

IN THE MATTER OF:  
IRVIN M. BADDOCK, Trustee of the  
Richard K. Adolph Residuary Trust -  
Legal Owners  
SAHBI HOOKAH, INC.  
28 W. Pennsylvania Avenue  
9<sup>TH</sup> Election District  
3<sup>rd</sup> Councilmanic District

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. 16-089-SPH

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**OPINION AND ORDER**

This matter comes to the Board of Appeals of Baltimore County (the “Board”) originally as a Petition for Special Hearing, pursuant to §500.7 of the Baltimore County Zoning Regulations (BCZR) filed by Sahbi Hookah, Inc. and (herein sometimes collectively referred to as the “Petitioners”) to approve the use of 28 W. Pennsylvania Avenue, Towson, Maryland (the “Premises”) as a hookah lounge, d.b.a. Towson Nights, (“Towson Nights”) and to allow it to operate between the hours of 12:00 midnight and 6:00 a.m. every day. The Premises is approximately 6,000 square feet and zoned BM/CT. The Petitioners’ contend that the limited operating hours imposed by County Council Bill 16-14, which became effective on May 18, 2014, is unlawful.

On July 21, 2016, a *de novo* hearing was held before this Board. The Petitioners were represented by Peter A. Prevas, Esquire and Baltimore County (the “County”) was represented by Michael E. Field, County Attorney and R. Brady Locher, Assistant County Attorney. Peter Max Zimmerman, Esquire and Carole S. Demilio, Esquire, People’s Counsel for Baltimore County (“People’s Counsel”), intervened to represent the interests of the citizens of Baltimore County. A public deliberation was held on October 6, 2016.

**Factual Background**

The Premises is owned by Irvin M. Baddock, Trustee of the Richard K. Adolph

Residuary Trust (the "Landlord"). On or about September 24, 2013, Towson Nights entered into a ten (10) year lease with the Landlord for the Premises to operate a hookah lounge. Landlord entered into the lease with Towson Nights with the understanding that it would operate as a hookah lounge and that at the time the lease was executed, the operation of a hookah lounge was a lawful use on the Premises. In addition, when the lease was executed, there was no requirement that Towson Nights close at 12:00 midnight.

County Council Bill 16-14 (the "Bill") established a new definition for a "hookah lounge" in Section 101.1 of the Baltimore County Zoning Regulations ("BCZR") and limited its hours of operation. "Hookah Lounge" is defined as follows:

Any facility, establishment, or location whose business operation, whether as its primary use or as an ancillary use, includes the smoking of tobacco or other substances through one or more hookah pipes (also commonly referred to as hookah, waterpipe, shisha or nareghile), including but not limited to establishments known variously as hookah bars, hookah lounges or hookah cafes. A hookah lounge may only operate from 6:00 A.M. to 12 A.M.

Section 2 of Bill 16-14 states:

a hookah lounge or vapor lounge lawfully in existence on or before the effective date of this act shall comply with the operating hours requirements of this act not more than 45 days after the effective date.

At the hearing, Mr. Abdul Nasser Taha (Mr. Taha"), owner of Towson Nights, testified that substantial improvements were made to the Premises and that on April 11, 2014 an occupancy permit was issued by Baltimore County which permitted the Premises to be used as a hookah lounge. Towson Nights also has a valid trader's license issued by the State of Maryland which authorizes it to sell tobacco products. Prior to July 2, 2014,<sup>1</sup> Towson Nights' hours of

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<sup>1</sup> This date is 45 days after the effective date of the Bill, May 18, 2014.

operation were Sunday through Thursday from 6:00 P.M. to 2:00 A.M. and Friday and Saturday from 6:00 P.M. to 3:00 A.M.

Mr. Taha testified that the alleged 45-day amortization period stated in the Bill forces Towson Nights to close at midnight which, he said, in effect, puts him out of business because nearly ninety (90%) percent of the hookah lounge business occurs between 11:00 P.M. and 2:00 A.M. This testimony was confirmed by the testimony of Colonel Alexander Jones of the Baltimore County Police Department; that the vast majority of business at hookah lounges occurs between 11:00 P.M. and 2:00 A.M. Mr. Taha also testified that the 12:00 midnight closing has caused Towson Nights to be behind in rent payments to the Landlord and forced him to borrow money from friends to remain in business. Mr. Taha acknowledged that, after Bill 16-14 went into effect, Towson Nights was the subject of a Code Enforcement case resulting in a civil penalty because it remained opened beyond 12:00 midnight.<sup>2</sup>

Mr. Taha testified that patrons previously brought and consumed alcoholic beverages on the premises; a practice commonly referred to as "bring your own bottle" ("BYOB"). Mr. Taha testified that he voluntarily discontinued the practice of BYOB on the Premises even though state law permits this practice up until 2:00 A.M. The Petitioners believe that one of the reasons for the midnight closing of hookah lounges is law enforcement's difficulty in controlling the consumption of alcohol after 2:00 A.M., if the hookah lounge's patrons are permitted to BYOB.<sup>3</sup>

The evidence produced at the hearing showed that, since late 2013, the County had serious concerns about hookah lounge activities - namely, the associated late night criminal activity and

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<sup>2</sup> On March 16, 2016, this Board affirmed the decision of the Administrative Law Judge in Case No.: 1507603 for a violation of Bill 16-14 in which the evidence showed that the "open" flag was displayed after midnight and patrons were observed inside of Towson Nights.

<sup>3</sup> On cross examination, Colonel Jones acknowledged that he did not know that Article 2B §20-103 makes it unlawful for any non-liquor licensed establishment to allow BYOB after 2:00 A.M.

indoor smoking. In the County's Case-in-Chief, Colonel Jones provided statistics from activities which occurred prior to the enactment of the Bill. These statistics showed the numbers and types of crimes in and around hookah lounges in Baltimore County were varied and problematic. Colonel Jones stated that these crimes were draining late-night police resources. However, after the enactment of the Bill, late-night police calls associated with hookah lounges were significantly reduced.<sup>4</sup> Colonel Jones testified that hookah lounges present additional problems that are different from those of typical bars in that there is no comprehensive scheme of licensing and/or regulation of the consumption of the alcoholic beverages at hookah lounges. Colonel Jones also testified that to permit hookah lounges to stay open until 2 A.M. compounds existing law enforcement problems involving concentration of late night disturbances around closing hours and produces unexpected criminal activity.

Tricia Rothlingshofer, of the Baltimore County Police Department, was on medical leave at the time of our hearing. Without objection, Ms. Rothlingshofer's testimony from the ALJ hearing below was proffered by People's Counsel, who provided a summary of the background facts. Evidence from the Crime and Traffic Analysis Division evaluated nine hookah lounges countywide between 2013 and 2015, with breakdowns for days, hours, and types of crimes connected to County hookah lounges both before and after the enactment of Bill 16-14. (P.C. Exhibit 9.) Prior to the enactment of Bill 16-14, the data shows a high number of late-night and early-morning weekend calls at hookah lounges. Many of these calls involve disturbances amounting to assaults and robberies. Conversely, after the enactment of Bill 16-

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<sup>4</sup> See People's Counsel Exhibit 9, Tables 11a through 11d.

14, the data shows a significant reduction in reported disturbances and violent acts in and around hookah lounges.

In addition to the general data related to several hookah lounges in the county, the data specifically showed that, during the period 2013 through 2015, Towson Nights had a significant number of police calls for service. Table 9a shows 31 calls for service at 20 Allegheny Avenue between 12 A.M. and 4 A.M, almost all on weekends, between January 1, 2013 and April 11, 2014. Table 9b shows that 18 calls were for disturbances, 3 calls were for theft, and 2 calls were for assault, among others. Table 9c shows 16 calls at the Premises between 12 A.M. and 3 A.M. from April 12, 2014 through December 31, 2015. Table 11d shows 11 for code violations, and one for assault. Again, after the enactment of Bill 16-14, the incidents of these types of disturbances at the Premises dropped significantly.

The office manager for Police Chief James Johnson, Detective Paul Merryman, compiled a notebook consisting of several documents from departmental records which detailed many issues concerning hookah lounges. (*See P.C. Exhibit 10.*) These departmental documents were submitted to the County Council to support the need for Bill 16-14. Similar to the statistics prepared by Ms. Rothlingshofer and the data presented by Colonel Jones, the notebook contains reports of incidents and problems in several police precincts, calls for service at various hookah lounges, and various specific significant incident reports.

Finally, People's Counsel, without objection, proffered evidence related to the legislative history of Bill 16-14. The Johns Hopkins University Bloomberg School of Public Health, Department of Environmental Health Sciences and Institute for Global Tobacco Control, published an online article in the *Journal of Exposure Science and Environmental Epidemiology*, entitled, *Waterpipe cafes in Baltimore, Maryland: Carbon monoxide, particulate matter, and*

*nicotine exposure*. In sum, the authors of the article found that both employees and patrons of waterpipe venues (such as hookah lounges) are at increased risk from complex exposures to secondhand waterpipe smoke. People's Counsel proffered that, based on the findings of several experts, smoking in a hookah lounge was in direct conflict with the Maryland Indoor Clean Act of 2007.<sup>5</sup>

### Petitioner's Arguments

In the Petitioner's Appeal Petition, four (4) issues were presented to challenge the legality of hours of operation specified in Bill No: 16-14. Those issues, some of which are constitutional in nature,<sup>6</sup> are as follows:

- (1) The forty-five (45) day amortization period specified in Bill No: 16- 14 denies due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution in that it does not adequately reflect the useful life of the business;
- (2) Limiting the hours of operation of a business in a zoning ordinance is *ultra vires* in that there is no authority in the enabling legislation, Land Use Article §4-102, authorizing Baltimore County to limit hours of operation;
- (3) The time restrictions contained in Bill No: 16-14 deny substantive due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution in that the limitation of hours of operation for Hookah Lounges is irrational, arbitrary, and unreasonable;
- (4) The time restrictions contained in Bill No: 16-14 deny equal protection of the laws under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution in that the limitation of hours of operation for Hookah Lounges and not other similarly situated businesses is an irrational, arbitrary, and unreasonable distinction.

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<sup>5</sup> The Maryland Clean Indoor Air Act is codified in the Health-General Article §§24-501 through 24-511 and limits smoking tobacco products indoors unless exempted by §24-505. Hookah lounges are not exempt under §24-505.

<sup>6</sup> Administrative Agencies are fully competent to resolve constitutional issues which are the subject of judicial review and if a constitutional issue is an administrative proceeding, and resolution of that issue is necessary for a proper disposition of the case, an agencies failure to decide the constitutional issue constitutes error. *Montgomery County v. Broadcast Equities, Inc*, 360 Md. 438 (2000).

Discussion

(1) Bill 16-14's 45-day Amortization Period does not violate Due Process Rights.

The Petitioner alleges that it was denied due process under the Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment because Bill 16-14 only provides a forty-five (45) day “amortization period” which, according to the Petitioner, does not adequately reflect the useful life of the business. With respect to the forty-five (45) day period stated in Bill 16-14, the specific language is as follows:

“SECTION 2. AND BE IT FURTHER ENACTED, that a hookah lounge or vapor lounge lawfully in existence on or before the effective date of this act shall comply with the operating hours requirements of this act not more than 45 days after the effective date.”

We do not agree with this argument. Section 2 of Bill 16-14 did not create an “amortization period,” as that term is generally used in zoning legislation. It neither eliminated the use of the Premises as a hookah lounge, nor declared that a hookah lounge was a nonconforming use in Baltimore County. Rather, Bill 16-14 permitted existing hookah lounges to operate lawfully during a specified time period. The legislative use of an amortization period is a technique drafted into statutes or ordinances that call for the immediate cessation of a nonconforming use after a certain period of time so as to mitigate some of the economic hardships a property owner may experience because he/she no longer has the desired use of his/her property. *See Mayor & City Council of Balt. v. Dembo, Inc.*, 123 Md. App. 527, 538–39 (1998) (“True amortization provisions almost if not universally call for a termination of non-conforming uses after the lapse of a reasonable, specified period in order that the owner may amortize his investment (the reasonableness of the period depends upon the nature of the nonconforming use, the structures thereon, and the investment therein).”). The use of a reasonable amortization period provides an

equitable means of reconciling the conflicting interests of government and the property owner to satisfy the due process requirements. *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 312 (1957). *See also Eutaw Enterprises, Inc. v. City of Baltimore*, 241 Md. 686 (1966). In this case, the Petitioner is permitted to continue to operate the Premises as a hookah lounge within the hours established by Bill 16-14. In short, because Bill 16-14 did not ban the use of the Premises as a hookah lounge and did not, by its express terms, create an amortization period, we do not find that the 45-day delayed implementation of Bill 16-14 violates the Petitioner's due process rights.

(2) Bill 16-14's operating hours are within the County's regulatory authority.

The substantive portion of Bill 16-14, which allegedly affects the Petitioner's business activities and his ability to earn more income, is Section 101.1. This section states that "A Hookah Lounge May Only Operate From 6:00 A.M. To 12 A.M." The Petitioner claims that the County does not have the authority to limit the hours of operation of a business in a zoning ordinance; therefore, Bill 16-14 constitutes an *ultra vires* act and is outside of the scope of the County's authority under Section 4-102 of the Land Use Article of the Annotated Code of Maryland.

The Land Use Article is comprised of comprehensive legislation designed to regulate the manner in which a Legislative Body controls the use and development of land within its jurisdiction through comprehensive planning and zoning. *See Md. Code Ann., Land Use § 4-101.*<sup>7</sup> Section 4-102(6) of the Land Use Article states as follows: "To promote the health, safety, and welfare of the community, a legislative body may regulate ... the location and use of buildings, signs, structures, and land." The legislative history of Bill 16-14 indicates that the County was

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<sup>7</sup> Section 4-101(b) of the Land Use Article states that, "[t]o achieve the public purposes of this regulatory scheme, it is the policy of the General Assembly and the State that local government action will displace or limit economic competition by owners and users of property through the planning and zoning controls set forth in this division and elsewhere in the public general and public local laws."



concerned about the after-hour disturbances and criminal activities at hookah lounges. Section 4-102(6) of the Land Use Article clearly grants the County the authority to regulate the use of a building, which implicitly means the activities carried on therein.

The Petitioner relies upon *Trip Associates, Inc. v. Mayor and City Council of Baltimore*, 392 Md. 563 (2006) to support its position that the hours of operation are generally not an appropriate subject for zoning regulations. The issue in *Trip Associates* was whether the Baltimore City Board of Municipal and Zoning Appeals (the "City Board") erred when it restricted the number of days per week that the Trip Adult Night Club (the "Club") owners could operate a valid nonconforming use. Since 1979, the Club presented up to five nights of adult entertainment per week. When the owners purchased the Club there was no restriction on the number of nights adult entertainment was permitted. However, the owners of the Club reduced the number of days to two nights per week for adult entertainment.

In 1992, the City Board approved the use of the Club's premises as a "after hours establishment" which exclusively presented adult entertainment after hours (after 2:00 a.m.). In 1994, the Baltimore City Zoning Board (the "City Board") enacted an ordinance to regulate adult entertainment (the "City Ordinance") and stated that any adult entertainment business existing after on September 10, 1993 is considered a nonconforming use which shall be subject to all Class III regulation.<sup>8</sup> The City Ordinance prohibited the expansion "in any manner" of a Class III nonconforming use.

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<sup>8</sup> "Class III" is defined in the Baltimore City Zoning Code, § 13-401. In describing what is regulated by the subtitle, it states:

"§ 13-401. Scope of subtitle.

"This subtitle applies to Class III nonconforming uses, which comprise:

In 2000, the continued use of the facility in *Tripp Associates* as an adult entertainment provider was challenged when a zoning inspector found that the Club was in violation of the ordinance because it did not have the proper license. The owners of the Club appealed to the City Board which found that the Club was a valid nonconforming use. However, based on the testimony at the hearing, adult entertainment was limited to two (2) nights per week. The City Board's findings were affirmed by the Circuit Court for Baltimore City (the "Circuit Court"). The Circuit Court concluded that limiting the Club's use to two days per week was not irrational or lacking in legal basis, and was a reasonable condition that continues the present practice. The Court of Special Appeals affirmed the decision of the Circuit Court.

In *Trip Associates*, the Court of Appeals reversed the judgment of the Court of Special Appeals and remanded with instructions to the City Board to enter a judgment in favor of the owners of the Club to allow it to operate as an adult entertainment provider five (5) days per week. *Id.* at 464. The Court relied on *Green v. Garrett*, 192 Md. 52 (1949), in which it held that a temporal expansion of a nonconforming use is an intensification and not an unlawful expansion. As such, when the City Board, pursuant to the City Ordinance, limited the days of operation of the Club as a provider of adult entertainment from five days to two days, its actions were unlawful.

In this case, Bill 16-14 does not transform a hookah lounge into a nonconforming use. In *Trip Associates*, the Court stated that "a nonconforming use is a vested right entitled to

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"(1) any nonconforming use of all or part of a structure that was designated and erected primarily for a use that is no longer allowed in the district in which it was located;

"(2) any nonconforming use of the lot on which that structure is located; and

"(3) any nonconforming use of land or structures not regulated as Class I or Class II."

constitutional protection." *See Amereihn v. Kotras*, 194 Md. 591 (1950). In *Amereihn*, after an area in which a light manufacturing plant was located was zoned as residential, the neighbors brought a complaint, praying that the new owners of the plant be restrained from using the property for manufacturing purposes. The Court in *Amereihn*, in ruling against the neighbors, stated that:

If a property is used for a factory, and thereafter the neighborhood in which it is located is zoned residential, if such regulations applied to the factory it would cease to exist, and the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Manifestly this cannot be done, because it would amount to a confiscation of the property.

*Id.* at 601.

Following the passage of Bill 16-14, a hookah lounge became a permitted use. There is no effort on the part of the County to ensure that hookah lounges would “cease to exist”. *Id.* Section 4-102 (6) of the Land Use Article permits the County to regulate the location and the use of buildings “to promote the health, safety, and welfare of the community.” The limitations placed on a hours of operation of hookah lounges and specifically, Towson Nights, by Bill 16-14 is a time, place and manner regulation enacted to promote the health and safety of the citizens in response to well-documented evidence of after-hour disturbances and criminal activities at hookah lounges.

3. Bill 16-14’s time restrictions do not deny Substantive Due Process Rights.

The Petitioner also claims that the time restrictions contained in Bill No: 16-14 deny substantive due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution in that the limitation of hours of operation for hookah lounges is irrational, arbitrary, and unreasonable. Generally, the argument is that legislative acts

violate substantive due process under Article 24 of the Maryland Declaration of Rights<sup>9</sup> and the Fourteenth Amendment to the United States Constitution<sup>10</sup> if there is no rational basis for such legislation. *See Maryland Aggregates Association, Inc. v. State of Maryland*, 337 Md. 658 (1995); *see also Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230 (1975).

In this case, no party has averred that Bill 16-14 infringes upon a fundamental right of Towson Nights.<sup>11</sup> As such, the constitutional test under the Due Process Clause is whether Bill 16-14 - as an exercise of the County's police powers - bears a real and substantial relation to public health, morals, safety and welfare of this citizen of Baltimore County. *Bowie Inn*, 274 Md. at 236. The exercise by the Legislature of police power will not be interfered with unless it is shown to be exercised arbitrarily, oppressively or unreasonably.

In *Bowie Inn*, the City Council of Bowie enacted an ordinance (the "Bowie Ordinance") intended to combat the problem of roadside litter by making it unlawful for any person to sell any soft drink or malt beverage unless a deposit of five (5) cents on each container was charged at the retail level and unless the deposit was given back upon return of the containers to the retail outlet. Violation of the Bowie Ordinance was a misdemeanor which subjected the violator to a fine up to \$100.00 and imprisonment for a maximum of thirty (30) days.

In one of its challenges, the appellants contended that the Bowie Ordinance infringed on its due process rights under the Maryland Declaration of Rights and the Fourteenth Amendment

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<sup>9</sup> Article 24 of the Maryland Declaration of Rights provides as follows: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the land."

<sup>10</sup> The Fourteenth Amendment to the United States Constitution provides, in part, as follows: "nor shall any State deprive any person of life, liberty, or property, without due process of law...."

<sup>11</sup> Towson Nights is not a member of a suspect class and a fundamental right is not at issue; therefore, the standard of review is the traditional and deferential rational basis analysis. *See Neifert v. Dept. of Environment*, 395 Md. 486 (2006) (2006).

to the United States Constitution by imposing a mode of doing business on retailers within Bowie which did bear a real and substantial relationship to the reduction of litter in Bowie. *Id.* at 233. At the trial in the Circuit Court, the appellants presented evidence alleging that the Bowie Ordinance places a heavy burden on businesses in Bowie and their distributors, and that the ordinance would fail to achieve its aim - "combating the problem of roadside litter". The Court held that the Bowie Ordinance was valid. The Court pointed out that, although the appellants presented some evidence that may cast some doubt on the wisdom of the Bowie Ordinance, the appellants failed to demonstrate that it bears no real and substantial relationship to the public health, morals, safety and welfare of the citizens of Bowie. *Id.* at 237.

In this case, substantial proffered exhibits prepared by Tricia Rothlingshofer of the Baltimore County Police Department, and oral testimony and exhibits from Colonel Alexander Jones, also of the Baltimore County Police Department, indicated that there were many reports of incidents, criminal activities and various other problems at County hookah lounges between the hours of 11:00 P.M. to 2:00 A.M. The County also produced evidence that, since the enactment of Bill 16-14, the frequency of these types of incidents have been reduced. In our review of the facts presented, the County has established that there was a real and substantial relationship between the public health, morals, safety and welfare of the citizens of Baltimore County and the hours of operation listed in Bill 16-14.

As pointed of in *Bowie Inn*, we note that when a statute is enacted pursuant to a legislature's policy-making authority - such as the time, place and manner provisions of Bill 16-14 - there is strong presumption of constitutionality of such a statute. Additionally, the statute is not subject to judicial review, and will not be held invalid if there are considerations relating to

public welfare that can be supported.<sup>12</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 at 440 (1985); *see also Bowie Inn*, 274 Md. at 236. Under these circumstances, as was supported by evidence, there is a real and substantial relationship between the reduced hours of operation of a hookah lounge and the reduction in criminal activity after the passage of Bill 16-14. The enactment of the Bill did not violate the due process rights of Towson Nights under the under the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

4. Bill 16-14's time restrictions do not violate the Equal Protection Clause.

Finally, The Petitioner claims that the time restrictions contained in Bill 16-14 deny equal protection of the laws under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution in that the limitation of hours of operation for hookah lounges, and not other similarly situated businesses, is an irrational, arbitrary, and unreasonable distinction.<sup>13</sup>

In *Bowie Inn*, the appellants claimed that Bowie Ordinance denied them equal protection under the law because it created an artificial and arbitrary classification of soft drinks and malt beverage containers. They argued that soft drink containers and beer containers are not different from other beverage containers in any respect having a substantial relation to the object of controlling litter. The Appellants alleged that all other beverage containers like milk cartons and

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<sup>12</sup> The People's Counsel also proffered evidence that based on the findings of several experts smoking in a hookah lounge was in direct conflict with the Maryland Indoor Clean Act of 2007. Although this evidence was enlightening, because the County permits smoking in a hookah lounge, it was not a compelling as the evidence presented by the Baltimore County Police Department.

<sup>13</sup> The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and directs that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Article 24 of the Maryland Declaration of Rights states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." *See Neifert v. Department of the Environment*, 395 Md. 486 (2000).

bottles, and fruit juice cans, should also have been regulated under the Bowie Ordinance. *Bowie Inn*, 274 Md. at 240. Relying on *Reed v. Reed*, 404 U.S. 71 (1971), the Court in *Bowie Inn* stated that the Fourteenth Amendment's Equal Protection Clause have required that a statutory classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Id.* at 240-241. The Court in *Bowie Inn* pointed out that the question of classification is for the legislature, and the courts will not interfere "if any facts reasonably may be conceived to justify the classification. *See also McGowan v. Maryland*, 366 U.S. 420 (1961). A "classification having some reasonable basis does not offend against the ... Equal Protection Clause ... merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Bowie Inn*, 274 Md. at 241.

The Petitioner here states that an establishment with a liquor license and BYOB establishments are subject to the Baltimore County Admissions and Amusement Tax which permits a 2:00 A.M. closing. Restaurants, billiard rooms and convenience stores are among the businesses exempt from this regulation and are allowed to remain open 24 hours a day.<sup>14</sup> As such, according to the Petitioner, there is no rational basis for requiring hookah lounges to close at midnight while similarly situated businesses are allowed to remain open until 2:00 A.M. or all night. In addition, cigar bars that do not provide entertainment, are also allowed to remain open 24-hours a day. The Petitioner believes that this arbitrary distinction between similarly situated businesses violates the Equal Protection Clause of Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights.

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<sup>14</sup> See Baltimore County Zoning Regulations Article 4, §437.1 and §437.2.

In this case, in order for the County to avoid a violation of the Equal Protection Clause or the Maryland Declaration of Rights it must demonstrate that there is a rational basis for the enactment of Bill 16-14. To prevail, the rational basis test requires the Petitioner to prove that (1) the government treated them differently than it treated others similarly situated, and (2) the disparate treatment did not bear a rational relationship to a legitimate interest. *Neifert v. Dept. of Environment*, 395 Md. 486 (2006) (2006).

In our view, licensed liquor establishments are not similarly situated to hookah lounges. The licensed liquor business is highly regulated under Maryland Annotated Code Article 2B whereas hookah lounges are not regulated by any Maryland statute. Similarly, BYOB establishments are not similarly situated to hookah lounges. A BYOB establishment - standing alone - is not similarly situated to a hookah lounge because, like a licensed liquor establishment, it is regulated by a Maryland statute.

We also find that a hookah lounge would also be subject to Bill 16-14 because of its smoking activities, not just the consumption of alcohol. Although there was little evidence presented at the hearing concerning the similarity of hookah lounges and cigar bars, People's Counsel pointed out cigar bars cater to an older and different patron group and there is no evidence that the customers of those establishments present the same types of late night disturbances when they close. Accordingly, we find that the arguments presented by the Petitioner do not prove that Towson Night is similarly situated to the aforementioned businesses. Therefore, we do not find an Equal Protection Clause violation.



The County has satisfied the second prong of the rational basis test under *Neifert*.<sup>15</sup> As detailed above, the regulation of hours of operation of a hookah lounge enumerated in Bill 16-14 bears a real and substantial relation to public health, morals, safety and welfare of the citizens of Baltimore County. The County has a legitimate interest in reducing after-hour police calls and criminal activity in and around hookah lounges when they close. The evidence presented by the legislative history assembled before the Bill-16-14 was passed<sup>16</sup> shows that the County exercised its police power under its county charter<sup>17</sup> and §4-102 (6) of the Land Use Article<sup>18</sup> to promote the public health, morals, safety and welfare of the citizens of Baltimore County.

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<sup>15</sup> In *Maryland Aggregates Association, Inc. v. State of Maryland*, 337 Md. 658, 673 (1995), the Court pointed out that: "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.... This standard of review is a paradigm of judicial restraint."

<sup>16</sup> The March 31, 2014 Executive Summary Thomas Peddicord, County Council Secretary, transmitted to the Council his Executive Summary. People's Counsel Exhibit 6 contains several major points to describe the legislative history of Bill 16-14:

Bill 16-14 regulates hookah and vapor lounge hours to protect public health and prevent or reduce late night crime. There are descriptions of the health risks of hookah smoking and of the late night crime problems associated with hookah lounge operations.

On the subject of "Public Welfare/Safety Concerns, it is reported, "During the past several months, the Baltimore County Police Department has conducted an investigation into the operation of and criminal 'conduct occurring in and around Hookah Lounges in Baltimore County. The Police Department has experienced a number of events requiring police action which have had a significant impact on police resources. During the last six months there were thirty-seven (37) arrests and thirty-nine (39) calls for service at the various hookah locations below, all occurring after 9:00PM. Due to the nature of the incidents at some of the lounges, there is a concern for the health and welfare of people who frequent, work, and travel in and around these locations. A review of recent criminal activity at these Hookah Lounges demonstrates some of the issues police are challenged with on a frequent basis."

<sup>17</sup> Md. Ann. Code Local Gov't Article (LG), Sec. 10-206(a) enables a charter county council to pass any ordinance, not inconsistent with State law, which "(1) may aid in executing and enforcing any power in this title; or (2) may aid in maintaining the peace, good government, health, and welfare of the county." Concurrently, LG Sec. 10-324 provides for local zoning and planning laws to protect and promote public safety, morals, health, and welfare. In contrast, LG Sec. 10-206(c) forbids a county to pass any law regulating alcoholic beverages, thus reinforcing exclusive state control.

<sup>18</sup> §4-102 (6) of the Land Use Article states "To promote the health, safety, and welfare of the community, a legislative body may regulate ... the location and use of buildings, signs, structures, and land.

**Conclusion**

1. Based upon the foregoing, the Board finds that the forty-five (45) day amortization period specified in Bill No: 16- 14 does not deny the Petitioner due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

2. Based upon the foregoing, the Board finds that limiting the hours of operation of a business in a zoning ordinance is not an *ultra vires* act and the County has authority under Land Use Article §4-102 to limit hours of operation of a hookah lounge.

3. Based upon the foregoing, the Board finds that the time restrictions contained in Bill No: 16-14 did not deny the Petitioner substantive due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution and said limitations are not irrational, arbitrary, and unreasonable;

4. Based upon the foregoing, the Board finds that the time restrictions contained in Bill No: 16-14 did not deny the Petitioner equal protection of the laws under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution and that Towson Nights is not similarly situated to a Licensed Liquor establishment, a BYOB or a Cigar bar and limiting the hours of operation of hookah lounges bears a rational relationship to a legitimate interest.

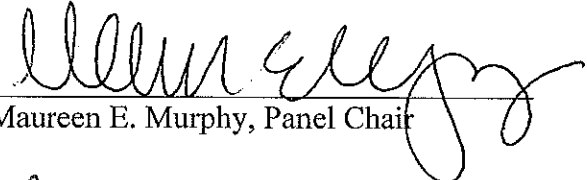
**ORDER**

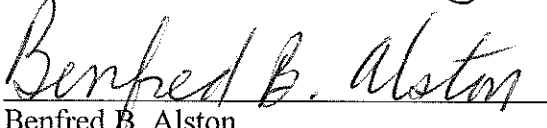
**THEREFORE, IT IS THIS** 9<sup>th</sup> day of January, 2017, by the Board of Appeals of Baltimore County,

**ORDERED** that Petitioner's Petition for Special Hearing to approve the use of 28 W. Pennsylvania Avenue, Towson, Maryland as a hookah lounge during the operating hours of 12:00 midnight to 6:00 a.m. every day is **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chair

  
Benfred B. Alston

  
James H. West



## Board of Appeals of Baltimore County

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410-887-3180  
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January 9, 2017

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RE: *Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust – Legal Owners  
SAHBI Hookah, Inc. – Lessee  
Case No.: 16-089-SPH*

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington  
Administrator

KLC/tam  
Enclosure  
Multiple Original Cover Letters

c: See Distribution List Attached

IRVIN M. BADDOCK, TRUSTEE OF THE RICHARD K. ADOLPH RESIDUARY TRUST – LEGAL OWNERS  
SAHBI HOOKAH, INC. – LESSEE  
CASE NO.: 16-089-SPH  
DISTRIBUTION LIST

c: Nasser Taha/SAHBI Hookah, Inc.  
Irvin M. Baddock, Trustee  
Lawrence M. Stahl, Managing Administrative Law Judge  
Andrea Van Arsdale, Director/Department of Planning  
Arnold Jablon, Deputy Administrative Officer, and Director/PAI  
Nancy C. West, Assistant County Attorney/Office of Law  
Michael E. Field, County Attorney/Office of Law