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2017 AUG 22 A # 17

August 21, 2017

Mr. Elam M. Herr, Assistant Executive Director  
Pennsylvania State Association of Township Supervisors  
4855 Woodland Drive  
Enola, PA 17025-1291

**RE: Final-Omitted Regulation 54-97 (IRRC #3175)  
Intermunicipal Transfer of Retail Licenses**

Dear Mr. Herr:

This is in response to your e-mail to the Independent Regulatory Review Commission (“IRRC”) dated August 8, 2017, which was forwarded to this office, wherein you offer comments on the above-captioned regulatory changes submitted by the Pennsylvania Liquor Control Board (“PLCB”). Specifically, you question why new statutory language that was added by Act 155 of 2006 (“Act 155”) is not being incorporated within section 7.62 of the PLCB’s Regulations, 40 Pa. Code § 7.62. You express concern that failing to incorporate the new statutory language within section 7.62 will leave open the possibility for an argument to be made that such language does not apply or is otherwise invalid.

In this instance, the PLCB’s proposed regulatory changes were submitted on a final-omitted basis. When regulatory changes are submitted on a final-omitted basis, there is no formal opportunity for public comments to be offered, and the submitting agency is not required to respond to any public comments that are received. 71 P.S. § 745.5a(c). However, in the interest of providing clarity with respect to its proposed rulemaking, the PLCB would like to take this opportunity to address your concerns.

In addition to eliminating the same statutory language that the PLCB proposes to delete from section 7.62 of its Regulations, Act 155 also added the following statutory provision: “A decision by the governing body of the municipality to deny the request may not be appealed.” 47 P.S. 4-461(b.3). As was explained in the PLCB’s Regulatory Analysis Form, the PLCB chose not to include this new statutory language in its proposed regulation because of ongoing litigation concerning whether there is a basis that exists for appealing a municipality’s decision outside the Liquor Code.

Moreover, after the regulatory review process commenced, the Commonwealth Court of Pennsylvania reached a decision in Giant Food Stores, LLC. v. Penn Township, No. 1310 C.D. 2016 (Pa. Cmwlth. Ct., July 2017). In that case, the court, sitting *en banc*, ruled that

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there is a right to appeal a municipality's denial of an intermunicipal liquor license transfer application pursuant to section 752 of the Local Agency Law, 2 Pa. C.S. § 752. Id. A petition for allowance of appeal has been filed with the Pennsylvania Supreme Court. However, unless the Supreme Court agrees to review the matter and elects to reverse, the decision made by Commonwealth Court is controlling.

In addition, because the statutory provision would stand as law on its own, the PLCB saw very minimal value in simply repeating the statutory language within a regulation. It is the PLCB's understanding that IRRC generally tends to frown upon this practice.

Considering the foregoing, including the language from Act 155 which you referenced in your letter, to section 7.62 would only serve to cause confusion. If any language were to be added to section 7.62 in the future, it would most likely be some sort of a signpost to section 752 of the Local Agency Law, 2 Pa. C.S. § 752. However, the PLCB is hesitant to pursue that course of action prior to a full resolution of the matter currently pending before the Supreme Court. Otherwise, the PLCB might once again need to amend its Regulations.

Should you have any additional questions or comments about the PLCB's regulatory submission, please feel free to contact this office by mail at Pennsylvania Liquor Control Board, Office of Chief Counsel, Room 401, Northwest Office Building, Harrisburg, PA 17124, or by telephone at (717) 783-9454.

Sincerely,

RODRIGO J. DIAZ  
CHIEF COUNSEL

By:

  
MEREDITH A. MILLARD  
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cc:

Leslie Lewis Johnson, Chief Counsel – IRRC  
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