

December 30, 2015

Marilouise McNally  
**VIA E-MAIL**

**RE: Management Company**

Dear Ms. McNally:

ISSUE: This is in response to your e-mail of November 19, 2015, wherein you state that Pocono Raceway may be holding other events in the future and would like certain parts to be “sub-managed.” You pose several questions which are set forth below.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Mountain Concessions, Inc. holds Restaurant Liquor License No. R-20856 (LID 32143) for use by it at Long Pond Road, Long Pond, Pennsylvania. The license is currently in safekeeping.

OPINION: As a threshold matter, it is recommended that you obtain guidance regarding your commercial operations from a private attorney experienced in Pennsylvania liquor law.

- 1. Can Mountain Concessions, Inc. have a management agreement with a company to handle certain areas of the licensed venue?*

Yes, it may enter into a management agreement provided that it complies with the provisions set forth below.

The Liquor Code and the Board’s Regulations permit the use of management companies, subject to certain conditions. Section 3.141 of the Board’s Regulations provides as follows:

- (a) A licensee may contract with another person to manage its licensed premises.

- (b) A management contract must reserve to the licensee the capability to direct its own business.
- (c) A management contract must be in writing, and a copy shall be maintained on the licensed premises where it shall be available for inspection by the Board.
- (d) A management contract may not give a pecuniary interest to a management company.

[40 Pa. Code § 3.141].

Section 3.1 of the Board's Regulations defines a "management contract" as "[a]n agreement between a licensee and a management company to operate, manage, or supervise all or part of the operating of the licensed premises." [40 Pa. Code § 3.141]. Similarly, section 102 of the Liquor Code defines a "management company" as "any entity employed or otherwise contracted by a licensee to operate, manage, or supervise all or part of the operation of the licensed business." [47 P.S. § 1-102].

The procedural aspects of management contracts are governed by sections 3.142 and 3.143 of the Board's Regulations [40 Pa. Code §§ 3.142- 3.143]. Section 3.142 provides as follows:

- (a) Current licensees or applicants for licenses that have management contracts shall file with the Board's Bureau of Licensing [(“Licensing”)] on forms supplied by Licensing, the identity of all persons who are parties to the management contract.
- (b) Current licensees or applicants for licenses that enter into, modify or terminate management contracts shall, within 30 days, file a written notice with the Board that this has occurred. The changes shall be reported on forms which will be furnished upon request by the Board.
- (c) Licensees filing notice of the establishment or modification of a management contract shall pay a fee of \$350. No fee is payable when a licensee gives notice to the Board that a management contract has been terminated. Likewise, no fee is required when a

licensee is notifying the Board of a non-substantive change to an existing management contract, such as the correction of a typographical error, the providing of a page or document inadvertently omitted from an earlier submission, or a name, address or contact information change as to one of the parties.

[40 Pa. Code § 3.142]. Section 3.143 of the Board's Regulations provides that:

- (a) The Board will notify the current licensee or applicant, in writing, of the Board's decision to either approve or refuse the involvement of a person providing services as a management company.
- (b) The Board may refuse the involvement of a person providing services as a management company. The Board's refusal may be based upon the following:
  - (1) The creation by the management contract of pecuniary interest in the license.
  - (2) Facts upon which the Board could refuse a person's involvement in the license which may include reasons specified in section 4-470(a.1) of the Liquor Code (47 P. S. § 4-470(a.1)) such as reputation, criminal history, and current or prior involvement in other licenses.
- (c) The licensee's use of a management company will not affect the licensee's responsibility for violations of the Liquor Code or this title.

[40 Pa. Code § 3.143].

Although management agreements may be acceptable, the Liquor Code prohibits the leasing or assignment of a license. [47 P.S. § 4-468(a)]. Moreover, the Liquor Code prohibits anyone other than the named licensee from having a pecuniary interest in the operation of a licensed business. [47 P.S. § 4-404]. Section 1.1 of the Board's Regulations defines "pecuniary interest" as:

An interest that sounds in the attributes of proprietorship. There is a rebuttable presumption of a pecuniary interest when a person receives

10% or more of the proceeds of the licensed business or when control is exercised by one or more of the following:

- (i) Employing a majority of the employees of the licensee.
- (ii) Independently making day-to-day decisions about the operation of the business.
- (iii) Having final authority to decide how the licensed business is conducted.

[40 Pa. Code § 1.1; see also Appeal of E-J Westside Inn Corp., 449 A.2d 93 (Pa. Cmwlth. 1982)].

*2. Does Mountain Concessions, Inc. pay their bartenders or does the management company?*

If the management agreement is in conformity with the aforementioned, either Licensee or the management company would be able to employ and to pay the salaries of the bartenders.

*3. Can Mountain Concessions, Inc. use a company that can supply bartenders? If so, does Mountain Concessions, Inc. pay the company which in turn pays its bartenders?*

Yes. Please refer to aforementioned responses.

*4. If an event is planned outside the scope of already approved locations, do we apply for an Off-Premises Catering Permit - PLCB-2043 ("OPCP"), a Special Occasion Permit - PLCB-12 ("SOP"), or an application for extension of retail license to cover additional premises - PLCB-49?*

Please be advised that the holder of a restaurant liquor license may obtain an off-premises catering permit ("OPCP") 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. [47 P.S. § 4-406(e)]. 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]. Please note, however, that the application for an OPCP must be filed by March 1<sup>st</sup> of the year for which it will be used; the Board has no discretion to accept an application that has been filed after this deadline. In addition, the OPCP has numerous restrictions and requirements that are delineated in section 406 of the Liquor Code. [47 P.S. § 4-406(f)].

Holding an event off of a licensed premises via an SOP would not be a viable option for Mountain Concessions, Inc. Only certain “eligible entities,” as defined in section 102 of the Liquor Code [47 P.S. § 1-102], may apply for and obtain an SOP, which authorizes the holder thereof to sell liquor and/or malt or brewed beverages to persons of legal drinking age for consumption on or off the licensed premises on any day for which the SOP is issued. [47 P.S. § 4-408.4(k)]. The purpose of an SOP is to provide the eligible entity with a means of raising funds for itself; it may be used in conjunction with activities and events involving other entities; however, no one other than the holder of the SOP may acquire a pecuniary interest therein. [47 P.S. § 4-408.4(m)].

If Mountain Concessions, Inc. wishes to extend its license to cover an additional area, it must submit an application for extension of premises with the Board. [40 Pa. Code § 7.21(b)(2)]. If the application is approved, it would enable the sale or service of alcohol on the newly licensed area. Please be aware that the additional area is subject to the Liquor Code and the Board’s Regulations. Specifically, Mountain Concessions, Inc. would be required to prevent the service of alcohol to minors or to visibly intoxicated persons, [47 P.S. § 4-493(1)], and prevent minors from frequenting the premises except under specific statutory exceptions. [47 P.S. § 4-493(14)].

It is important to note that, even without an extension of premises, it would still be possible for patrons to purchase up to 192 ounces of malt or brewed beverages in a single sale from the already licensed premises and thereafter take the malt or brewed beverages off the licensed premises to be consumed, provided there are no local ordinances prohibiting such activity. [47 P.S. § 4-407(a)]. It is advisable that you consult your local municipality to determine applicable restrictions. Patrons would not be permitted to carry wine or spirits from the already licensed premises for off-premises consumption.

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,



RODRIGO J. DIAZ  
EXECUTIVE DEPUTY CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement  
Jerry W. Waters, Director of Office of Regulatory Affairs  
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LCB Advisory Opinion No. 15-513