

August 25, 2015

Kenneth J. McDermott, Esquire
Shumaker Williams P.C.
P.O. Box 88
Harrisburg, PA 17108

**Re: Tussey Food Services, Inc.
Your File No. 14-761**

Dear Mr. McDermott:

ISSUE: This is in response to your letter dated July 15, 2015, wherein you advise that you represent Tussey Food Services, Inc., (“Licensee”), which holds a restaurant liquor license. The licensed premises is located on a ski resort that is bisected by Bear Meadow Road, a public thoroughfare. More specifically, the licensed premises is located on the eastern side of Bear Meadow Road (“Bear Meadow East”). You advise that your client wants the ability to serve alcohol at a location on the western side of Bear Meadow Road (“Bear Meadow West”). You note that the western location includes a reception area where your client would like to serve food and alcohol. You have written this office for advice on which of several possibilities, restated below, would accomplish this goal for your client.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Licensee holds Restaurant Liquor License No. R-17363 (LID 32392) for the premises at Bear Meadows Road, Route 322 East, Boalsburg, Pennsylvania.

OPINION: You ask if Licensee may, by way of a place-to-place transfer, move its existing license to Bear Meadow West, and then apply for another ski resort license for Bear Meadow East. You assert that “this transaction would be within both the technical language of and spirit of 47 P.S. § 4-461” since Licensee is not changing ownership, but simply “adjusting its location for usage on the same property.”

To the contrary, section 461(f) provides:

The provisions of subsection (a) [allowing for an exception to the quota restrictions] which apply to privately-owned public golf courses or privately-owned ski resorts **shall not apply to the owner of such course or resort who has . . .** at any time after the effective date of this amendatory act, sold or **transferred** a regularly issued license for such course or resort.

[47 P.S. § 4-461(f) (emphasis added)]. The plain language of the statute prohibits a transfer of any kind. There is nothing in the statute that indicates that place-to-place transfers are an exception. Therefore, if you were to transfer the license to Bear Meadow West, you would not be permitted to obtain another ski resort license for Bear Meadow East; you would have to obtain an already existing license on the marketplace.

You next ask if it is possible to allow Licensee to extend its licensed premises to Bear Meadow West, despite the existence of a public thoroughfare. You allege that “certain golf course licensees” have been permitted to do this, without citing names or locations. You note the similar treatment of golf courses and ski resorts within the Liquor Code and ask if Licensee may extend its premises to the other side of the public thoroughfare.

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)]. The Board has discretion to approve an application for extension to an area that is not immediate, abutting, adjacent and contiguous; however, the two (2) licensed premises may not be separated by a public thoroughfare. 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.]. Therefore, because Bear Meadow Road bisects the property, and Bear Meadow Road is a public thoroughfare, neither an extension of the license nor a secondary service area would be permissible.

In your letter, you note that golf course licensees “have been able to extend their licensed premises to include property they own even when a ‘public thoroughfare’ is located on the property,” and ask if this exception may apply to ski resorts as well. Please note that

said golf courses may be operating pursuant to a statutory exception set forth in section 406(e)(2):

A holder of a restaurant or club license located on a golf course may store liquor or malt or brewed beverages in a permanent facility on the unlicensed portion of the golf course so long as the liquor or malt or brewed beverages remain on the restaurant, club or golf course without regard to whether there is any intervening public thoroughfare.

[47 P.S. § 4-406(e)(2)]. There is no similar exception provided for ski resorts.

Your third possibility is nearly identical to your first; the existing license is transferred to Bear Meadow West and another ski resort license is acquired for Bear Meadow East. The primary difference is that a new company (“Newco”) would apply for the ski resort license. You note, however, that the underlying ownership interest in Licensee and Newco would be the same. This possibility fails for the same reason that the first did: the ski resort itself, having been subject to a license, cannot be subject to another license obtained outside of the quota system. [47 P.S. § 4-461(f)].

You mention in your letter that Bear Meadow West has a reception area that would be used for the service of food and alcohol. It may be possible that your client will be able to serve food and alcohol at that location through the use of an off premises catering permit (“OPCP”).

Pursuant to section 406(f) of the Liquor Code, holders of restaurant licenses, hotel licenses, eating place retail dispenser licenses, breweries holding a brewery pub license, and performing arts facilities licenses may apply for and obtain an OPCP, which allows the permittee to hold a “catered function” off its licensed premises and on otherwise unlicensed premises. Sales of alcohol at such catered functions are permitted and can be by the glass, open bottle or other container, for consumption on the catered premises; no sales for take-out are permitted. [47 P.S. § 4-406(f)].

A “catered function” is defined as “the furnishing of food prepared on the premises or brought onto the premises already prepared in conjunction with alcoholic beverages for the accommodation of a person or an identifiable group of people, not the general public, who made arrangements for the function at least thirty days in advance.” [47 P.S. §1-102].

As noted in section 406(f) of the Liquor Code:

(f) The holder of a hotel or restaurant liquor license may obtain an off-premises catering permit subject to section 493(33) to hold a catered function off the licensed premises and on otherwise unlicensed premises where the licensee may sell wine, liquor and malt or brewed beverages by the glass, open bottle or other container, and in any mixture together with food, for consumption on those premises. Functions conducted under the authority of the permit shall be subject to the following:

(1) alcohol may be provided only during the days and hours that the license holder may otherwise sell alcohol;

(2) all servers at the off premises catered function shall be in compliance with the responsible alcohol management provisions under section 471.1;

(3) each catered function shall last no longer than one day and not more than fifty catered functions may be held each calendar year by each license holder for use with a particular license;

(4) a catered function shall not be held at a location that is already subject to the applicant's or another licensee's license;

(5) a permit shall not be issued to an applicant whose license is in safekeeping;

(6) a permit shall not be issued to a location that is subject to a pending objection by the director of the Bureau of Licensing or the board under section 470(a.1);

(7) a permit shall not be issued to a location that is subject to a pending license suspension under section 471 or the one-year prohibition on the issuance or transfer of a license under section 471(b);

(8) no alcohol may be taken from the permitted location by any patron, but the applicant may transport alcohol to and from its licensed premises to the proposed premises;

(9) written notice of the catered function as enumerated in paragraph (10) shall be provided to the local police and the enforcement bureau at least seven days in advance of the event;

(10) written notice shall be provided to the board at least thirty days prior to a catered function. Written notice must include the location of the function, time of the function, host of the function, general information regarding the guests expected at the function as well as any information the board shall from time to time prescribe. The board may, in its discretion, accept notice in an electronic format. The board may, in its discretion, waive the thirty-day notice period for a catered function if:

(i) the applicant has previously conducted functions that meet the requirements of this act;

(ii) the applicant is a licensee in good standing with the board;

(iii) notification was received at least fourteen days prior to the catered function; and

(iv) the applicant pays a late fee of one hundred dollars (\$100);

(11) the board shall, in its discretion, approve or disapprove a catered function if the applicant fails to provide timely notice of the catered function, does not intend to conduct a function that meets the requirements of this act or has previously conducted a function that did not meet the requirements of this act;

(12) if a catered function is scheduled to occur on private property, the owner of that property is deemed to have submitted to the jurisdiction of the enforcement bureau, and the warrant required by section 211(a)(2) of this act shall not be necessary for the enforcement bureau to enter and search the premises during the function or any activities related to the function;

(13) no catered function may be held for more than five hours per day and must end by midnight;

(14) neither the owner of the property nor the applicant may sell tickets to a catered function unless one of the following conditions is met:

(i) the applicant has contracted with an eligible entity for the function, and the function is being used to raise money for the eligible entity's organization;

(ii) the applicant has contracted with a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501(c)(3)), for an event which has the sole purpose of raising funds for that nonprofit organization; or

(iii) the applicant has contracted with an organization that holds tax exempt status under section 527 of the Internal Revenue Code of 1986;

(15) the catered function location shall be subject to section 493(34) of this act;

(16) catered functions may not be held in locations that are subject to a pending, protested transfer application;

(17) a permit may not be issued to a license holder whose license is subject to a pending objection by the director of the Bureau of Licensing or the board under section 470(a.1);

(18) a permit shall not be issued to a licensee for use in any location that is mobile; and

(19) a permit shall not be issued for use on any location used for parking at a sports event or concert event.

[47 P.S. § 4-406(f) (footnotes omitted)]. Please note that the OPCP application must be filed by March 1st of the calendar year; there is no statutory provision that allows the Board to accept applications after that date.

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If the OPCP does not meet your client's needs, the only alternative would be to obtain, via transfer, an already-existing restaurant liquor license.

Should you have any other questions and/or issues related to the Liquor Code or the Board's Regulations, please feel free to once again 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.

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. 15-366