March 26, 2015

Kari Robbins
Chief Operating Officer
Acorn Markets

RE: Restaurant Liquor License Inquiry

Dear Ms. Robbins:

ISSUE: This office is in receipt of your e-mail dated February 12, 2015, in which you indicate that your company currently holds two (2) liquor licenses. The first license is currently in use as a restaurant as well as a take-out beer business in Wellsboro, Pennsylvania ("the Wellsboro location"). You advise that you also operate a convenience store on the other side of a paved parking lot, which currently sells fast food, retail merchandise, and gasoline. You would like to extend the existing liquor license to allow for the sales of beer at the convenience store, in addition to the currently licensed restaurant.

You further indicate that you also have a restaurant liquor license for a location in Shinglehouse, Pennsylvania ("the Shinglehouse location"). The license is currently in safekeeping. You tore down the previously licensed premises, and currently operate a convenience store on an adjoining lot at that location, similar to the arrangement in Wellsboro, described above. You would like to renovate the Shinglehouse location to incorporate the liquor license into the existing operation.

For both the Wellsboro and Shinglehouse locations, you ask if your proposed changes would be permissible, and if not, what changes must be made to the proposals to render the locations eligible for licensure.

Records of the Pennsylvania Liquor Control Board ("Board") indicate that the Acorn Markets, Inc. of Wellsboro, Pennsylvania, holds Restaurant Liquor License No. R-15128 (LID 45928) for use at the premises located at 105 East Avenue, Wellsboro, Pennsylvania.

Additionally, Acorn Markets, Inc. of Shinglehouse, Pennsylvania holds Restaurant Liquor License No. R-3883 (LID 66553) for use at 117 North Oswayo Street, Shinglehouse, Pennsylvania. Board records confirm that this license is currently in safekeeping.

OPINION:

The Wellsboro Location

Your proposed "extension" of the license at the Wellsboro location, to include the convenience store on the other side of the parking lot, is problematic for several reasons. In order to allow sales and/or service of alcoholic beverages beyond an existing licensed premise, a licensee must apply for an extension of its licensed premises to cover any additional area. Section 7.21(b)(2) of the Board's Regulations permits a licensee to extend its license to **immediate, abutting, adjacent, and contiguous vacant land**. [40 Pa. Code § 7.21(b)(2) (emphasis added)]. The Board has discretion to approve an application for extension to an area that is not immediate, abutting, adjacent or contiguous; however, typically such an area must be on the same premises or location as the licensed premises. Roberts v. Pennsylvania Liquor Control Board, 146 Pa. Cmwlth. 64, 604 A.2d 1152 (1992).

In addition, Section 406.1 of the Liquor Code allows the Board to approve the extension of a restaurant liquor license to include a secondary service area with dimensions of at least one hundred seventy-five (175) square feet, enclosed on three (3) sides and with adequate seating. [47 P.S. § 4-406.1]. However, the secondary service area must be located on property having a minimum area of one (1) acre and it must be on land which is immediate, abutting, adjacent or contiguous to the licensed premises with no intervening public thoroughfare. [Id.]. Additionally, the original licensed premises and the secondary service area must be located on the same tract of land. The Liquor Code defines "tract" as "a contiguous expanse of land under the control of one person." [47 P.S. § 1-102]. The determination as to whether a particular area constitutes a public thoroughfare is made by the Board, following an investigation by the Bureau of Licensing, upon receipt of an application for extension of premises.

Furthermore, section 3.52(c) of the Board's Regulations provides that a licensee may not conduct another business on the licensed premises without Board approval. [40 Pa. Code § 3.52(c)]. Also, a licensed premises cannot have an inside passage or communication to or with any other business conducted by the licensee or other persons except as approved by the Board. [40 Pa. Code § 3.52(b)]. Section 3.53 of the Board's Regulations provides that "[w]here the Board has approved the operation of another business which has an inside passage or communication to or with the licensed premises, storage and sales of liquor and malt or brewed beverages shall be confined strictly to the premises covered by the license." [40 Pa. Code § 3.53]. Section 3.54 of the Board's Regulations provides that "[w]here the Board has approved the operation of another business which has an inside passage or communication to or with the licensed premises, the extent of the licensed area shall be clearly indicated by a permanent partition at least 4 feet in height." [40 Pa. Code §

3.54]. Pursuant to section 468(e) of the Liquor Code, the Board is not permitted to approve an interior connection that is greater than ten (10) feet wide between a licensed business and another business. [47 P.S. § 4-468(e)]. Thus, the convenience store business would, if proposed as part of the licensed premises, require Board approval. Please note that the Board has traditionally approved interior connections to another business such as a convenience store, rather than licensing the convenience store itself.

Another potential problem arises with the existence of gasoline pumps on the property of the convenience store. The Liquor Code prohibits the licensing of locations in which liquid fuels are sold. [47 P.S. § 4-404]. The Board has, however, historically approved new licenses and transfers or extensions to properties upon which are located businesses that conduct sales of liquid fuels/oil if the applicant can show some physical separation (barriers) between the pumps and the proposed licensed premises. Acceptable barriers have included roads, speed bumps, chains and four (4)-foot walls, or natural barriers such as dirt banks or a river. Thus, the existence of gas pumps at the business would, if proposed as part of the location of the licensed premises, require Board approval.

<u>The Shinglehouse Location</u>

Because the license for the Shinglehouse location is a restaurant liquor license, the premises must meet the criteria for a "restaurant." As you are aware, section 102 of the Liquor Code 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. 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]. The Board's Regulations provide that an eating space is "at least 18 inches wide by 12 inches deep, which is suitable for a service setting of plate, utensils and drink." [40 Pa. Code § 3.1]. Additionally, your establishment should "principally and habitually" be used for providing food to the public and you should ensure that the service of alcohol does not take priority over your service of food at any time. [47 P.S. § 1-102]. Thus, whatever structure you propose at the Shinglehouse location must, at the outset, comply with the above requirements to be eligible for licensed operation.

In addition, as discussed previously herein, the existence of a convenience store and/or gas pumps at, or adjoining, the proposed location of the licensed restaurant would require Board approval.

If you choose to proceed with either of your proposals at either location, you may wish to submit your application to the Bureau of Licensing on a prior approval basis. Submitting an application on a prior approval basis allows the applicant to receive consideration of its application based on plans rather than the actual construction at the proposed premises or, in this case, the actual alteration of the existing premises.

Please do not hesitate to contact this office should you have additional questions.

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. 15-111