

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
(28 W. Pennsylvania Avenue)		
9 th Election District	*	OFFICE OF
5 th Council District		
	*	ADMINISTRATIVE HEARINGS
Richard K. Adolph & Irwin M. Baddock		
<i>Legal Owners</i>	*	FOR BALTIMORE COUNTY
SAHBI HOOKAH, INC.		
<i>Lessee</i>	*	Case No. 2016-0089-SPH
Petitioners		
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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Richard K. Adolph & Irwin M. Baddock, legal owners and Sahbi Hookah, Inc, lessee (“Petitioners”). The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to approve the continued use of the premises as a Hookah Lounge including hours of operation from 12 midnight to 6 a.m. every day.

Nasser Taha and Ervin Baddock appeared in support of the petition. Peter A. Prevas, Esq. represented the Petitioners. Peter Max Zimmerman, Esq., People’s Counsel and Brady Locher, Esq. also participated in the hearing and objected to the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. A Zoning Advisory Committee (ZAC) comment was received from the Department of Planning (DOP).

The subject property is 6,000 square feet and zoned BM/CT. Mr. Taha testified he has a 10 year lease for the site, at which he operates a Hookah Lounge. The lounge opened its doors in April 2014, and shortly thereafter the Baltimore County Council enacted Bill 16-14, which for the first time permitted such lounges in specified zones, subject to limitation as to hours of operation. It is the hours of operation specified in the Bill that forms the crux of this case.

Mr. Taha and other witnesses testified the Hookah Lounge is busiest between 10:30 pm and 2 am. Mr. Braddock testified the 10 year lease establishes a monthly rent of \$7,000, and that the tenant is currently at least \$30,000 in arrears. Mr. Taha explained he invested approximately \$500,000 to build out the space, and his contractor Sam Alrub provided additional details concerning the project. In summary, Mr. Taha stated that his business has been devastated by the restricted hours of operation set forth in the legislation, and that he is “losing everything for no reason.”

Baltimore County and People’s Counsel presented testimony from three members of the Baltimore County Police Department (BCPD). Tricia Rothlinghaffer, a civilian employee, testified that she is responsible for providing the Department with statistical support, and in that capacity prepared a series of reports marked as People’s Counsel Ex. #9. Col. Alexander Jones, Chief of Operations for BCPD, discussed several of the key statistics which in his opinion demonstrate that the midnight closing restriction has reduced considerably the number of calls for police service. Col. Jones also explained that in his opinion the main problem at this facility is the alcohol (B.Y.O.B.), not the Hookah tobacco. He also stressed that unlike bars, which can have their liquor license revoked, there is no enforcement mechanism to ensure that the Hookah Lounge complies with all pertinent laws and regulations.

LEGAL ISSUES

Petitioners raised several legal issues in their special hearing filing, and contend that Bill 16-14 is unlawful. Petitioners explained they are making these arguments in this forum to “exhaust” their administrative remedies, a prerequisite to judicial relief. Prince George’s Co. Ray’s Used Cars, 398 Md. 632 (2007). A special hearing request has been likened to a declaratory judgment proceeding, and the request will be addressed as such. Antwerpen v. Baltimore County,

163 Md. App. 194, 209 (2005). At the conclusion of the hearing, the undersigned requested the parties to address only two of the four arguments raised in the Petition: amortization of nonconforming use and equal protection.

The other arguments raised by petitioners do not have merit. The B.C.Z.R. contains restrictions as to hours of operation in other settings, and in several instances the regulations provide the zoning commissioner may reasonably limit and prescribe hours of operation for an enterprise. B.C.Z.R. §§ 402C.5 (residential art salons), 436.4.B (pawnshops) & 406A.5.C (tennis facilities). Thus, I do not believe Bill 16-14 is *ultra vires*. In addition, substantive due process claims are successful when challenging conduct that “shocks the conscience,” and the enactment of this legislation does not rise to that level. *See, e.g., Smith v. Bortner*, 193 Md. App. 534, 552 (2010).

As for the remaining issues, I agree with the arguments advanced by the Office of People’s Counsel in its thorough post-hearing memorandum. The legislation in question is subject to “rational basis” review under the Equal Protection Clause, a standard which “allows the States wide latitude.” *Maryland Aggregates Ass’n. v. State*, 337 Md. 658, 672 (1995). A law will be upheld against such a challenge if it is reasonable and bears a rational relationship to a permissible government objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). I believe, based on the testimony of Colonel Alexander, Bill 16-14 is reasonable and was adopted to address public safety issues associated with late-night activities at hookah lounges. This is all that is required to withstand an equal protection challenge in this setting.

The final legal issue raised by Petitioner concerns whether Bill 16-14 terminated a lawful nonconforming use without providing an adequate amortization period. As noted by People’s Counsel, the amortization doctrine is applicable only when the government prohibits an existing

lawful or nonconforming use. Here, assuming for sake of argument Petitioner established its operation was a lawful nonconforming use at the time Bill 16-14 was enacted, the legislation did not prohibit the use outright. Rather, it permitted hookah lounges by right in the business zones, but contained limitations as to the hours of operation. Thus, an amortization period is not required. *See, e.g., Eutaw Enterprises v. City of Baltimore*, 241 Md. 686 (1966).

THEREFORE, IT IS ORDERED, this **23rd** day of **March, 2016** by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to approve the continued use of the premises as a Hookah Lounge including hours of operation from 12 midnight to 6 a.m. every day, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln