

PTI

70344-22A-2015

BEFORE THE PENNSYLVANIA LIQUOR CONTROL BOARD

In Re: Application for Double Transfer of Restaurant Liquor License R-19027

Restaurant R-19027 (the "License")
Liquor
License:

LID: 70344

Applicant: Weis Markets, Inc.

Premises: 331 N READING RD
EPHRATA PA
17522-1652
(Lancaster County)

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PETITION OF MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA TO INTERVENE

Proposed Intervenor Malt Beverage Distributors Association of Pennsylvania ("MBDA") respectfully requests, in the manner contemplated by section 17.12(b) of Title 40 of the Pennsylvania Code, that the Pennsylvania Liquor Control Board (the "Board") grant it leave to intervene with respect to the above-captioned proposed double transfer of restaurant liquor license R-19027 ("Proposed Transfer") to Applicant for use at 331 N. Reading Road, Ephrata, PA 17522-1652 (the "Premises"). In support of this Petition to Intervene, MBDA states as follows:

1. MBDA is a trade association representing more than 420 Distributor and Importing Distributor licensees in the Commonwealth of Pennsylvania. MBDA has members with beer distributorships located in close proximity to the Premises.
2. MBDA's principal executive offices are located at 230 S. Broad Street, Suite 903, Philadelphia, PA 19102, Telephone No. 215-732-6258, Fax 215-732-6023, President, Tom Mehaffie.
3. MBDA files this Petition to Intervene on its own behalf and on behalf of the Distributors and Importing Distributors it represents who will be directly aggrieved by the issuance of the License at the Premises, including, without limitation the distributors listed above.
4. This Petition to Intervene is filed in opposition to an application for a double transfer filed by:

Weis Markets, Inc
331 N. Reading Road
Ephrata, PA 17522-1652
(Lancaster County)
License No. R-19027; LID 70344

5. Notice of this Petition to Intervene was served upon the Applicant by sending a copy on September 25, 2014 by facsimile and United States mail to Applicant's counsel, R.J. O'Hara, Esquire, Flaherty & O'Hara, P.C., 610 Smithfield Street, Suite 300, Pittsburgh,

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Pennsylvania 15222, Facsimile: 412-456-2019.

6. According to the orange "Notice of Application" placard posted at the proposed licensed premises, notice of the Proposed Transfer was posted at the Premises by the Applicant on or about August 27, 2014. This petition is filed within thirty (30) days of the notice posting.

7. MBDA and its members would be directly and adversely aggrieved by the Proposed Transfer to qualify as an intervenor under section 17.12 of Title 40 of the Pennsylvania Code for the following reasons:

(a) There would be catastrophic consequences to MBDA and its members if the Board approves the sale of malt and brewed beverages to businesses which sell gasoline with whom beer distributors cannot effectively compete and who maintain hours beyond those legally permitted by a beer distributor.

(b) Approving a retail license at the proposed licensed premises would infringe upon the market niche legislatively carved for the distributor and would expand the character of retail dispenser beer sale outlets to encompass commercial entities, unlike hotels, restaurants, clubs and eating places, which do not currently engage in the retail sale of alcohol to the public for off-premises consumption. A policy determination in this regard must be accomplished by the legislature and it is not the role of the Board to sanction such a momentous transformation.

(c) The system for selling alcoholic beverages in Pennsylvania is highly regulated and interconnected, with restrictions on one class important to the functioning of the entire system and the authority granted to other classes. The issuance of restaurant liquor licenses to a business which sell gasoline would disrupt that system.

(d) Retail sales of malt and brewed beverages in Applicant's business will be damaging to any nearby distributorships because the Applicant will offer many items that distributors cannot offer, including food for consumption on premises, gasoline, and convenience and grocery store items.

(e) If beer for takeout is available, it will likely be purchased by customers who went there originally by necessity (for gasoline) or for some other purpose out of convenience, thereby taking sales from distributors. The Applicant will attempt to capitalize on such impulse buying.

(f) The Commonwealth Court has already held that MBDA has standing to intervene in proceedings where the Board granted an application for a double transfer of an eating place malt beverage license to premises on which a restaurant, convenience store, and gas station would operate. See MBDA v. PLCB, 881 A.2d 37 (Pa. Commw. Ct. 2005). In doing so, the Commonwealth Court acknowledged that "with approximately 400 beer distributor members, MBDA is integrally involved in the regulated distribution of beer and malt beverages generally" and, as a statewide trade association, the 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." *Id.* at 43. See also Water Street Beverage, LTD. v. PLCB, 84 A.3d 786 (Pa. Commw. Ct. 2014) (a distributor was properly permitted to intervene in a liquor license transfer proceeding to challenge an application filed by Weis Markets, Inc.).

8. MBDA opposes the Proposed Transfer for the following reasons (in addition to those set forth in paragraph 7 above):

(a) Proposed is a double transfer to a new owner at a new location which

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sells liquid fuels or oil.

(b) With respect to the sale of gasoline and other fuels, the Applicant is bound by Act No. 1998-15 and its regulations (Title 37, Part I, Subpart B. Flammable and combustible liquids) governing the storage and sales of liquid fuels as follows:

(i) The law requires at least a single attendant whose "primary function" shall be "supervise, observe and control the dispensing" of fuel;

(ii) The law requires remote facilities to control the pumps, and that the attendant shall control sources of ignition, immediately handle accidental spills, and the use fire extinguishers if needed;

(iii) The law requires the attendant to remain "within arm's length" but not more than 15 feet of the principal remote control location;

(iv) The law requires the attendant be on duty not be more than 125 feet from the farthest self-service dispensing device;

(v) The law requires the attendant to be able to observe the area adjacent to pumps including the ground since the attendant shall "prevent the dispensing of flammable or combustible liquids into portable containers that do not comply".

(vi) Thus, the proposed new location consists of these two regulated businesses at the same location, to wit: a convenience store selling fuel with an attendant within a building and on the same property or premises that will be selling malt and brewed beverages.

(vii) Hours of sale of gasoline and liquid fuels are unregulated, meaning that during hours when malt and brewed beverages cannot be sold an attendant will by necessity have to provide security for the licensed premises while providing control for the gasoline and convenience store operation.

(c) The Liquor Code does not provide any discretion on the part of the Board to allow transfers to such a location, stating that the Board "shall refuse any application for a new license, the transfer of any license to a new location ... where the sale of liquid fuels or oil is conducted." See 47 P.S. § 404, et al, (emphasis added). Additionally, Section 468 of the Liquor Code Provides: "no license shall be transferred to any place or property upon which is located as a business the sale of liquid fuels and oil." 47 P.S. §4-468(a)(3) (emphasis added).

(d) The General Assembly made clear that an express goal of the Liquor Code is to prohibit the sale of liquor and malt or brewed beverages where liquid fuels or oil are also sold; indeed, no less than four times in the Liquor Code such sales are expressly prohibited from co-existing. See 47 P.S. § 4-404; 47 P.S. § 4-431(b); 47 P.S. § 4-432(d); 47 P.S. § 4-468(a)(3).

(e) The statute does not authorize such approvals even if there is some physical separation between the licensed areas and fuel pumps. In this case, the various segments of the Applicant's business are all related and constitute one integrated and continuous property, location and business.

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(f) The consequences of the issuance of a liquor license to the Applicant would amount to a significant transformation of the character of outlets for the sale of malt or brewed beverages. The Commonwealth Court has already stated that "[w]hile such a transformation may be in the public interest, it should be based on legislative intent rather than on a strained administrative reading of statutory language." MBDA v. PLCB, 918 A.2d 171, 177 (Pa. Commw. Ct. 2007). This decision was affirmed by the Pennsylvania Supreme Court in 2009.

(g) Not only does the clear statutory language prohibit the issuance of a restaurant liquor license to a location where the sale of liquid fuels is conducted, but the statutory framework has been amended over the years to make this provision of the Liquor Code more restrictive and to remove any discretion on the part of the Board. And this policy is especially important to the overall scheme of the Liquor Code because like the now prohibited "open saloon" of old, see 47 P.S. § 1-104(a),¹ gas stations are ubiquitous, and if they are allowed to sell alcohol by creative curb and parking barrier placements (and the like), the core, express purpose of the Liquor Code is thwarted. Cf. Maxwell's Pic-Pac, Inc. v. Dehner, 739 F.3d 936, 940-41 (6th Cir. 2014) (applying Kentucky liquor law and concluding "reasonably conceivable facts support the contention that grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers").

(h) The core principles of the Liquor Code are to restrain the sale of alcohol, not promote it by making it widely available at businesses where gasoline is sold, and to protect the public welfare, health, peace and morals of our citizens. It would be contrary to the public welfare, health, peace and morals for alcohol to be available at places which sell gasoline. Such places are commonly frequented by minors, are places customers must go out of necessity, are commonly targeted for crimes (including theft), and are supported by employees who are required to perform many different tasks – much differently than beer distributors whose employees are trained and focused on responsible sales of malt or brewed beverages.

(i) MBDA desires to submit for the Board's consideration documentary, testimonial, and other evidence supporting its opposition to the Proposed Transfer.

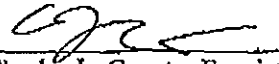
9. For the reasons set forth above, MBDA, on its own behalf and on behalf of its members, respectfully requests that the Board (a) grant it standing to intervene as a party in opposition to the proposed double transfer of restaurant liquor license R-19027 and (b) deny the Proposed Transfer.

Dated: September 25, 2014

Respectfully Submitted,

Caputo, Caputo & Regan, P.C.

By:


Charles L. Caputo, Esquire
Pa. I.D. No. 86058

Holly L. Guna, Esquire
Pa. ID. No. 90024

¹ "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon, and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose." 47 P.S. § 1-104(a).

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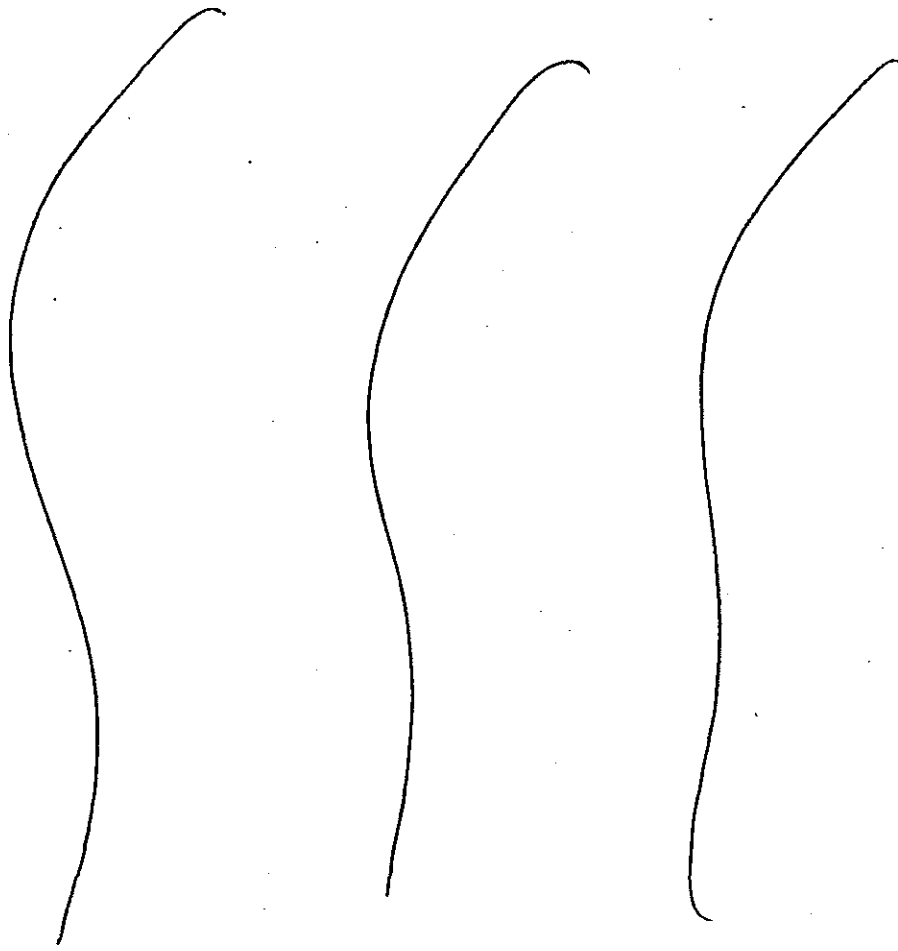
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Nicholas A. Miller, Esquire
Pa. I.D. No. 204141

Caputo & Caputo, P.C.
Buhl Building, 5th Floor
204 Fifth Avenue
Pittsburgh, PA 15222
412-325-0693
412-690-2350 (facsimile)
info@caputolawoffice.com

Attorneys for Intervenor:
Malt Beverage Distributors
Association of Pennsylvania

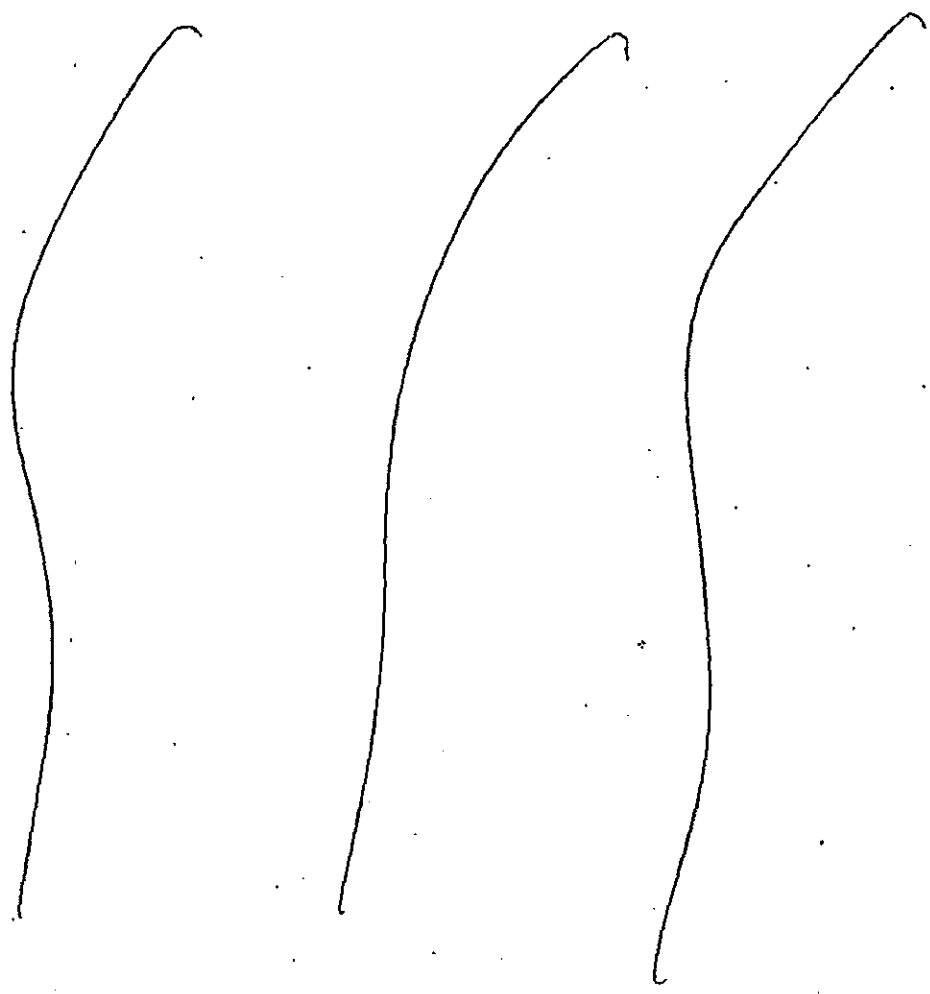
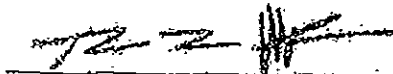


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VERIFICATION

I, Tom McHaffie, am the President of the Malt Beverage Distributors Association of Pennsylvania, and as such, I am authorized to make this verification on its behalf and state that I have read the foregoing Petition to Intervene and declare that it is true and correct to the best of my knowledge, information, and belief. I declare that this statement was made subject to penalties of Title 18 Pa. C. S. § 4904 relating to unsworn falsifications to authorities.

Date: July 28, 2014



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within PETITION OF MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA TO INTERVENE was forwarded to the parties and counsel in the manner listed below, which service complies with the requirements of 1 Pa. Code §§ 33.32 -33.36, on this 25th day of September, 2014.

Faith S. Diehl, Esquire
Pennsylvania Liquor Control Board
Office of Chief Counsel
401 Northwest Office Building
Capital and Forster Streets
Harrisburg, PA 17124-0001
(via facsimile and overnight mail)

Commonwealth of Pennsylvania
Pennsylvania Liquor Control Board
Bureau of Licensing
Northwest Office Building, Room 108
Harrisburg, PA 17124-0001
ATTENTION: Tisha Albert
(via facsimile, US mail and overnight mail)

R.J. O'Hara, Esquire
Flaherty & O'Hara, P.C.
610 Smithfield Street, Suite 300
Pittsburgh, Pennsylvania 15222
(via facsimile and overnight mail)



Charles L. Caputo, Esquire
Counsel for Intervenor

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