IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Malt Beverage Distributors Association, Bonanza Beverage, Inc. and Kern Brothers, Inc., Petitioners	:	
	:	No. 900 C.D. 2009
v.	:	Submitted: December 8, 2009
Pennsylvania Liquor Control Board, Respondent	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: January 7, 2010**

In this appeal from an order of the Pennsylvania Liquor Control Board (PLCB), Malt Beverage Distributors Association (MBDA) and two of its members, Bonanza Beverage, Inc. (Bonanza), and Kern Brothers, Inc. (Kern) (collectively, Petitioners), ask whether the PLCB erred in granting Club Partners Ventures, Inc.'s (Club Partners) application for the inter-municipal double transfer of an eating place malt beverage license for a proposed licensed premises within its grocery store in Dallas Township, Pennsylvania.

This case represents the latest in a series of disputes between MBDA, various individual beer distributors and the PLCB involving the PLCB's grant of restaurant or eating place malt beverage licenses to permit the sale of beer by entities that operate grocery stores and attached restaurants. Earlier this year, in a series of en banc decisions this Court upheld the PLCB's grant of restaurant liquor

licenses to several Wegmans stores in Pennsylvania (collectively, "Wegmans cases").[1]

In this appeal,[2] Petitioners argue the PLCB improperly granted an eating place liquor license to "Thomas' Beer Town," a portion of a supermarket focused on the sale of beer in six-packs for takeout, when, in so doing, it in essence authorized the sale of beer at a venue – a supermarket – not permitted to sell beer in Pennsylvania. Petitioners further argue the PLCB, through the expansive use of its "interior connection" and "other business" regulations, improperly circumvented the statutory rules on venues at which beer may be sold and thereby engineered a "momentous transformation" without legislative authorization. MBDA also maintains the PLCB abused its discretion when it identified no basis for its decision to permit an interconnection other than those required in the event

[1] See Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (Dickson City Wegmans), 966 A.2d 1188 (Pa. Cmwlth. 2009) (en banc); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (State College Wegmans), 966 A.2d 1180 (Pa. Cmwlth.) (en banc), appeal granted, ___ Pa. ___, 981 A.2d 1286 (2009); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (Wilkes-Barre Wegmans), 966 A.2d 1172 (Pa. Cmwlth.) (en banc), appeal granted, ___ Pa. ___, 981 A.2d 1286 (2009); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (Easton Wegmans), 966 A.2d 1165 (Pa. Cmwlth.) (en banc), appeal granted, ___ Pa. ___, 981 A.2d 1286 (2009); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (Williamsport Wegmans), 965 A.2d 1269 (Pa. Cmwlth.) (en banc), appeal granted, ___ Pa. ___, 981 A.2d 1286 (2009); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd. (Bethlehem Wegmans), 965 A.2d 1254 (Pa. Cmwlth.) (en banc), appeal granted, ___ Pa. ___, 981 A.2d 1286 (2009) (collectively, "Wegmans" cases).

[2] In September 2009, our Supreme Court granted MBDA's petitions for allowance of appeal in five of the "Wegmans" cases. As a result, this Court stayed other cases involving the PLCB's grant of restaurant or eating place liquor licenses in similar cases pending the Supreme Court's resolution of the "Wegmans" cases. However, none of the parties requested a stay here, and this Court declined to stay this case on its own motion.

it authorizes an interconnection. Upon review, we conclude our decisions in the "Wegmans cases" are controlling; therefore, we affirm the PLCB's grant of the eating place malt beverage license to Club Partners.

I. Background

In October 2008, Club Partners filed an application for the inter-municipal double transfer of Eating Place Malt Beverage License No. E-3230, from Rodano's Pizza, Inc. t/a Rodano's, 155 North Main Street, Wilkes-Barre, to itself, for the premises located at 75 Country Club Shopping Center, Dallas Township. In response, Petitioners filed a timely joint petition to intervene.

The PLCB's Bureau of Licensing informed Club Partners it would conduct a hearing to take evidence on the following issues:

> 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.
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> 2) The [PLCB] shall take evidence to determine if [Club Partners] will allow minors to frequent its licensed premises, in violation of Section 493(14) of the Liquor Code.[3]
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> 3) 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. 2007) (Sheetz II), aff'd, ___ Pa. ___, 974 A.2d 1144 (2009) (Sheetz III)], and/or Section 3.52 – 3.54 of its Regulations[,] [40 Pa. Code §3.52-2.54], precludes an

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

> 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).
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> 4) The [PLCB] shall take evidence and hear argument on the issue of whether the Commonwealth Court decision in [Sheetz II], 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).
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> 5) The [PLCB] shall take evidence to determine if [Petitioners] would be directly aggrieved by the granting of this application, which would qualify them as intervenors in this matter. See [In re Family Style Restaurant, Inc.,] 503 Pa. 109, 468 A.2d 1088 (1983); [Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd. (Sheetz I), 881 A.2d 37 (Pa. Cmwlth. 2005)].
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> 6) 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., 6/19/09, Finding of Fact (F.F.) No. 2. A hearing ensued before a PLCB hearing examiner, at which a PLCB investigator and a representative of Club Partners testified. The parties also presented related exhibits.

Additionally, in lieu of live testimony and exhibits on the issue of intervenors' standing, the parties entered into a number of stipulations, entitled "Stipulations as to Evidence on Standing of Intervenors and Related Evidentiary Issues." F.F. No. 57. That Stipulation allowed the parties to incorporate into this record designated portions of the hearing record developed in the "Wegmans" cases.

After hearing, the PLCB hearing examiner issued a recommended opinion in which he opined the PLCB should approve Club Partners' license transfer application. In addition, the hearing examiner opined Petitioners should be granted intervenor status.

The PLCB subsequently issued an order approving Club Partners' license application and granting Petitioners intervenor status. Petitioners filed a petition for review to this Court, and Club Partners timely intervened. Club Partners filed a cross-petition for review challenging the PLCB's determination granting intervention. This Court, on it own motion, dismissed the cross-petition, but indicated Club Partners could raise the issue of standing in its brief. The PLCB subsequently issued an opinion in support of its order.

II. PLCB's Opinion
A. PLCB's Findings

The PLCB's opinion in support of its order approving Club Partners' license application contained 207 findings, which are summarized below.

In February 2009, the Dallas Township Board of Supervisors adopted a resolution approving the transfer of Eating Place Malt Beverage License No. E-3230 into the Township.

Edward Caffrey, a PLCB licensing analyst who investigated Club Partners' inter-municipal license transfer application, testified concerning his investigation of the application and the proposed interior connections. Caffrey testified the proposed licensed premises is located in an open-air plaza, shopping center in a commercial area. He testified the neighborhood within 500 feet of the proposed licensed premises is approximately 80-percent commercial and 20-percent undeveloped land. Caffrey testified the proposed licensed premises is a section of a grocery store known as Thomas' Market. Caffrey explained there are several areas included in the proposed licensed area, one of which is a 30-foot by 28-foot area in which patrons would be able to enter from the grocery store to buy prepared meals and/or alcoholic beverages. He testified there is also another sales service area and several storage cooler areas and counters at which patrons can sit to consume their food or beverages. Caffrey testified food would be prepared on the proposed licensed premises. He explained the proposed licensed premises could be accessed through the unlicensed grocery store and the connection between the proposed licensed premises and the unlicensed grocery store is approximately four feet wide. Caffrey also noted there is an entrance from the outside and an emergency exit in the proposed licensed area. Caffrey explained the proposed licensed premises would contain seating for 30 patrons. He also explained that plans submitted by Club Partners showed a 24-foot beer case, a 16-foot beer case, and a 4-foot food case. Caffrey testified there is a nine-foot counter for the sale of

cigarettes, bagged snacks and similar items. Caffrey testified there will be a separate cash register in the proposed licensed area.

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.

Club Partners presented the testimony of Thomas Bareski, one of its two partners. Bareski explained the proposed licensed premises is located in the southwest corner of a grocery store that is situated in a strip mall. The grocery store, which is new, is approximately 43,000 square feet in size and the proposed licensed premises is approximately 1,000-1,100 square feet in size. Bareski explained the proposed licensed premises would have a nine-foot long counter service area, which would contain a cash register, a four-foot multi-deck food case, a beer storage case, four tables with chairs, and additional countertop seating around the corner from the beer storage. Bareski noted the food case would contain some freezer items, salads, hoagies, pizza, chicken wings, and other items that would change on a daily/weekly basis. He also stated the proposed licensed premises would sell chili or seasonal soups, and two microwaves would be available for the preparation of frozen foods. Bareski testified he anticipates most customers would prefer self-service, but there would also be a small cooking area available behind one of the counters at which food could be prepared for customers. Bareski testified beer would be sold in single containers or in six packs and is intended for consumption both on and off the licensed premises. Bareski testified both the grocery store and the proposed licensed premises would be open

from 7:00 a.m. to 9:00 p.m. He also testified a four-foot wall separates the grocery store from the proposed licensed premises, and there is an overhang that comes down from the ceiling. Bareski testified the interior connection between the grocery store and the proposed licensed premises would be four-feet wide and would be manned by personnel. He explained Club Partners intends to require its employees receive Responsible Alcohol Management Program (RAMP) training. He testified Club Partners intends to require identification from every individual that attempts to purchase alcohol and persons without identification will not be served. Bareski also explained minors would not be permitted to enter the proposed licensed premises unless they are accompanied by an adult or legal guardian. He testified employees who work in the proposed licensed premises would be 21 years of age or older. Bareski noted Club Partners has four other grocery stores in the vicinity of the store at issue. He further explained Club Partners would refer to the proposed licensed area as "Thomas' Beer Town" for marketing purposes. Bareski testified construction of the grocery store began in the fall of 2008 and the plan has always been to have an eating place on the premises.

The parties' stipulation stated that if called to testify Clifford F. Shields, the president of Bonanza, which holds a distributor license, would testify as follows. Shields has owned Bonanza for 21 years. Beer sales comprise approximately 90-percent of Bonanza's revenue, with the remaining revenue coming from the sale of soda, chips and beef jerky. Bonanza is located approximately two miles from the proposed licensed premises. Shields would further testify, based on his 21 years' experience in the beer business, he believes

Bonanza would lose sales to Club Partners because of the convenience of shopping in a supermarket setting such as Thomas' Market and adding beer to the products purchased there. Shields would further testify to his belief that the vast array of grocery products offered by Thomas' Market, which Bonanza is unable to sell, would give Thomas' Market an unfair advantage in the sale of beer. Shields would also testify to his belief that the sale of beer in the configuration proposed by Club Partners is a major change to the beer distribution system.

The parties' stipulation also stated that if called to testify Thomas P. Farina, the president of Kern, which also holds a distributor license, would testify as follows. Farina has owned Kern since 1998. Kern has been in business for approximately 75 years, the business is approximately 2,500 square feet in size and it is located in the Dallas Shopping Center. Beer sales comprise about 90-percent of Kern's revenue, with the remainder coming from the sale of snacks, soda and cigarettes. Kern is located approximately 1.16 miles from the proposed licensed premises and even closer to a Weis Market, which holds an "R" license. Farina would further testify that Kern sells beer to approximately 60 taverns and delicatessens in addition to its retail business. Based on his experience in the beer business, Farina would testify to his belief that some of his retail customers, while shopping at Thomas' Market, would purchase beer they would otherwise purchase from Kern. Further, Farina is concerned Thomas' Market would take business from several of Kern's wholesale accounts, a number of which are located near Thomas' Market, including one in the same shopping center as Thomas' Market.

In 2008 and 2009, John Rowland Dunham and Thomas Shepstone testified on behalf of Wegmans Food Markets, Inc., in its applications for transfers of restaurant liquor licenses involving locations in Bethlehem, Williamsport, Wilkes-Barre, Dickson City/Scranton, State College and Easton. MBDA and other individual intervenors, represented by counsel, participated in those proceedings and cross-examined Dunham and Shepstone. A summary of the testimony of Dunham and Shepstone follows.

Dunham, an economist and expert in the field of economic impact analysis, performed an analysis of whether beer sales by Wegmans would have a significant negative impact on beer distributors in Luzerne County. In summary, Dunham opined neither MBDA nor any individual distributors would be harmed as a result of Wegmans' beer sales in its various locations 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 further testified sales of cases of beer and six-packs are two different businesses that cater to different customer bases. 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 testified Wegmans would attract few new customers through the sale of beer. Dunham further opined, based on the testimony of MBDA's witnesses and his own research, he has seen nothing to indicate if Wegmans obtained liquor licenses for

its sought after locations that it would detrimentally affect any beer distributors. If called to testify here, Dunham would testify there would be essentially no negative effect on beer distributors in Luzerne County if Thomas' Market were to sell beer for takeout for the proposed licensed premises. Dunham would further testify Thomas' sale of beer for takeout at its proposed location may actually expand the specialty and micro-beer market for beer distributors in the county because customers would try a smaller amount of a particular beer at Thomas' premises, and, if they like it, would buy a larger package at a lower price at a distributor.

Shepstone, an expert in economic development, economic impact and market research, previously performed a market study at Wegmans' request. In summary, Shepstone testified he did not believe there would be a negative impact on any beer distributors if Wegmans began selling beer in its restaurants. 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 Wegmans' sale of beer would generate many new customers for Wegmans; rather, the sale of beer would primarily serve existing customers. If called to testify here, Shepstone would testify beer distributors in Luzerne County would not be injured in any way if Thomas' Market were to sell beer for takeout from the proposed licensed premises. Shepstone would further testify he believes, given such information as traffic patterns and other commercial development in the area, other businesses, including beer distributors around Thomas' Market would benefit because Thomas' Market would draw people to the area.

In addition, the parties agreed that if called to testify on the issue of intervenors' standing, Mary Lou Hogan, MBDA's Executive Director, would present evidence as to the identity and locations of MBDA members in Luzerne County (per an attached exhibit that identified MBDA's members), and in accordance with her testimony, including cross-examination, at the hearings involving Wegmans' Williamsport and Erie locations. By way of brief summary, at those hearings Hogan testified MBDA is a trade association for malt beverage distributors in Pennsylvania, comprised of 430 members. 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, but at the same time 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 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 explained the sale of beer by Wegmans would have a direct and indirect 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.

B. PLCB's Analysis

Based on its findings, the PLCB authored an analysis concerning the objections to Club Partners' license transfer application.

As to the issue of standing, the PLCB determined Petitioners would be directly aggrieved by the approval of Club Partners' license transfer application, and, therefore, they were entitled to intervenor status. In so determining, the PLCB relied on our decisions in the "Wegmans cases," in which we held MBDA and its individual members had standing to intervene in proceedings in which Wegmans sought restaurant liquor licenses for its Market Café restaurants located in its grocery stores.

The PLCB also considered whether it should approve an interior connection between the proposed licensed premises and the unlicensed grocery store. It noted 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, based on evidence regarding the layout of Club Partners' proposed licensed area 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 walls, plus an overhang. It noted the entrance to the proposed licensed area would be possible from an exterior doorway or a four-foot interior passageway in the wall separating the licensed and unlicensed areas. The PLCB noted all beer purchases would be restricted to the licensed portion of the premises, at a dedicated cash register. It stated the licensed portion of the premises will have the same hours as the rest of the store and it will be manned by employees at all times. Given this evidence, the PLCB stated, it perceived no reason not to approve the interior connection between the proposed licensed premises and the unlicensed grocery store.

The PLCB further determined Club Partners' 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 that decisions of this Court in Sheetz II and the Supreme Court in Sheetz III, did not preclude the proposed interior connection between the licensed premises and the unlicensed grocery store; rather, the issue discussed in those cases centered on an interpretation of the "retail dispenser" definition contained in the Liquor Code.

The PLCB also determined approval of Club Partners' 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.

In addition, the PLCB determined neither its regulations nor case law from this Court or the Supreme Court imposed a limitation on the size of the

unlicensed portion of a business as compared to the licensed portion of the business. The PLCB noted the only "size" requirement in the Liquor Code states that restaurant liquor licensees must have an area within a building of not less than 400 square feet, equipped with tables and chairs, including bar seats, accommodating at least 30 persons. The PLCB stated Club Partners' proposal easily exceeded these square footage and seating requirements.

As a final point, the PLCB stated this case was substantially similar to the "Wegmans cases" in which this Court held the PLCB did not abuse its discretion in granting Wegmans' applications for restaurant liquor licenses for several of its stores that proposed to sell beer for takeout and on-premises consumption in the Market Café restaurant areas of its supermarkets. Because this case was substantially similar to the "Wegmans cases," the PLCB stated, its decision here conformed to existing case law.

Based on these findings and determinations, the PLCB approved the application for double transfer of Eating Place Malt Beverage License No. E-3230. This matter is now before the Court for disposition.

III. Discussion

A. Issues

On appeal,[4] Petitioners assert that momentous transformations of regulatory schemes require legislative action. See Sheetz III; Sheetz II. They

[4] 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

(Footnote continued on next page…)

argue that notion is inherent in the principle that elected and accountable officials, not administrative agencies, make the basic decisions.

Petitioners contend the issue in Sheetz III, which the Supreme Court found to be of that character, is far less transformative than what is at issue here (and in the 'Wegmans cases" and the many subsequently issued and applied-for licenses). They maintain the licensed premises here, which is known as Thomas' Beer Town, is a slightly smaller than normal beer distributor disguised as an eating place and located within a supermarket. Petitioners argue the Supreme Court's intervening decision in Sheetz III gives this Court the opportunity to take a fresh look at the issue, unconstrained by the precedent of Wegmans.

Petitioners further assert the PLCB misused its discretion here. They contend the PLCB articulated no acceptable basis for exercising its discretion to allow an interconnection between Thomas' Beer Town and Thomas' Food Town. As in Wegmans, Petitioners argue, the PLCB's stated basis includes only actions that are required in the event the PLCB approved the interconnection; they maintain this Court in Wegmans misapprehended that important fact. Petitioners maintain courts should hesitate to affirm an administrative agency's exercise of discretion where, as here, no articulated principles guide its exercise; when the exercise of discretion is seriously at odds with how the agency has, until quite

(continued…)

and procedures of the PLCB were followed and whether necessary findings of fact were supported by substantial evidence in the record. Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 918 A.2d 171 (Pa. Cmwlth. 2007) (Sheetz II), aff'd, ___ Pa. ___, 974 A.2d 1144 (2009) (Sheetz III).

recently, interpreted the rule; and, when the agency decision omits discussion of pertinent facts. Petitioners contend every exercise of an agency's discretionary authority must be consistent with the fundamental principles underlying the governing statute. They maintain action taken without articulated reasons and without "fettering" criteria, action that is taken whenever and however an agency wishes, is the paradigm of "capricious action."

For these reasons, Petitioners argue this Court should reverse and vacate the PLCB's grant of a license to Club Partners for its operation of Thomas' Beer Town within Thomas' Market.

The PLCB responds there is no dispute Club Partners' proposed licensed premises satisfies all statutory and regulatory requirements to hold an "E" license. Further, it asserts, this Court acknowledged the PLCB may approve an interior connection between a retail licensee and another business operated by that licensee. The PLCB argues for half a century, it has in fact approved interior connections between retail dispenser licensees and supermarkets, grocery stores, bakeries, delis and other businesses. Thus, it maintains, this Court affirmed the PLCB's grant of restaurant licenses in the "Wegmans cases" – cases involving the very same issues that are at issue here.

Further, the PLCB asserts the Supreme Court's decision in Sheetz III does not alter or otherwise undermine the validity of this Court's holdings in the "Wegmans cases" since the issue in Sheetz III was merely whether the applicant met the Liquor Code definition of "retail dispenser" due to its desire to sell beer

only for off-premises consumption. The PLCB argues such is not the issue in this case because Club Partners seeks to sell beer for both on-premises and off-premises consumption. Thus, the PLCB maintains, its decision should be affirmed.

Club Partners argue this case is governed by this Court's decision in Bethlehem Wegmans (and the Wegmans companion cases) They asserts the only difference here is the name of the grocery store. In Bethlehem Wegmans, Club Partners contends, Petitioners presented the exact same arguments they advance here.

Club Partners maintain Petitioners argue that the PLCB abused its discretion. It asserts, however, this Court soundly and conclusively rejected that argument in Bethlehem Wegmans in a well-reasoned, unanimous en banc opinion. Club Partners contend MBDA is attempting to have the Supreme Court review and change that decision, taking the extraordinary step of filing a King's Bench motion as if this were a matter of extreme constitutional or health and welfare importance. Club Partners argue the Supreme Court recognized the motion for what it was—a "Hail Mary" attempt to avoid the normal appellate process and to exercise psychological influence on the Supreme Court to grant its petitions for allowance of appeal in the "Wegmans cases."

Club Partners further assert Petitioners apparently believe they should have a new day in court. However, MBDA ignores the PLCB's expertise and beseeches the courts to assume the role of the PLCB. Club Partners argue that is not a workable system. Club Partners maintain this Court is bound by its opinion

in Bethlehem Wegmans, and MBDA has not advanced any new or legitimate argument to distinguish the "Wegmans cases." Thus, Club Partners assert that this Court should affirm the PLCB's grant of the license for the operation of an eating place interconnected to the Thomas' Market.

In addition, Club Partners challenge Petitioners standing. Club Partners contend Petitioners have not established the requirements to obtain intervenor status because they have not established any harm. Club Partners also argue an automatic grant of intervenor status advances no legitimate purpose and simply adds to the time and cost of obtaining a restaurant liquor license. They also maintain Petitioners have no special status to circumvent long-standing Pennsylvania precedent on standing, and it is appropriate for this Court to deny intervenor status where harm is based solely on speculation and no evidence or expert opinion.

In sum, Club Partners assert that MBDA and its members had their day in court, made their arguments and did not prevail. They argue there is no longer any legal basis to allow them to otherwise obstruct and delay the issuance of "R" and "E" licenses to proper applicants.

B. Analysis

1. Standing

We first consider whether the PLCB properly determined Petitioners had standing to intervene in this mater before the PLCB. In determining Petitioners had standing to intervene here, the PLCB relied on this Court's

decisions in Sheetz I as well the "Wegmans cases." In Bethlehem Wegmans, this Court held the PLCB properly determined MBDA and one of its member distributors, Tanczos Beverages, Inc. (Tanczos), had standing to intervene in the proceedings related to Wegmans' application for a restaurant liquor license at its Bethlehem store. We explained:

> Here, in determining MBDA and Tanczos had standing to intervene in this matter, the PLCB determined our holding in Sheetz I was controlling. Upon review, we discern no error in PLCB's determination that MBDA and Tanczos had standing to intervene in this matter before the PLCB based on our decision in Sheetz I.
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> In Sheetz I, Ohio Springs, Inc., an entity related to Sheetz, Inc., applied for the transfer of an eating place malt beverage license from a bar and grill to premises where Sheetz operated a restaurant, convenience store and gas station. MBDA filed a petition to intervene in the licensure proceedings before the PLCB. In support of its petition, MBDA presented the testimony of [Mary Lou Hogan, MBDA's Executive Secretary], and David Shipula, President of MBDA and the owner of a distributorship, both of whom testified the takeout sale of beer by Sheetz would financially harm MBDA's members. Hogan and Shipula explained that convenience stores that sell beer would have an unfair competitive advantage over distributors and that distributors would lose sales to impulse buyers at Sheetz. Ultimately, the PLCB denied MBDA's petition to intervene. On appeal by MBDA, however, this Court reversed, explaining:
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> > The Court is persuaded that the [PLCB's] denial of MBDA's petition in the present case must be classified as an abuse of discretion and an error of law. First, even under the narrowest interpretation of association standing principles, MBDA presented evidence in the form of the testimony of Hogan and Shipula that retail sales of

beer by this Sheetz store will be damaging to any nearby D distributorship because the Sheetz will offer many items that the distributor cannot offer, including food for consumption on the premises, gasoline and convenience store items. If beer for takeout is available as well, it will likely be purchased by customers who went there originally for some other purpose, thereby taking sales from distributors. Hogan testified that the results would likely be catastrophic for a nearby D distributor and that there was such a member distributor [nearby]. An association need only allege that one member is suffering immediate or threatened injury. [North-Central Pa. Trial Lawyers Ass'n v. Weaver, 827 A.2d 550 (Pa. Cmwlth. 2003).]

More generally, however, the Court also agrees that the [PLCB] should have exercised its discretion to grant standing to MBDA because of the new and very different nature of the application. As MBDA points out, even in [Application of El Rancho Grande, Inc., 496 Pa. 496, 508, 437 A.2d 1150, 1156 (1981)], the Supreme Court referred to a statement of the United States Supreme Court in Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), that where statutes are concerned "the trend is toward enlargement of the class of people who may protest administrative action." In [MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Commission, 827 A.2d 580 (Pa. Cmwlth. 2003)], the applicable regulation permitted consideration of the best interests of horse racing generally, and the Horse Racing Commission concluded there that granting the application was in the best interest of racing. The Court stated that MEC had standing akin to that of the "local community" in [Cashdollar v. State Horse Racing Commission, 600 A.2d 646 (Pa. Cmwlth. 1991)], which had standing to appeal where the statute required consideration of the public interest and the Court held that when an

> agency was directed in its enabling statute to consider the effects of its decision on a particular class of individuals, then they might have standing to challenge a decision on the ground that the agency did not fulfill its statutory duty.
>
> With 400 beer distributor members, MBDA certainly is integrally involved in the regulated distribution of beer and malt beverages generally. The Liquor Code created the D Distributor Class and to some extent protects that class. A statewide trade association, such as MBDA, is likely much better suited than any individual distributor to represent the interests of the class when a proposal is made that has the potential to alter dramatically the current balance under applicable statutory provisions. …

Sheetz I, 881 A.2d at 42-43 (footnotes omitted).

Here, as in Sheetz I, MBDA presented evidence in the form of testimony from Hogan and Tanczos that the retail sale of beer by Wegmans would financially harm nearby beer distributors. Hogan explained, unlike a typical restaurant licensee, Wegmans offers a large variety of grocery items, which beer distributors cannot offer. As a result, she explained, Wegmans would attract customers who might not otherwise be contemplating a takeout beer purchase, thereby drawing customers away from nearby distributors. Hogan testified she believed a number of beer distributors in the area of Wegmans would go out of business if Wegmans was granted a restaurant liquor license. Additionally, Mark Tanczos, who owns a distributorship about a mile away from Wegmans' Bethlehem location, testified his business would suffer financially if Wegmans is permitted to sell beer for takeout. He explained that Wegmans' ability to sell beer for takeout would draw customers away from his distributorship. Tanczos further testified the competition from Wegmans would be unfair because, while Wegmans can profit from thousands of items, more than 80 percent of his business is from beer sales alone. "An association need only allege that one member is

> suffering immediate or threatened injury." Sheetz I, 881 A.2d at 42.
>
> In short, we believe the above analysis in Sheetz I applies with equal force here. As a result, we discern no error in the PLCB's determination that MBDA and [one of its individual members] had standing to intervene in this matter based on Sheetz I.

Bethlehem Wegmans, 965 A.2d at 1262-63 (footnote omitted).

Our decisions in Sheetz I and Bethlehem Wegmans (as well as the Wegmans companion cases) are controlling here. In lieu of live testimony, the parties here entered into a "Stipulation as to Evidence on Standing of Intervenors and Related Evidentiary Issues," Reproduced Record (R.R.) at 23a-26a, in which they agreed that representatives of Bonanza and Kern would present testimony similar to that presented by the individual distributors in the Sheetz I and Wegmans cases. In addition, the parties agreed that if called to testify Hogan would present testimony as to the identity and locations of MBDA members in Luzerne County and in accordance with her testimony at the hearings involving Wegmans' locations in Williamsport and Erie. R.R. at 23a-26a. This evidence was sufficient for the PLCB to conclude Petitioners had standing to intervene here based on Sheetz I and the "Wegmans cases."

To the extent Club Partners rely on our decisions in Capital BlueCross v. Pennsylvania Insurance Department, 937 A.2d 552 (Pa. Cmwlth. 2007) (en banc), appeal denied, 600 Pa. 106, 963 A.2d 906 (2009), and Pennsylvania Bankers Ass'n v. Pennsylvania Department of Banking & Trumark Financial Credit Union, 893 A.2d 864 (Pa. Cmwlth. 2006) (en banc), rev'd, 598 Pa. 313, 956

A.2d 956 (2008), in support of their argument that Petitioners lacked standing to intervene here, we reject that argument. Indeed, in Bethlehem Wegmans we rejected a similar argument, explaining:

> Wegmans asserts a pair of recent decisions by this Court compels the conclusion that the PLCB erred in determining MBDA and Tanczos had standing to intervene here. See [Capital BlueCross; Pa. Bankers Ass'n]. For the reasons set forth below, we reject Wegmans' reliance on Capital BlueCross and Pennsylvania Bankers Ass'n.
>
> Wegmans first relies on an excerpt from Capital BlueCross in which this Court stated: "[H]arm will not be presumed. Absent an independent statutory basis for standing, a complaining party must establish a direct interest in an agency action by presenting evidence of causation of harm to its financial interest by the agency action." Id. at 591. Wegmans argues that although neither MBDA nor Tanczos presented evidence of causation of harm to their financial interests, the PLCB granted standing. It asserts this decision was erroneous based on the above excerpt from this Court's decision in Capital BlueCross.
>
> Contrary to Wegmans' assertions, and as explained more fully above, here MBDA and Tanczos presented evidence of threatened financial harm if Wegmans obtained the requested liquor license and commenced takeout sales of beer. Further, unlike in the case presently before us, in Capital BlueCross, the litigants denied intervenor status did not participate in the agency proceedings and, therefore, did not present any evidence to support their claim that they would suffer financial harm as a result of the challenged agency action. Clearly, that is not the case here. Thus, we reject Wegmans' reliance on Capital BlueCross.
>
> Similarly, we reject Wegmans' reliance on Pennsylvania Bankers Ass'n. There, banks and a banking association filed petitions to intervene in agency

> proceedings in which a group of credit unions sought to expand their membership fields. The agency initially granted the banks intervenor status, but later revoked this status and dismissed the banks as intervenors because, at hearing, the banks did not prove their interests would be directly affected by the challenged actions of the credit unions. On appeal, this Court held the agency properly denied the banks' intervenor status because they did not show they would be harmed by the credit unions' proposed expansion, despite an opportunity to do so. Recently, however, our Supreme Court reversed, holding the agency improperly revoked the banks' intervenor status after it failed to give them notice that standing and intervention remained undecided and subject to proof at the agency hearing.
>
> In Pennsylvania Bankers Ass'n this Court decided that under some circumstances financial harm may support standing of a competitor to challenge an administrative decision. The standing problem in that case arose from the failure of the competitors, banks and a banking association, to go beyond bare assertions of harm and offer proof of harm during administrative hearings. In contrast, here MBDA and Tanczos offered extensive proof of competitive harm during the administrative hearings. Based on this critical distinction, the holding in Pennsylvania Bankers Ass'n does not advance Wegmans' position on standing here.

Bethlehem Wegmans, 965 A.2d at 1263-64 (emphasis in original).

In short, because Petitioners presented similar evidence of competitive harm here to that presented in the "Wegmans cases," we reject Club Partners' reliance on Capital BlueCross and Pennsylvania Bankers Ass'n.

2. Merits

As to whether the PLCB abused its discretion in approving the proposed interior connection between Thomas' Beer Town/restaurant area and its grocery store, we agree with the PLCB and Club Partners that our decisions in Bethlehem Wegmans and the companion "Wegmans cases" are controlling here.

In Bethlehem Wegmans, the PLCB granted Wegmans' application for the transfer of a restaurant liquor license to its Bethlehem store. There, Wegmans sought approval to sell malt or brewed beverages for on- and off-site consumption at its 900-square foot Market Café restaurant area, which was attached to Wegmans' grocery store. The evidence indicated Wegmans would install a four-foot high divider wall separating the licensed restaurant area from the unlicensed grocery store areas, and there would be separate, designated cash registers through which all beer sales would have to proceed. Ultimately, the PLCB approved the proposed interior connection between the licensed Market Café area and the unlicensed grocery store, and granted Wegmans' restaurant liquor license application. Following an appeal by MBDA and one of its member-distributors, this Court affirmed.

First, we pointed out that MBDA did not dispute that Wegmans' Market Café restaurant satisfied the statutory "restaurant" definition 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.

To that end, we stated the PLCB's decision to approve the interior connection was subject to an abuse of discretion standard of review, and no abuse of discretion was apparent in the PLCB's decision to allow the proposed interior connection. As a final point, 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' restaurant liquor license application. Therefore, we affirmed the PLCB's decision.

Here, as in Bethlehem Wegmans, MBDA does not dispute that Thomas' Beer Town satisfies the statutory "eating place" definition in Section 102 of the Liquor Code, 47 P.S. §1-102 (defining an "Eating Place" as "a premise where food is regularly and customarily prepared and sold, having a total area of not less than three hundred square feet available to the public in one or more rooms … and equipped with tables and chairs, including bar seats, accommodating thirty persons at one time …."). In addition, as in Bethlehem Wegmans, we do not believe the PLCB abused its discretion in interpreting its "interior connection" regulations. Section 3.52 of the PLCB's regulations states:

> §3.52. Connection with other businesses.
>
> (a) A licensee may not permit other persons to operate another business on the licensed premises.
>
> (b) 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].
>
> (c) A licensee may not conduct another business on the licensed premises without [PLCB] approval.

40 Pa. Code §3.52 (emphasis added).

In addition, Section 3.53 of the PLCB's regulations provides:

> §3.53. Restriction on storage and sales where [PLCB] has approved connection with other business.
>
> Where the [PLCB] 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 (emphasis added).

Further, Section 3.54 of the PLCB's regulations states:

> §3.54. Separation between licensed premises and other business.
>
> Where the [PLCB] 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 (emphasis added).

MBDA does not challenge the PLCB's determinations that Club Partners' proposed operation would comply with the above regulations. Rather, MBDA now argues that in Bethlehem Wegmans this Court erred in sanctioning the PLCB's interpretation and application of Section 3.52(b) of its regulations. MBDA asserts this regulation provides the PLCB with unfettered discretion in deciding whether to approve a proposed interior connection, and in the absence of

any standards or criteria to guide such a determination, this Court should not permit the PLCB's decision to stand.

For reasons stated below, we reject MBDA's unprecedented argument that because the PLCB's regulations are not more detailed, any application of the regulations is *per se* capricious. Under this argument, the interior connection regulations could never be applied validly, a result we view as absurd.

MBDA's argument distorts the deferential review for abuse of discretion. With regard to the "abuse of discretion" standard of review in Paden v. Baker Concrete Construction, Inc., 540 Pa. 409, 412, 658 A.2d 341, 343 (1995), our Supreme Court explained:

> Where the discretion exercised by the [lower tribunal] is challenged on appeal, the party bringing the challenge bears a heavy burden. As stated in Echon v. Pennsylvania Railroad Co., 365 Pa. 529, 534, 76 A.2d 175, 178 (1950) (quoting Garrett's Estate, 335 Pa. 287, 292-93, 6 A.2d 858, 860 (1939)
>
> When [lower tribunal] has come to a conclusion by the exercise of its discretion, the party complaining of it on appeal has a heavy burden; it is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the [tribunal] below; it is necessary to go further and show an abuse of the discretionary power. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." Mielcuszny et ux. v. Rosol, 317 Pa. 91, 93, 94, 176 A. 236.

Accord Bedford Downs Mgmt. Corp. v. State Harness Racing Comm'n, 592 Pa. 475, 487, 926 A.2d 908, 916 (2007) (citations omitted) ("An abuse of discretion is not simply an error of judgment. It requires much more. '[I]f in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.'")

Here, in its analysis of the "interior connection" regulations, the PLCB stated:

> In the past, the [PLCB] has permitted interior connections similar to the one at issue here. Historically, interior connections have been approved in licensed establishments that had interior connections to a number of commercial establishments. Section 3.52 of the [PLCB's] [r]egulations, adopted in 1970, and its predecessors, Regulation 103 (effective 1952 Pa. Bulletin Vol. 1, No. 2, p. 78) and Regulation R-37-27 (effective on August 18, 1937), reflect over seventy (70) years of policy that has given the [PLCB] discretion to approve interior connections between restaurant or eating place licenses and commercial establishments, such as department stores, convenience stores, delicatessens, and grocery stores. At the hearing, evidence was presented of licenses held by John Wanamaker's, Boscov's, and Wawa convenience stores, among other places. … An interior connection between a Weis grocery store and its restaurant area was recently approved.
>
> [Club Partners] presented evidence concerning the layout of its restaurant area, which will be licensed, and the unlicensed portion of the premises containing the grocery store. The proposed licensed area will be clearly marked by four (4)-foot walls, plus an overhang. Entrance to the proposed licensed area is possible from an exterior doorway, or a four (4)-foot interior passageway in the wall separating the licensed and

> unlicensed areas. All beer purchases will be restricted to the licensed portion of the premises, at a dedicated cash register. The licensed portion of the premises will have the same hours as the rest of the store and it will be manned by employees at all times the store is open. Given this evidence, the [PLCB] sees no reason to not approve an interior connection between the proposed licensed premises and the unlicensed grocery store. …

PLCB Op. at 48-49. No abuse of discretion is apparent in the PLCB's interpretation and application of its interior connection regulations. MBDA does not convincingly explain how the PLCB's exercise of its discretion represents a misapplication of the law, or is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Further, we reject MBDA's argument that the PLCB abused its discretion in the absence of some further standards or criteria to guide its approval of interior connections. As in any abuse of discretion review, the PLCB is not required to further support its approval of the proposed interior connection; rather, MBDA is required to show the PLCB's approval constitutes an abuse of discretion. See, e.g., Leckey v. L. Southampton Twp. Zoning Hearing Bd., 864 A.2d 593, 596 n.4 (Pa. Cmwlth. 2004) (in analyzing an "abuse of discretion" claim, burden is on the party asserting an abuse of discretion occurred to show discretion was abused, rather than on agency that exercised its discretion to further support its decision). In the absence of any clear explanation as to how the PLCB abused its discretion here, MBDA's arguments fail. MBDA does not convincingly explain how the grant of the license to Club Partners, which proved compliance with all applicable statutory and regulatory requirements to obtain an eating place liquor license,

constitutes an abuse of discretion. In addition, as in Bethlehem Wegmans, MBDA does not attack the validity or constitutionality of the PLCB's regulations.[5]

Also, for the reasons more fully explained in Bethlehem Wegmans, we conclude this Court's decisions in Sheetz II and Ripley, again relied on by MBDA, do not compel reversal of the grant of the eating place malt beverage license here.

Additionally, the Supreme Court's decision in Sheetz III, which affirmed our decision in Sheetz II does not alter this result. In Sheetz III, the Supreme Court considered whether an establishment that sold malt or brewed beverages solely for takeout and prohibited consumption of beer on its premises qualified as a "retail dispenser" as defined by Section 102 of the Liquor Code. The Court held such an establishment did not qualify as a retail dispenser. In a footnote, the Supreme Court specifically stated:

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[5] We carefully distinguish MBDA's abuse of discretion argument from a possible constitutional issue relating to the PLCB's enabling legislation, the Liquor Code. In particular, MBDA does not argue that the Liquor Code provides the PLCB with unfettered discretion in violation of the "non-delegation doctrine."

The "non-delegation doctrine," which is embodied Article II, Section 1 of the Pennsylvania Constitution, states: "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pursuant to the non-delegation doctrine reflected in Article II, Section 1 and Article III, Section 1 (no law shall be passed except by bill), the Legislature may not delegate its lawmaking power to any other branch of government, body or authority. Christ the King Manor v. Dep't of Pub. Welfare, 911 A.2d 624 (Pa. Cmwlth. 2006), aff'd, 597 Pa. 217, 951 A.2d 255 (2008). The Legislature, however, may delegate policy making authority to an administrative agency as long as the Legislature makes the basic policy choices and enacts adequate standards guiding and restraining the exercise of the delegated administrative functions. Id.

Here, MBDA does not challenge the PLCB's enabling legislation. Therefore, we do not address this issue.

> MBDA attempts to interject other concerns into this appeal regarding the proximity of gasoline operations, the interior connections between the various components of the Sheetz facility, and the applicability of certain PLCB regulations to such circumstances. We find these issues to be outside the scope of our grant of allocatur and decline to address them.

Sheetz III, ___ Pa. at ___, 974 A.2d at 1152, n.14 (emphasis added). In addition, the Supreme Court "express[ed] no opinion as to the propriety of license issuance if the Sheetz facility sold beer on the premises, as such issue is not before us." Id. at ___, 974 A.2d at 1150, n.11.

In Sheetz III, the Supreme Court did not speak to the issue presented in this case, i.e., the PLCB's interpretation and application of its regulations regarding "other businesses" and "interior connections." In addition, unlike the applicant in Sheetz III, here Club Partners intend to sell malt or brewed beverages for both on- and off-premises consumption. Therefore, the Supreme Court's decision in Sheetz III does not compel the result sought by MBDA here.

Based on the foregoing, the order of the PLCB is affirmed.

ROBERT SIMPSON, Judge

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Malt Beverage Distributors Association, Bonanza Beverage, Inc. and Kern Brothers, Inc., Petitioners	:	No. 900 C.D. 2009
v.	:	
Pennsylvania Liquor Control Board, Respondent	:	

O R D E R

AND NOW, this 7th day of January, 2010, the order of the Pennsylvania Liquor Control Board is **AFFIRMED**.

ROBERT SIMPSON, Judge