently sell cigarettes through a machine in your licensed premises and you would like to also sell “e-cigarettes.” You understand that permission to do so is required and you seek that permission. You indicate that you have a smoking section, and it was confirmed that you have an exception from the Pennsylvania Department of Health (“DOH”) allowing smoking on your licensed premises.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Hill Boys, Inc., t/a The Brick House, holds Restaurant Liquor License No. R-7864 (LID 43260) for premises located at 112 North Main Street, Butler Pennsylvania. You are the manager/steward of record.

OPINION: Generally, section 3.52 of the Board’s Regulations prohibits a licensee from operating or permitting another person to operate, another business on a licensed premises without Board approval. [40 Pa. Code § 3.52].

The Board has previously granted approval for retail licensees, including restaurant, hotel and club liquor licensees, to sell cigarettes. However, the products you seek to sell are not cigarettes as defined by the Fiscal Code. Under section 202-A of the Fiscal Code “cigarettes” are defined as “any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material,

excepting tobacco....” [72 P.S. § 202-A].

Given the novelty of these items, the three (3)-member Board previously reviewed and considered the topic of e-cigarettes at its September 22, 2010 public meeting. At that time, the Board decided to indefinitely hold a final determination regarding the matter of sales of e-cigarettes by licensees until such time as the federal government provides definitive guidance and/or regulations concerning the sale of items.

The Family Smoking Prevention and Tobacco Control Act, Pub.L. No. 111-31, 123 Stat. 1776 (2009), granted the Food and Drug Administration (“FDA”) authority to regulate tobacco products; however, recent litigation has called into question the degree to which the FDA is permitted to control the sale of e-cigarettes. Furthermore, as of this date, the FDA is still considering new regulations. As a result, the constraints and limitations upon the sale of e-cigarettes are presently unclear.

Since the federal government has yet to finalize its position on the product, the Board is unable to grant you the authority to sell e-cigarettes at this time.

Finally, please be advised that the DOH, and not the Board, is responsible for administering, interpreting and enforcing the Clean Indoor Air Act (“CIAA”). Accordingly, questions pertaining to allowing smoking of e-cigarettes, as opposed to the sale of e-cigarettes, should be directed to the DOH. You may contact the DOH via its website at www.health.state.pa.us.

If you have any further questions or concerns regarding this matter, please do not hesitate to contact this office.

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.

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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. 14-082