

May 11, 2015

Herbert K. Sudfeld, Esquire  
Curtin & Heefner LLP  
250 North Pennsylvania Avenue  
Box 217  
Morrisville, PA 19067

**RE: Distributor and Retail License within Same Building**

Dear Mr. Sudfeld:

**ISSUE:** This letter is in response to your March 31, 2015, letter and subsequent telephone conversations with this office. In your letter, you indicate your client, Andrew Jarin, owns property located at 3670 Sawmill Road, Doylestown, Pennsylvania 18901. He leases this property to B&B Beverages, Inc., (“B&B”) holder of Distributor License No. D-2313. Your client is also the sole shareholder of B&B.

Your client wishes to take the property and convert it into a condominium which would consist of two (2) units. The first unit would be used by the above-mentioned distributor license. The second unit would be occupied by one of Mr. Jarin’s family members. That family member wishes to acquire a retail license for use at the second unit location. Neither party shall have an interest in the other’s property or finances. None of the common areas would be used by either business when conducting its operation; each party would pay its proportional share of the upkeep for the communal areas. There would be an interior connection between the two (2) businesses. You ask whether this proposal would violate the Liquor Code.

**OPINION:** The Liquor Code imposes strict interlocking business prohibitions between distributors and retail licensees such as restaurants and eating place retail dispenser licenses. Section 443 of the Liquor Code generally prohibits an entity from simultaneously holding an interest in both a retail license and a distributor license. [47 P.S. § 4-443]. Please note, however, that a person who holds a five

Herbert Sudfeld, Esquire

May 11, 2015

Page 2

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. § 4-443(g)].

Further, pursuant to subsection 443(d), no importing distributor or distributor shall be interested, either directly or indirectly, in the ownership or leasehold of any property or in any mortgage against the same, for which a liquor or retail dispenser’s license is granted; nor shall any such importing distributor or distributor, either directly or indirectly, lend any moneys, credit or equivalent thereof to, or guarantee the payment of any bond, mortgage, note or other obligation of, any liquor licensee or retail dispenser, in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business operated under a liquor or retail dispenser's license. [47 P.S. § 4-443(d).]

Similarly, section 411(e) of the Liquor Code prohibits a retail licensee and its officers, directors, stockholders, employees and agents from having an interest, either directly or indirectly, in the ownership or leasehold of any property or in any mortgage against the same, which an importing distributor or distributor license holder uses to conduct its business; nor shall a retail licensee or its officers directors, stockholders, employees or agents, lend any moneys, credit or equivalent thereof to, or guarantee the payment of any bond, mortgage, note or other obligation of, any importing distributor or distributor, in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business operated by an importing distributor or distributor. [47 P.S. § 4-411(e).]

You have indicated that the building will be converted to condominiums to insure that neither party has an ownership interest in the area occupied by the other party. The property on which the condominiums are located would also need to be owned by someone who does not have an interest in either license.

Assuming the condominiums would have easements across common areas, such an easement is considered a property interest. See Assalita v. Chestnut Ridge Homeowners Assn., 866 A.2d 1214 (Pa. Cmwlth. 2005). While the use of any common area by either license for purposes of the operation of the licensed premises may be deemed an impermissible use, you have indicated that such would

not occur in the instant case. It would be permissible for customers of both businesses to use the same parking lot. Further, since section 13.51 of the Board's Regulations prohibits licensees of one class - such as retail licensees - from giving anything of value to licensees of a different class - such as distributor or importing distributor licensees - each party to the condominium association may not contribute more than its assessment to the association. [40 Pa. Code § 13.51.]

Your letter also mentioned the possibility that there would be an interior connection between both licensed businesses. Section 3.52(b) of the Board's Regulations provides that a licensee 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)]. Therefore, you would need Board approval in order to have an interior connection between the two (2) businesses. Typically, the Board requires each business to have an additional entrance before it approves an interior connection between them.

Further, please note that section 492(13) of the Liquor Code prohibits a distributor from permitting the storage on the licensed premises or in any place contiguous or adjacent thereto accessible to the public any alcohol or liquor, other than malt or brewed beverages. [47 P.S. § 4-492(13)]. Unlike the Board's Regulations dealing with interior connections referenced above, there is no provision in section 492(13) which would allow the Board to waive this restriction. Having a restaurant liquor licensee adjacent to a distributor license, with an interior connection between the two (2) businesses would violate this section if the restaurant liquor licensee were to store any alcohol other than malt or brewed beverages, at the location.

Herbert Sudfeld, Esquire

May 11, 2015

Page 4

Finally, please note that approval of a license application is not granted by this office but by the Board's Bureau of Licensing ("Licensing") initially and the Board itself ultimately. Since your proposal involves numerous legal issues, if you wish to pursue this matter, you may wish to submit your application on a "prior approval" basis. Under "prior approval," Licensing will review your application based on plans rather than actual construction. If there is a problem with the application, it would allow for the modification of the plans. Once approved, the applicant would have six (6) months to complete the proposed 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. 15-209