

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Malt Beverages Distributors Association,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 513 C.D. 2008
	:	
Pennsylvania Liquor Control Board,	:	Argued: December 10, 2008
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge¹
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

**OPINION
BY JUDGE SIMPSON**

FILED: February 23, 2009

In this appeal from an order of the Pennsylvania Liquor Control Board (PLCB), Malt Beverage Distributors Association (MBDA) asks whether the PLCB erred in granting Wegmans Food Markets, Inc.'s (Wegmans) application for a restaurant liquor license at its store in Williamsport, Pennsylvania. Essentially, MBDA argues the real seller of beer here is Wegmans' supermarket, and the notion that Wegmans' Market Café restaurant is actually the seller is merely a legal fiction. Wegmans asserts the PLCB erred in granting MBDA standing to intervene in the proceedings. Upon review, we affirm.

¹ The decision in this case was reached before January 1, 2009, when Judge Friedman assumed the status of senior judge.

I. Background

In October 2006, Wegmans filed an application for the double transfer of Restaurant Liquor License No. R-13137 from Altar, Ltd. t/a Second Street Tavern, 830 Second Street, Williamsport, Pennsylvania, to itself, for the premises located at 201 William Street, Williamsport, Pennsylvania. MBDA, Linbur, Inc., and T & T Beverage, t/a Beverage Barn, filed a joint motion to intervene in the licensure proceedings. Wegmans filed an answer, requesting the PLCB deny the motion to intervene.

The PLCB's Bureau of Licensing (Bureau) informed Wegmans it would conduct a hearing to take evidence regarding several objections by the Bureau, including:

- 1) The [PLCB] shall take evidence to determine if it should permit an interior connection to the unlicensed grocery store in accordance with Section 3.52(b) of the [PLCB's] Regulations.
- 2) The [PLCB] shall take evidence to determine whether it should permit [Wegmans] to operate another business on the licensed premises (the storage and preparation of food items for the unlicensed grocery store as well as grocery item sales), in accordance with Section 3.52(c) of the [PLCB's] Regulations.
- 3) The [PLCB] shall take evidence to determine if [Wegmans] will allow minors to frequent its licensed premises, in violation of Section 493(14) of the Liquor Code.^[2]

* * * *

² Act of April 12, 1951, P.L. 90, as amended, 47 P.S. §4-493(14).

5) The [PLCB] shall take evidence and hear argument on the issue of whether the Commonwealth Court decision in Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, [918 A.2d 171 (Pa. Cmwlth.), appeal granted, 593 Pa. 413, 931 A.2d 626 (2007)], and/or Section 3.52 – 3.54 of its Regulations, precludes an interior connection between a supermarket and a restaurant, notwithstanding the lack of reference to such a limitation in the Regulation and its predecessors, Regulation 103 and Regulation R-37-27 and further notwithstanding the [PLCB's] historical policy of approving such connections when appropriate. [See] Freedman v. Pennsylvania Liquor Control Board, 20 Pa. D & C[.]2d 353 (CCP Montgomery 1954). [See also] Tacony Civic Association v. Pennsylvania Liquor Control Board, 668 A.2d 584 (Pa. Cmwlth. 1995).

6) The [PLCB] shall take evidence and hear argument on the issue of whether the Commonwealth Court decision in Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, [918 A.2d 171 (Pa. Cmwlth.), appeal granted, 593 Pa. 413, 931 A.2d 626 (2007)], and/or Section 3.52 – 3.54 of its Regulations, imposes a limitation on the size of the licensed business, notwithstanding the lack of reference to such a limitation in the Regulation and its predecessors, Regulation 103 and Regulation [R-]37-27 and further notwithstanding the [PLCB's] historical interpretation of the Regulations to allow an interior connection to other businesses such as department stores (Wanamaker's and Boscov's).

7) The [PLCB] shall take evidence to determine if [MBDA], [Linbur, Inc.] and [T & T Beverage Co., Inc.], would be directly aggrieved by the granting of this application, which would qualify them as intervenors in this matter. See In re Application of Family Style Restaurant, Inc., 503 Pa. 109, 468 A.2d 1088 (1983); Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 881 A.2d 37 (Pa. Cmwlth. 2005).

8) The [PLCB] shall take evidence to determine that the approval of this application will not adversely affect the health, welfare, peace and morals of the neighborhood

within a radius of 500 feet of the proposed licensed premises. ...

PLCB Op., Finding of Fact (F.F.) No. 2. A hearing ensued before a PLCB hearing examiner.

After hearing,³ the PLCB hearing examiner issued a recommended opinion in which he opined the PLCB should approve Wegmans' license transfer application. In addition, the hearing examiner opined MBDA would not be directly aggrieved if Wegmans obtained the requested license and, therefore, it should not be granted intervenor status.

The PLCB subsequently issued an order approving Wegmans' license application. The order indicated if an appeal was filed the PLCB would issue an opinion in support of its order. Wegmans filed three motions asking the PLCB to clarify and/or reconsider its order. Each motion focused on the standing of MBDA, Linbur, Inc., or T & T Beverage, t/a Beverage Barn to intervene in the proceedings. Ultimately, the PLCB clarified its prior order, holding MBDA had standing and expressly granting it intervenor status. The PLCB declined to grant Linbur, Inc., or T & T Beverage, t/a Beverage Barn intervenor status because no one appeared at the hearing on their behalf and, therefore, they failed to show how

³ Wegmans also filed license transfer applications for its Bethlehem, Wilkes-Barre, Dickson City/Scranton, State College and Easton locations. Within a six-week period, a PLCB hearing examiner conducted individual hearings for each of the various locations. At each hearing the parties presented testimony that was generally applicable to the issues surrounding Wegmans' applications. The parties proceeded before the PLCB hearing examiner by creating a single record applicable to all stores or any single store. However, the PLCB issued separate opinions for each individual location due to some site specific issues as well as specific geographic intervenors.

they would be directly aggrieved. MBDA filed a petition for review to this Court, and the PLCB issued an opinion in support of its order.⁴

II. PLCB's Opinion

A. PLCB's Findings

The PLCB's opinion in support of its order approving Wegmans' license application contained 422 findings, which are summarized below.

Andrew Stuffick, regional manager of the Bureau's investigations for the PLCB's central region, testified concerning his investigation of the application and the proposed interior connections. Stuffick explained the Williamsport location consists of a one-story brick building that contains a grocery store, three seating areas, three kitchens and four storage areas. He testified there is also a concrete patio area outside that is surrounded by a three-foot cast iron fence, for which Wegmans sought approval. Stuffick indicated the proposed licensed portion of the premises was in excess of 300-square feet, the minimum square footage required by PLCB regulations. Stuffick testified the seating areas in the proposed licensed area would accommodate over 130 customers. Stuffick testified Wegmans would separate its proposed licensed Market Café area from the remainder of the store with four-foot dividing walls. Stuffick testified beer would be served from a cooler in the proposed licensed area and there would be a cash

⁴ Additionally, MBDA and various distributors filed petitions for review from PLCB orders approving Wegmans' license transfer applications for its stores in Easton (514 C.D. 2008), Wilkes-Barre (515 C.D. 2008), State College (516 C.D. 2008), Bethlehem (517 C.D. 2008) and Dickson City/Scranton (518 C.D. 2008). Those matters were argued seriatim with this case. Like the PLCB, we issue separate opinions for each transfer application.

register within the proposed licensed area used for beer sales. He testified Wegmans would sell beer for on- or off-premises consumption. Stuffick testified takeout sales of beer are expected to be about 20-percent of total beer sales in the Market Café area. He also explained the proposed licensed premises would not be within 200 feet of any other licensees or within 300 feet of any restrictive institutions. Stuffick testified there is a direct ingress/egress to the proposed licensed area, and the licensed area would be accessible through the openings in the four-foot wall separating it from the grocery store.

The Bureau also presented evidence that the PLCB previously issued licenses to Boscov's, John Wanamaker's and Wawa, Inc., all of which had restaurants with interior connections to retail stores.

MBDA presented the testimony of Mary Lou Hogan, MBDA's chief counsel and executive secretary. Hogan explained that MBDA is a trade association for malt beverage distributors in Pennsylvania, which is comprised of 430 members. Hogan testified that MBDA's basic concern with regard to Wegmans' application is the economic impact on distributors if a supermarket the size of Wegmans is permitted to sell beer. She testified MBDA believes the difference between Wegmans and a typical restaurant licensee is that customers who patronize Wegmans are there to buy grocery items, which beer distributors cannot sell. She further explained that Wegmans' customers would be able to purchase beer in direct competition with distributors. Hogan testified MBDA is concerned that, because Wegmans sells a multitude of grocery items, the sale of beer at Wegmans could attract customers who might not otherwise be

contemplating a beer purchase. Hogan further testified Wegmans would attract customers for take-out beer sales and distributors could not compete with that because distributors are required to sell beer by the case, while restaurants can sell beer in six-packs. Hogan further testified that if Wegmans obtained a restaurant liquor license many of its sales could come at the expense of distributors and, as a result, a number of area distributors would go out of business. Hogan noted there are 12 beer distributors in Lycoming County. Hogan explained the sale of beer by Wegmans would have a direct and indirect negative impact on all distributors in the state. Specifically, she explained, the direct impact would be for distributors in the immediate area of Wegmans, while the indirect impact would be as a result of other supermarkets across the state obtaining licenses to sell beer.

Although MBDA's petition to intervene was filed jointly by Lindbur, Inc. and T & T Beverage Co., Inc., which are both beer distributors in the Williamsport area, no one appeared from or on behalf of either entity to testify how they would be directly aggrieved by the grant of Wegmans' application.

However, Jessica Wheeland, a co-owner of Home Service Beverage, a beer distributor located in Williamsport and a member of MBDA, testified in support of MBDA's petition to intervene. Wheeland testified that she is concerned that potential customers will buy beer when they are at Wegmans' store because of its convenience and more flexible hours. She testified her concern is based on her experience when other "six-pack shops" opened in the area, which caused a decrease in her profits.

In addition, Carl F. Schultz, also a member of MBDA, and the owner of Valley Beverage, which is approximately 12 miles from Wegmans' Williamsport store, testified in support of MBDA's petition to intervene. Schultz testified he believed his business would be at a competitive disadvantage if Wegmans receives approval to sell beer because Wegmans would be a "one-stop shop" as customers would purchase their beer at the same time they purchase their groceries. Based on his experience in the beer industry and past experience as a grocery store manager, Schultz testified he believed a new business automatically takes a percentage of business away from a certain area. While Schultz could not determine exactly how much business he would lose if Wegmans obtained its requested license, he testified he would lose some business.

Wegmans presented the testimony of David DeMascole, its Regional Beverage Director for Pennsylvania and the general manager of its distribution center in Schuylkill County. As Regional Beverage Manager, DeMascole is responsible for coordinating the opening and introduction of beer sales in the restaurants in Wegmans' stores. DeMascole explained Wegmans began opening restaurants in the 1990s as a way to distinguish itself from other supermarkets and grow its business in the restaurant field. DeMascole explained, compared to large supermarket chains, Wegmans is a small regional chain and it needed to develop a niche, which it did by opening its restaurants over the past 15 years. DeMascole testified the food offered at Wegmans' restaurants is comparable to that served at restaurants such as T.G.I. Friday's or Applebee's, but that Wegmans is at a competitive disadvantage with such restaurants because of its inability to serve a glass of beer with a meal. DeMascole explained that Wegmans would sell beer for

both on-site consumption and takeout, but it has not reached a conclusion as to the percentage of on-site consumption versus takeout sales. DeMascole further testified that on-premises consumption of beer would be limited to the licensed areas. DeMascole also testified, unlike its stores in other states, Wegmans does not anticipate impulse purchases of beer in its Pennsylvania stores because the beer would only be located in the restaurant area of the store, which is not an area that all customers frequent.

Wegmans also presented the testimony of Michael Ruby, the store manager of its Williamsport location who is familiar with the store layout and all operational aspects. Ruby testified Wegmans' Williamsport location, which opened around 1995, operates a restaurant under the same roof as the supermarket and that the restaurant opened at the same time as the supermarket. Ruby testified the licensed restaurant portion of Wegmans' Williamsport location would sell beer in bottles and cans individually or in six-packs. Ruby explained that customers would be able to select beer from coolers in the licensed restaurant area, and they would have to purchase the beer at the register within the licensed area. He testified that customers who purchased a six-pack from the licensed area could take the beer into the unlicensed grocery store and continue to shop for groceries. Ruby further explained that customers could purchase a single bottle or can of beer and consume it in the restaurant area. He testified there would be 30 to 40 people working in the licensed area and the area would be constantly supervised by staff and management. Ruby further testified there would be training for employees and guidelines in place for the service of beer and how it relates to minors.

Wegmans also presented the testimony of Thomas J. Shepstone, an urban planner, who performed a market study at Wegmans' request. Shepstone testified Wegmans is pursuing its business model of niche marketing, particularly with regard to its sale of prepared foods. Shepstone testified he did not believe there would be a negative impact on any beer distributors if Wegmans began selling beer in its restaurants. He explained that, as compared to other supermarkets, Wegmans is more aptly characterized as a "destination," i.e., a store that customers would travel further to reach than a typical grocery store. Shepstone opined other businesses, including beer distributors, near Wegmans actually benefit from their location because Wegmans draws customers to the area that would not otherwise be there. Shepstone also opined it is unlikely that Wegmans' sale of beer would generate many new customers for Wegmans; rather, the sale of beer would primarily serve existing customers. At Wegmans' request, Shepstone also examined the location of Wegmans' Williamsport store in relation to nearby beer distributors. Shepstone opined Wegmans and other local beer distributors are located in, and draw customers from, different neighborhoods resulting in different customer bases. As a result, he opined Wegmans would not detrimentally affect any other Lycoming County beer distributors.

Wegmans also presented the testimony of John Rowland Dunham, an economist, who performed an analysis of whether beer sales by Wegmans would have a significant negative impact on beer distributors. Dunham opined neither MBDA nor any individual distributors would be harmed as a result of Wegmans' beer sales and, in his opinion, they may actually benefit. Dunham testified, in his years of experience studying retail establishments, he found that similar retail

establishments often locate together to enhance all of their businesses. Dunham testified Wegmans is beneficial to nearby businesses based in part on the economic benefit of “clustering,” which occurs when retail establishments are located very close to one another. Dunham explained the benefit to other distributors of Wegmans being located near them is Wegmans attracts a large number of customers because it is more than a grocery store, but rather it is a “destination retailer.” Dunham further testified that sales of cases of beer and six-packs are two different businesses. He opined Wegmans would not adversely impact distributors, in part, because Wegmans would be limited to selling two six-packs per transaction while distributors sell in much greater quantity. Dunham also agreed with Shepstone’s testimony that Wegmans would attract few new customers through the sale of beer.⁵

In order to rebut the testimony of Wegmans’ experts that more competition helps all businesses, MBDA presented the testimony of Matthew Weinstein, an attorney specializing primarily in retail shopping center development, leasing and financing. He testified that contrary to the testimony of Wegmans’ experts, “real world” commercial tenants do not seek to “cluster” or “co-locate” around similar businesses. To that end, Weinstein testified regarding various use restrictions and restrictive covenants commonly placed in commercial leases that are used to deter direct competition between retail tenants. In addition, MBDA presented the testimony of Lee Goldstein, the owner of several strip malls

⁵ Wegmans also presented the testimony of its Regional Loss Prevention Manager, Carl Phillips, who testified concerning the safeguards and policies Wegmans would implement in connection with its proposed sale of beer.

and the operator of a real estate management company. Goldstein generally agreed with Weinstein's testimony regarding commercial leasing.

B. PLCB's Analysis

Based on its findings, the PLCB issued an analysis concerning the objections to Wegmans' license transfer application.

As to the issue of standing, the PLCB determined MBDA would be directly aggrieved by the approval of Wegmans' license transfer application, and, therefore, it was entitled to intervenor status. The PLCB relied on this Court's decision in Malt Beverage Distributors Ass'n v. Pennsylvania Liquor Control Board (Sheetz I), 881 A.2d 37 (Pa. Cmwlth. 2005), appeal denied, 586 Pa. 775, 895 A.2d 1264 (2006), where we determined MBDA had standing to intervene in proceedings in which the operator of a Sheetz convenience store sought an "eating place" malt beverage license in order to sell beer for takeout in connection with its "new Sheetz convenience restaurant." Id. at 38.

The PLCB also considered whether it should approve an interior connection between the licensed premises and the unlicensed grocery store. It noted that Section 3.52(b) of its regulations provides, "Licensed premises may not have an inside passage or communication to or with any business conducted by the licensee or other persons except as approved by the [PLCB]." 40 Pa. Code §3.52(b) (emphasis added). The PLCB noted it previously approved interior connections similar to the one at issue here at stores such as Boscov's, John Wanamaker's, and Wawa. The PLCB also determined that, based on evidence

regarding the layout of Wegmans' Market Café in relation to the unlicensed grocery store area, there was no reason not to approve the proposed interior connection. It noted the proposed licensed area would be clearly separated from the unlicensed portions of the premises by four-foot high barriers. The PLCB further determined Wegmans' proposal fully complied with the requirements set forth in Sections 3.52-3.54 of the PLCB's regulations, 40 Pa. Code §§3.52-3.54. Also, it determined this Court's decision in Malt Beverage Distributors Ass'n v. Pennsylvania Liquor Control Board (Sheetz II), 918 A.2d 171 (Pa. Cmwlth.) (*en banc*), appeal granted, 593 Pa. 414, 931 A.2d 626 (2007), did not preclude the proposed interior connection between the licensed premises and the unlicensed grocery store. Finally, the PLCB determined that approval of Wegmans' application would not adversely affect the health, welfare, peace and morals of the neighborhood within a radius of 500 feet of the proposed licensed premises.

Based on these findings and determinations, the PLCB approved the application for double transfer of Restaurant Liquor License No. R-13137.⁶ This matter is now before the Court for disposition.⁷

⁶ Shortly after MBDA filed its petition for review with this Court, MBDA filed a motion asking this Court to stay beer sales by Wegmans. Ultimately, a single judge of this Court quashed MBDA's motion.

⁷ Our review of a decision of the PLCB as an administrative agency is limited to determining whether there was a constitutional violation or an error of law, whether the practices and procedures of the PLCB were followed and whether necessary findings of fact were supported by substantial evidence in the record. Sheetz I.

III. Standing

As an initial matter, Wegmans argues the PLCB erred in granting MBDA standing as an intervenor in the licensure proceedings before the PLCB.

In the companion case of Malt Beverage Distributors Ass'n & Tanczos Beverages, Inc. v. Pennsylvania Liquor Control Board (Bethlehem Wegmans), ___ A.2d ___ (Pa. Cmwlth, No. 517 C.D. 2008, filed February 23, 2009), we rejected Wegmans' argument that the PLCB erred in granting MBDA and Tanczos Beverages, Inc. (an MBDA member distributor) standing to intervene in these licensure proceedings. In short, we held the PLCB properly determined this Court's prior decision in Sheetz I controlled this issue and, therefore, the PLCB properly determined MBDA and Tanczos had standing to intervene in the licensure proceedings for Wegmans' Bethlehem store. Consistent with our holding in Bethlehem Wegmans, we discern no error in the PLCB's decision to grant MBDA standing to intervene in the licensure proceedings in this matter.

IV. Merits

As to the merits, MBDA advances several arguments in support of its general contention that the PLCB erred in approving Wegmans' application for the double transfer of Restaurant Liquor License No. R-13137.

In Bethlehem Wegmans, we rejected MBDA's assertions that the PLCB erred in granting Wegmans' application for the transfer of a restaurant liquor license to its Bethlehem location. First, we pointed out that MBDA did not dispute that Wegmans' Market Café satisfied the statutory "restaurant" definition

set forth in Section 102 of the Liquor Code, 47 P.S. §1-102. Next, we stated the PLCB did not err in its interpretation of the PLCB regulations governing interior connections between licensed premises and other businesses. See 40 Pa. Code §§3.52-3.54. In addition, we determined the PLCB properly applied these regulations to the facts presented concerning Wegmans' proposed operation of its licensed restaurant and the unlicensed grocery store. Finally, we determined the authority cited by MBDA, Sheetz II and Pennsylvania Liquor Control Board v. Ripley, 529 A.2d 39 (Pa. Cmwlth. 1987), did not compel the conclusion that the PLCB erred in granting Wegmans' application for a restaurant liquor license for its Bethlehem location with the proposed interior connection between the licensed restaurant and the unlicensed grocery store. Consequently, we held the PLCB properly approved Wegmans' license transfer application.

In accord with our decision in Bethlehem Wegmans, which is controlling here, we affirm the order of the PLCB granting Wegmans' request for the double transfer of Restaurant Liquor License R-13137 for its Williamsport location.

ROBERT SIMPSON, Judge

Judge McGinley did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Malt Beverages Distributors	:	
Association,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 513 C.D. 2008
	:	
	:	
Pennsylvania Liquor Control	:	
Board,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of February, 2009, the order of the Pennsylvania Liquor Control Board is **AFFIRMED**.

ROBERT SIMPSON, Judge