

**Testimony of Rodrigo Diaz, PLCB Chief Counsel  
and  
Tisha Albert, PLCB Director of Regulatory Affairs**

Chairman Pyle and Chairman Deasy,

Good morning. My name is Rod Diaz. I am the Chief Counsel for the Pennsylvania Liquor Control Board. With me is Tisha Albert. She is the Director of the Board's Office of Regulatory Affairs. We are here to provide this committee with some background information on how the Liquor Code and the Board have historically dealt with requests from licensees to have interior connections between the licensed business and another, unlicensed business. We will also raise some points you may want to consider when considering House Bill 1644.

When Prohibition ended in 1933, the Legislature created licenses in order to regulate the sale of alcohol in Pennsylvania. It decided that only certain types of businesses would be allowed to sell alcohol for on-premises consumption. The main types of businesses that would be eligible for licenses were restaurants.

The Legislature created a definition for restaurants. The Liquor Control Act defined a restaurant as a business, at least 400 square feet in size, that could sell and serve food to 30 people at one time.<sup>1</sup>

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<sup>1</sup> Since certain municipalities only allowed for the sale of beer rather than beer, wine and liquor, a beer-only license, or retail dispenser license, was also created. It is like a restaurant liquor license except that the holder can only sell beer and the license is only available to businesses that meet the definition of an eating place. The Beverage License Law defined an eating place in a manner similar to a restaurant – you need to be able to sell and serve food to at least 30 people at a time – but the square footage requirement was and is slightly smaller – 300 square feet, rather than 400 square feet.

Beyond saying what a restaurant must be, the Legislature at the time, did not really address the issue of what a restaurant could not be. Could a restaurant, for example, sell food and groceries? Could a restaurant sell food and cars? Could a restaurant sell food and offer haircuts? The one exception was that the Legislature did say that restaurants could not principally sell liquid fuels, AKA gasoline, and still be licensed as a restaurant.<sup>2</sup> Ultimately, the Board adopted a policy, through regulation, which can be distilled into three statements:

- A restaurant cannot allow a third party to operate on its premises unless the Legislature has specifically allowed it.
- A restaurant cannot have an interior connection to another business unless the Board has specifically approved it.
- A restaurant cannot conduct another business on the licensed premises unless the Board has specifically approved it.

While it has received increased interest in the last ten years or so, the Board's policy of allowing interior connections with other businesses stretches for decades. The existing regulation was adopted in 1970. That regulation itself was a reenactment of PLCB Regulation 103, which authorized interior connections

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<sup>2</sup> In addition, there have always been tied house prohibitions which prohibit holders of manufacturer and distributor licenses from acquiring retail licenses. These prohibitions have been modified over time but still remain in Pennsylvania and most other states. Also, over the years, the Legislature has added and deleted certain other prohibitions such as prohibiting the licensing of circuses, theaters or museums.

between a licensed business and other business. Regulation 103 became effective in 1952. Prior to that, Regulation R-37-27, which became effective on August 18, 1937, specifically authorized the Board to approve an interior connection between an eating place retail dispenser license and another business.

At no time did any of the regulations mention supermarkets, grocery stores, department stores, or delis. Nonetheless, retail licensees have operated with Board-approved interior connections to grocery stores, supermarkets, delicatessens, bakeries, and convenience stores for half a century. For example, in 1959, the Board issued an eating place retail dispenser license to a location selling grocery items and gasoline<sup>3</sup>; in 1987, the Board issued a retail license to a location with an interior connection to bakery and gift/antique shop<sup>4</sup>; in 1995, the Board approved a transfer of an eating place retail dispenser license to what was described in the Commonwealth Court's Opinion as "Applicant's delicatessen/grocery store at 4700-02 Longshore Avenue."<sup>5</sup> The Board has also approved interior connections between restaurant liquor licenses and other businesses such as Boscov's and Wanamaker's.

Nonetheless, the issue of whether the Board ought to be approving these interior connections was challenged by the Malt Beverage Distributors Association (MBDA) as more and more grocery and convenience stores applied for liquor licenses. In Malt Bevs. Distribs. Ass'n v. Pa. Liquor Control Bd., 607 Pa. 560, 8

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<sup>3</sup> Freedman v. Pennsylvania Liquor Control Bd., 20 Pa. D. & C.2d 353 (C.C.P. Montgomery 1959)

<sup>4</sup> Commonwealth, Pennsylvania Liquor Control Bd. v. Ripley, 107 Pa. Cmwlt. 425, 529 A.2d 39 (1987)

<sup>5</sup> Tacony Civic Ass'n. v. Pennsylvania Liquor Control Bd., 668 A. 2d 584 (Pa. Cmwlt. 1995)

A.3d 885 (Pa 2010), the Pennsylvania Supreme Court affirmed that the Board could approve restaurant liquor applications from businesses such as grocery stores, even if there was an interior connection between the licensed restaurant and a grocery store.

Subsequent to the Supreme Court decision, the Legislature has made changes to the Liquor Code that presumes that the Board will allow interior connections between a licensed restaurant and another business. These include changes to section 404 (dealing with interior connections with gas stations), section 415 (dealing with where items from the unlicensed business may be paid for) section 468(e)(1) (dealing with the width of the interior connection between the two businesses) and section 468(e)(2) (dealing with separate entrances between the two businesses). Since the Legislature has neither banned interior connections between restaurants and other businesses nor has it required a full integration of the licensed and unlicensed business, there is no reason for the Board to abandon its current approach.

This committee is meeting today to consider House Bill 1644. It is not our intention to comment on the underlying policies in support of or in opposition to the bill. As an agency, however, we would simply ask that the Legislature provide clear guidance as to what the Board is to do. That being said, here are some things you may wish to consider:<sup>6</sup>

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<sup>6</sup> In addition, to the substantive questions, there are two technical matters you may wish to consider. First, while the bill requires the filing of a written application to the Board, all applications are now filed electronically. Second, you might want to replace the word “purchase” on page 2, line 27 and page 3, line 8, with “sale” since the licensee is selling, and the language is intended to tell the licensee what it can and cannot do.

- The language of the bill grants additional privileges to the holder of the permit by allowing the holder to engage in a series of activities outside of the licensed premises. These privileges include the right to place alcohol outside of the licensed premises, and the right to sell product through registers that are located off of the licensed premises. By allowing this activity to occur off of the licensed premises, the bill, as written, could deny oversight of that activity from either the Board and the Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE). This is because while licensees must allow the Board and the BLCE access to their licensed premises, no such requirement exists for their unlicensed premises.

If the intent is to expand a licensee's ability to use more of the facilities currently used by the unlicensed business, then perhaps a better way to address it is to allow for the licensing of such areas under whatever parameters you wish to include.

- While some of the requirements for qualifying as a restaurant – specifically, the requirement for tables and chairs – have been eliminated, others – such as the requirement for on-premise food and the square footage – remain. When previous Legislatures have addressed this issue in the past – such as in sections 412 (dealing with public venues), 413 (performing arts facilities) and 414 (continuing care retirement communities) – they have exempted the licensee from the definition of a restaurant altogether. It will be hard for us to tell permit holders that while they no longer must have any place for the

patrons to sit, they still must have food available to feed thirty persons at the location.

- The bill specifically allows licensees to hold educational classes regarding the alcohol products that they sell and to charge a fee for such classes. It is unclear whether the intent is to hold such classes on the licensed premises or in the adjacent business.
- It is unclear whether neighbors or other third parties will have the right to protest an application for a customer convenience permit. While typically protests can be filed against license applications the same is not true for permits. That being said, the Liquor Code does allow protests when an E license – which is a beer only license – is converted to an R license. Presumably this is because the R license has significantly more rights than an E license. All we ask is clarity on the issue.

We appreciate this opportunity to speak with you and are happy to answer any questions you may have.

