**TO:                      The Partners (Shuster & Brobson)**

**FROM:               The Associates (Dunn & Hadrick**

**Date: January 30, 2015**

**Re: Bonapints/Napoleon**

**Subject: Rights to Intervene and/or Appeal LCB Proceeding Regarding Shwawa License**

**Background**

Shawn wishes to build a gas station and convenience store on his property on Crosby Road in Kendall Township, Pennsylvania. Crosby Road is the main thoroughfare in Kendall Township, and nearly every township resident travels it during the week. In addition to the gas station, Shawn would like to build an attached café, in which he would sell both food and beer. The gas station, convenience store, and café will collectively be known as Shwawa. Customers would be able to purchase and consume beer in the café, which would be separated from the convenience store/gas station by a wall. Takeout beer would also be available in the café.

Napoleon is the owner of Bonapints, one of several beer distributors in Kendall Township. His store is located on Crosby Road, about two miles away from the proposed Shwawa. Over the past few years, Napoleon has been losing some business to newer beer distributors. Napoleon is concerned that Shwawa’s beer takeout service will further affect his business. Bonapints is located two miles from the proposed Shwawa. Napoleon argues that because the café is also permitted to sell gasoline, a large variety of food, and convenience store items, it has an unfair advantage over his business. The café is also able to sell beer in smaller quantities than he can at his store. He asserts that the Shwawa will put him out of business entirely.

**Issues**

1. If Shawn applies to the Pennsylvania Liquor Control Board (LCB) for the transfer of a restaurant liquor license to the café so he will be able to sell beer, and the LCB orders a hearing on the application, will Napoleon be permitted to intervene in the hearing before the LCB?
2. If Shawn does not intervene in the LCB proceedings, and the LCB grants Shawn’s liquor license transfer application, may Napoleon nevertheless appeal?

**Discussion**

**I. Participation in the Liquor Control Board Proceeding**

If Napoleon would petition to intervene in the LCB proceedings, his petition would likely be granted, as Napoleon could show that he has a direct interest in Shawn's application for a transfer of a liquor license.

Under section 17.11 of title 40 of the Pennsylvania Administrative Code, certain persons and entities may protest an application for a liquor license before the Liquor Control Board ("LCB"). Specifically, a licensee who is located within 200 feet of the proposed premises of the license at issue can file a protest if such protest is on the basis of the location of the license. 40 Pa. Code § 17.11. Further, churches, hospitals, charitable institutions, schools, and public playgrounds within 300 feet and individual residents within 500 feet of the proposed license may automatically file a protest with respect to the location of the proposed license. *Id.* The effect of filing the protest is that the protestant automatically becomes a party to the LCB proceedings. *Id.* § 17.11(e).

Other parties may petition to intervene the LCB under 40 Pa. Code § 17.12. A party " who can demonstrate a direct interest in an application for a new retail liquor license, retail malt or brewed beverage license, importing distributor or distributor license, or the transfer of these licenses, whether person-to-person, place-to-place, or both, or an extension of premises of these licenses, and who can further demonstrate that a Board decision contrary to the person's direct interest will cause the person to be aggrieved may file a petition to intervene." 40 Pa. Code § 17.12. This section gives the LCB the discretion to grant a petition, and may also grant limited participation in the hearing regarding the application. *Id.*

Under section 17.12 of the regulations, a competitor's application could be granted by showing the "direct, substantial and immediate harm" that granting a new liquor license would cause its business. *See Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd*., 881 A.2d 37, 42 (Pa. Commw. Ct. 2005) [hereinafter *Sheetz*]. In *Sheetz*, an association representing local beer distributors petitioned to intervene in the license applications of a Sheetz convenience store. *Id.* The LCB denied the petition to intervene, and the association appealed. The Commonwealth Court determined the LCB erred in denying the association's petition to intervene. *Id.* The court noted the "direct, substantial and immediate harm standard" under section 17.12 of the LCB regulations is the same standard as the standard for intervention under the Pennsylvania Administrative Agency Law. *Id.* at 42. The association presented evidence showing the Sheetz license for takeout liquor beverages would damage the business of nearby distributors, as Sheetz would provide other enticing services, such as food and gasoline. *Id.* The court found the association met the requirement to show that even just one member would suffer an "immediate or threatened injury." *Id.*

Likewise, in *Water Street Beverage LTD v. Pa. Liquor Control Bd*., 84 A.3d 786 (Pa. Commw. Ct. 2014), the court determined a beer distributor located less than one mile from a supermarket applying for a liquor license had standing to intervene in the LCB proceedings. The supermarket, which proposed to build an indoor café and gas station, wanted to sell malt beverages in the café. The beer distributor provided testimony that the supermarket would be able to sell the malt beverages in smaller quantities and at higher prices than his business, along with selling food and gasoline. *Id.* at 793. The court found the beer distributor presented "sufficient evidence to establish the potential for direct and substantial harm" to his business. *Id.* at 794.

In contrast, the court in *Schneller v. Pa. Liquor Control Board*, 2011 WL 10857605, (Pa. Commw. Ct. Oct. 26, 2011), denied the petitioners request to intervene in the application proceedings. The petitioner, a resident in the neighborhood of the proposed licensed premises, asserted the transfer of the license would cause traffic, impair the morality of the area, and would encourage outsiders to come to the neighborhood. *Id.* at \*4. The court found the petitioner's allegations expressed "general concerns for the welfare of the community . . . and are otherwise insufficient to show that [the petitioner] would be directly and substantially harmed by the [license]." *Id.* Since the petitioner did not show any harm particular to the petitioner, he did not have standing to intervene in the LCB proceedings. *Id.*

Napoleon's beer distributor business is about two miles away from the Shwawa site; as such, Napoleon does not qualify to protest the application for the license as a matter of right. Napoleon's position is almost identical to that of the members of the association in *Sheetz* and the distributor in *Water Street*. Napoleon is concerned Shwawa's services will take away from his business. Like the applicant in *Sheetz*, Shwawa will provide additional services Napoleon's business cannot: gasoline, food, and smaller quantities of alcohol. If Napoleon is able to present testimony that Shwawa will affect Napoleon's business in this way, it is likely the LCB will grant his petition to intervene in Shawn's application proceedings. Unlike the petitioner in *Schneller*, Napoleon's claims of harm apply to him and his business only; the grievances he would assert are not general to the community. Thus, Napoleon would likely have standing to intervene in the LCB proceedings.

To the extent, however, that the Board becomes aware that Napoleon's business is already losing business without the presence of the Shwawa, the LCB might deny Napoleon's request. This information negates the "threatened injury" to Napoleon's business and diminishes Napoleon's interest in the license proceedings. Further, Napoleon's operation is more than two miles from the proposed Shwawa, which is further than the beer distributor in Water Street. There are several other beer distributors near Napoleon's operation which have affected his business. These factors could impact a decision to grant Napoleon's petition to intervene in the proceeding.

**II. Appeal to the Courts**

If the LCB grants a liquor license to Shawn and Shwawa, and Napoleon did not petition to intervene in the LCB proceeding, Napoleon will not be able to appeal to the Court of Common Pleas in his county, but will likely be able to appeal to the Commonwealth Court.

Under the Liquor Code, only a "church, hospital, charitable institution, school or public playground" that is within 300 feet of the proposed location for the license may appeal the grant of a license to the court of common pleas of the county where the proposed premises for the license is located. 47 P.S. § 4-464.

However, the Pennsylvania Administrative Agency Law permits "any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication" to appeal to the Commonwealth Court. 2 P.S. § 702. A party seeking to assert standing under section 702 must show that it has been aggrieved beyond that of the "common interest of all citizens." *Application of El Rancho Grande, Inc*., 437 A.2d 1150, 1153 (Pa. 1981). Further, there must be a causal connection between the injury and the challenged government action such that the injury is "direct and immediate." *Id.* (quoting *Indep. State Store Union v. Pa. Liquor Control Bd.*, 432 A.2d 1375 (Pa. 1998)). A party who otherwise is precluded from intervening under the Liquor Code might nevertheless be permitted to intervene under section 702 of the Administrative Agency Law. *See Iram Temple AAONMS v. Pa. Liquor Control Bd*., 87 A.3d 983, 994 (Pa. 2014); *Application of El Rancho Grande, Inc*., 437 A.2d 1150 (Pa. 1981). The requisite interest in the adjudication under section 702 is the same interest needed to intervene in a LCB proceeding under section 17.12 of title 40 of the Administrative Code. *See Malt Beverages*, 881 A.2d at 42.

In *Application of El Rancho Grande, Inc*., 437 A.2d 1150 (Pa. 1981), several license holders challenged the grant of a license by appealing to the court of common pleas. The new license holder alleged the competitors did not have standing. *Id.* While the court agreed the competitors did not have standing under the provisions of the Liquor Code, the court found that it was also possible for the competitors to appeal under section 702 of the Administrative Agency Law. *Id.* at 1152. The competitors were closest in location to the new licensee, each about one to three miles from the new licensee, and thus asserted an interest "beyond the common interest of all citizens." *Id.* at 1153. Further, the competitors presented testimony that the competitors would be put out of business by the new license. *Id.*

In *Iram Temple*, the Supreme Court evaluated whether a fraternal organization had standing to appeal the grant of a transfer of a liquor license to the court of common pleas in the county where the license was to be located. 87 A.3d at 987. The court determined that, under section 4-464 of the Liquor Code, the fraternal organization was not a "charitable institution" qualified to appeal the grant of the license to the court of common pleas and did not otherwise have a right to appeal to that court. *Id.* at 993-994. However, the Supreme Court determined that, since the fraternal organization was able to protest the license application under section 17.11 of the liquor regulations, it had the "direct interest" necessary to appeal to the Commonwealth Court under section 702 of the Administrative Agency law. The *Iram Temple* court noted that the "right to appeal under the Administrative Agency Law is in addition to that provided by the Liquor Code." *Id.* at 994.

In *Tacony Civil Association v. Pennsylvania Liquor Control Board*, 668 A.2d 584 (Pa. Commw. Ct. 1995), the court found that a civic association did not have standing to appeal an approved liquor license. The association argued that serving alcohol on the premises would violate a deed restriction on the property, increase traffic, and otherwise impair the health and welfare of the community. *Id.* at 586. The court found the association presented nothing that would show that the license would directly affect its interests. *Id.* at 589. The association did not have standing to appeal the license to any court. *Id.*

It would be unsuccessful to argue that Napoleon's business qualified as one of the entities able to appeal to the court of common pleas. However, to the extent that Napoleon would have standing to petition the LCB to intervene in the Shwawa license proceedings under the Administrative Agency Law, as discussed above, Napoleon would similarly argue that he is entitled to appeal to the Commonwealth Court. Napoleon could likely present testimony that granting the license to Shwawa would put Napoleon's distributorship out of business. Like the competitors in *El Rancho*, Napoleon's business is within a few miles of the Shwawa location. Napoleon is not like the association in *Tacony Civil Association*, which only stated general concerns for the community; Napoleon's anticipated injury is directly related to the Shwawa license. Thus, Napoleon could likely argue he has been aggrieved sufficient to have standing to appeal a LCB decision to grant Shwawa's liquor license. Since the right to appeal under the Administrative Agency Law is separate from the rights under the Liquor Code and its regulations, Napoleon could appeal irrespective of the fact Napoleon did not petition to intervene in the LCB proceedings.

**Recommendation**

Although Napoleon could appeal the LCB decision under the Administrative Agency Law without first petitioning to intervene in the LCB proceeding, to do so would be less practical than petitioning to intervene in the LCB proceeding. First, the cost of appeal litigation would likely exceed the cost of addressing Napoleon's concerns before the LCB. Further, if Napoleon petitioned to intervene in the LCB proceeding and was so permitted but received an adverse decision, Napoleon would still have another opportunity to have his issues addressed before the Commonwealth Court.