

June 3, 2016

Dale Edward Caya, Esquire  
Grim, Biehn & Thatcher  
**VIA E-MAIL**

**RE: Third Party Vendor Biergarten Operation**

Dear Mr. Caya:

ISSUE: This is in response to your letter sent via e-mail on April 28, 2016, wherein you advise that you represent Vereinigung Erzgebirge, Inc., a German-American club holding a catering club liquor license. You explain that your client has received a proposal from a third-party vendor to manage and operate a “biergarten” on the club property. Your letter provides certain provisions of the proposed agreement for this office to review, and you request an advisory opinion as to whether the terms are compliant with the Liquor Code and the Pennsylvania Liquor Control Board’s (“PLCB”) Regulations.

Records of the PLCB indicate that Vereinigung Erzgebirge holds Catering Club Liquor License No. CC-1300 (LID 3120) for its premises located at 130 Davisville Road, Warminster, Pennsylvania.

OPINION: The proposed agreement would not be permissible under the Liquor Code and the PLCB’s Regulations.

First, a licensee may not permit other persons to operate another business on the licensed premises, nor may a licensed premises have “an inside passage or communication to or with any business conducted by the licensee or other persons except as approved by the Board.” 40 Pa. Code §§ 3.52(a), (b). Further, a licensee may not conduct another business on the licensed premises without Board approval. 40 Pa. Code § 3.52(c).

Since the agreement references food and beer sales being conducted by the third-party vendor within the proposed biergarten, it is assumed that the biergarten would be located on the club’s licensed premises, which would be a violation of section 3.52(a).

Additionally, the provision regarding food and alcohol sales raises an issue under section 468 of the Liquor Code. Section 468 provides that licenses are not assignable. 47 P.S. § 4-468(a)(1). In other words, no one but the named licensee may sell alcoholic beverages under the authority given by a license.

Therefore, the third-party vendor, through its employees, would not be permitted to sell alcohol at the proposed biergarten under your client's license. Although licensed clubs, such as your client, may designate a concessionaire to sell food at the club premises and to collect and receive the profits, such concessionaires are prohibited from selling or even handling liquor or malt or brewed beverages. 40 Pa. Code § 5.82.

If the desired arrangement is for the third-party vendor's employees to fully operate the proposed biergarten, it may be permissible if done through a Board-approved management contract. 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 premises." 47 P.S. § 1-102. The PLCB's Regulations define "management contract" as an "agreement between a licensee and a management company to operate, manage or supervise all or part of the operation of the licensed premises." 40 Pa. Code § 3.1. Please further note the following information regarding management contracts:

- 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.

The Liquor Code also prohibits anyone other than the named licensee from having a pecuniary interest in a licensed business. 47 P.S. § 4-404. Section 1.1 of the PLCB'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.

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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).

Please note that only the Board has the authority to approve a management agreement, which means that you will ultimately need to submit any finalized agreement to the PLCB's Bureau of Licensing for review and submission to the Board. 40 Pa. Code § 3.143.

If you have any additional questions regarding the Liquor Code or the PLCB's Regulations, 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.

Sincerely,



RODRIGO J. DIAZ  
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. 16-206