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Supreme Court of Maryland

ROBERT C. MURPHY COURTS OF APPEAL BUILDING

Petitions for Writ of Certiorari - April 2019

PETITIONS FOR WRIT OF CERTIORARI

September Term, 2018

dealing with the verminments disabilities of health problems, in a circuit court that has 35 judges and comprises two large courthouses?

Denied April 19, 2019

Allen v. Hill - Pet. Docket No. 406
Barnett, Antonio v. State - Pet. Docket No. 494 and conditional cross-petition
Bigham, Dale v. State - Pet. Docket No. 14 *
Cardillo, Henry J. v. State - Pet. Docket No. 377
Carmean, Glenn Allen v. State - Pet. Docket No. 7 *
Clark, Anthony v. State - Pet. Docket No. 458
Clark, Corey v. State - Pet. Docket No. 33 *
Clark, Hammel v. State - Pet. Docket No. 10 *
Clements, David Thomas v. State - Pet. Docket No. 513
Collins, Joel v. State - Pet. Docket No. 466
Crawson, Michael Timothy v. State - Pet. Docket No. 20 *
Dame, Francois v. State - Pet. Docket No. 32 *
Dickerson, Daquan Cartier v. State - Pet. Docket No. 533
Estate of Puppolo v. Sinai Hospital of Baltimore - Pet. Docket No. 529
GAB Enterprises v. Rocky Gorge Development - Pet. Docket No. 534
Gray, Isaac v. State - Pet. Docket No. 525
Hailes, Jermaine v. State - Pet. Docket No. 519
Harris, Edward Allen, Jr. v. State - Pet. Docket No. 415
Hicks, Allen v. State - Pet. Docket No. 12 *
Hirshauer v. AQ Holdings - Pet. Docket No. 501
Horan v. Marks - Pet. Docket No. 510
Isel v. Munson - Pet. Docket No. 500
Jobs, Michael, Jr. v. State - Pet. Docket No. 496
Johnson v. Credit One Bank - Pet. Docket No. 514
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Marks, Jason Nathaniel v. State - Pet. Docket No. 15 *
Mayor & City Council of Ocean City v. Nathans Associates - Pet. Docket No. 518

~~MOORE, David R. v. State - Pet. Docket No. 367~~

Ogunde v. Johnson - Pet. Docket No. 9 *

Ong, Lye Huat v. State - Pet. Docket No. 521

Palmore v. Washington Mutual Bank - Pet. Docket No. 497

Parker, Wayne K. v. State - Pet. Docket No. 526

Pellum v. Unique & Modern Homes - Pet. Docket No. 530

Porter v. Baltimore Washington Medical Center - Pet. Docket No. 517

Reed, Alfred Orlando v. State - Pet. Docket No. 516

Reynolds, Johnny v. State - Pet. Docket No. 25 *

Rubin v. United Therapeutics - Pet. Docket No. 535

Sahbi Hookah v. Baltimore County - Pet. Docket No. 493

Schleunes v. Schleunes - Pet. Docket No. 511

Seymour v. Tidewater Investment Group - Pet. Docket No. 508

Smallwood v. Brown - Pet. Docket No. 522

Stratton, Michael v. State - Pet. Docket No. 528

Terrell, Chastian Devon v. State - Pet. Docket No. 11 *

T.T.G., LLC v. RLD Rental Properties - Pet. Docket No. 502

Turner, Terrence Norman, Jr. v. State - Pet. Docket No. 523

Witherspoon, Edward v. State - Pet. Docket No. 520

Witherspoon v. Bishop - Pet. Docket No. 532

* September Term 2019

Granted April 22, 2019

Dana T. Johnson, Jr. v. State of Maryland - Case No. 9, September Term, 2019

Issues – Criminal Law – 1) Section 5-612 of the Criminal Law Article, which prohibits possession of certain quantities of controlled dangerous substances, provides that

SAHBI HOOKAH, INC.

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IN THE

Petitioner

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COURT OF APPEALS

v.

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OF MARYLAND

BALTIMORE COUNTY, MD

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No:

Respondent

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September Term 2018

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**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS**

Sahbi Hookah, Inc.¹, Petitioner requests this Court to issue a writ of certiorari.

The Case in the Lower Court

The case in the lower court was designated *Irvin M. Baddock, et al v. Baltimore County, Maryland*, in the Circuit Court for Baltimore County, Case No: 03-C-17-000957.

Decision of Court of Special Appeals

The case has been decided by the Court of Special Appeals in a reported opinion dated November 28, 2018. *See* 239 Md. App. 467, 197 A.3d 546 (No. 1271, Sept. Term 2017).

The Circuit Court Adjudicated All Claims

The Circuit Court adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action.



¹Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust, one of the Petitioner below has since sold the property. As the trust is no longer the Landlord of the premises, it does not join in this Petition.

Date of Judgment and Mandate

The judgment of the Circuit Court for Baltimore County sought to be reviewed was entered on August 7, 2017. The mandate of the Court of Special Appeals was issued on January 11, 2019.

Questions Presented for Review

- I. IS THE 45 DAY AMORTIZATION PERIOD OF A DISCONTINUANCE OF A LAWFUL NONCONFORMING USE A DENIAL OF DUE PROCESS UNDER ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND THE 14th AMENDMENT TO THE US CONSTITUTION?
- II. DID BALTIMORE COUNTY ACT *ULTRA VIRES* IN THE ENACTING OF TIME RESTRICTIONS IN A ZONING LAW?
- III. DOES BILL NO. 16-14 VIOLATE SUBSTANTIVE DUE PROCESS (OR THE SUBSTANTIAL RELATIONSHIP TEST) AS AFFORDED BY ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND/OR THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION?
- IV. DOES BILL NO. 16-14 VIOLATE EQUAL PROTECTION UNDER ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND/OR THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION?

Grounds for Allowance of the Writ

Review of the questions presented is desirable and in the public interest as they address the constitutional limitations on the police power of a county to place time restrictions on a lawful business use. Specifically, prior to enactment of Baltimore County Council Bill 16-14 passed on May 8, 2014, Petitioner had a valid use and occupancy permit

to operate a hookah lounge. For the first time, Petitioner was required to close its business from midnight to 6:00 A.M. and was required to come into compliance within 45 days. The hours of operation restriction was tantamount to a termination of the lawful use as almost all revenues are generated between 11:00 P.M. and 2:00 A.M.. Petitioner has challenged the ordinance as irrational, violating substantive due process as the only proper bases for legitimate exercise of police power are regulation of alcohol, which is a State Law function, and regulation of tobacco, which is just as harmful before midnight as it is after midnight. Petitioner is also challenged the ordinance as irrational on equal protection grounds since cigar lounges may remain open 24 hours per day while hookah lounges must close from midnight to 6:00 A.M.. Petitioner has also challenged the 45 day compliance period as a unconstitutionally insufficient amortization period for cessation of a lawful business use. Lastly, Petitioner, while conceding that time restrictions are within the proper police power, so long as they do not otherwise violate due process and equal protection considerations, in the instant case, the time restrictions were enacted as part of a zoning law.

Additionally, this case affords this Court to resolve an important issue that was left unresolved in its decision in *Prince George County v. Ray's Used Cars*, 398 Md. 632, 922 A.2d 495 (2007). In *Ray's Used Cars*, Judge Eldridge questioned the lower Court's application of the *substantial relationship test* as stated in *Levinson v. Montgomery County*, 95 Md. App. 307, 620 A.2d 961, *cert. denied* 331 Md. 197, 627 A.2d 539 (1993) and *Goldman v. Crowther*, 147 Md. 282, 182 A.50 (1925) in addressing a substantive due process

challenge to a local zoning law under Article 24 of the Maryland Declaration of Rights. In footnote 5 of the decision, Judge Eldridge states that the *substantial relationship test* is no longer good law. The decision provides no precedent since the decision was reversed based upon a failure to exhaust administrative remedies and was not decided on the merits.

Pertinent Legal Provisions

This case involves a challenge to Baltimore County Council Bill No. 16-14 codified in Baltimore County Zoning Regulations §101.1, definition of Hookah Lounge. Pertinent to that analysis is Article 24 of the Maryland Declaration of Rights and the Equal Protection Clause of Fourteenth Amendment to the U.S. Constitution.

Statement of Facts

The subject property, 28 West Pennsylvania Avenue, Towson, MD 21204 was owned by Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust. On September 24, 2013, Sahbi Hookah, Inc. *t/a* Towson Nights (hereinafter “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 Tenant, with the knowledge that Tenant intended to operate as a hookah lounge and that the operation of a hookah lounge was a lawful use, even after 12:00 midnight. Substantial improvements were made to the premises after obtaining a building permit on November 22, 2013 for use as a hookah lounge and on April 11, 2014, a use and occupancy permit was issued permitting use as a hookah lounge. Upon obtaining the occupancy permit, the premises opened for business. Prior to the July 2, 2014 expiration of

the 45 day amortization period, Towson Nights' hours of operation were Sunday through Thursday from 4:00 P.M. to 2:00 A.M. and Friday and Saturday from 4:00 P.M. to 3:00 A.M..

Testimony was offered by Mr. Taha that requiring Towson Nights' operation as a hookah lounge to close at midnight effectively puts him out of business as approximately 90% of all business occurs between 11:00 P.M. and 2:00 A.M.

On May 18, 2014, Bill No. 16-14 became effective. Bill No. 16-14 was enacted pursuant to Baltimore County's zoning authority and is titled an Action Concerning Zoning Regulations - Hookah Lounges, Vapor Lounges - Definitions and Limitations. Its stated purpose as specified in its preamble is "for the purpose of allowing hookah lounges and vapor lounges in the B.L. zone; limiting the operating hours of hookah and vapor lounges; defining certain terms; making technical changes; providing for the application of this act; and generally establishing certain restrictions for hookah and vapor lounges.

Section 1 of Bill No. 16-14 provides for a new definition of "hookah lounge" to be codified in Baltimore County Zoning Regulation §101.1 of the. "Hookah Lounge" is defined as follows:

"Hookah Lounge. 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.**"

In addition to defining hookah lounge, this section limits the hours of operation of a hookah lounge so that it must close at midnight every day and may not reopen until 6:00 A.M. the following day. In section 2 of Bill No. 16-14, the ordinance provides that a hookah lounge lawfully in existence on or before the effective date of this act shall comply with the operating hours requirements not more than 45 days after the effective date. Therefore, beginning July 2, 2014 at midnight, for the first time hookah lounges located in Baltimore County were required to cease operations from midnight to 6:00 A.M..

Argument

I. IS THE 45 DAY AMORTIZATION PERIOD OF A DISCONTINUANCE OF A LAWFUL NONCONFORMING USE A DENIAL OF DUE PROCESS UNDER ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND THE 14th AMENDMENT TO THE US CONSTITUTION?

The operation of a hookah lounge is a lawful use. In pursuit of that lawful use, the Petitioners entered into a long term lease, expended substantial sums of money to remodel the premises as a hookah lounge, and obtained an occupancy permit for a hookah lounge on April 11, 2014. Prior to the enactment of Bill No. 16-14, Towson Nights operated as a hookah lounge pursuant to an occupancy permit.

In *Johnson v. Town of Philadelphia*, 94 Miss. 34, 47 So. 526 (1908), the town of Philadelphia passed legislation requiring skating rinks to close from 6:00 P.M. to 6:00 A.M.. The court noted that skating is a recreational activity that is enjoyed after 6:00 P.M., and that the 6:00 P.M. closing time went beyond a lawful regulation of hours of operation and

resulted in a complete cessation of the business. The court noted that as there was nothing inherent in the operation of a skating rink that resulted in illegal activity and that the power to regulate is not the power to destroy the business. Where the business operation is completely lawful, only individual businesses being operated as a nuisance are subject to closure and the existence of individual nuisances businesses does not justify the cessation of an entire lawful use. Peoples Counsel argues that *Johnson v. Town of Philadelphia* is based on obsolete due process principals that imposed stricter regulation on the government police powers than the current rational basis test. This is not the case. In McQuillen Mun. Corp. §24:327 - §24:332, 3d ed. (2004), it is made clear that the older cases are still valid in that they did not rely upon obsolete notions of substantive due process, but rather on whether the legislation went beyond the police powers afforded the government. If the 6:00 P.M. closure of skating rinks as occurred in *Johnson v. Town of Philadelphia* were to be enacted today in Baltimore County, that legislation would likewise be struck down.

Under no circumstances could a 45 day amortization period be considered reasonable and constitutional. Unlike the discontinuance of signs, discontinuance of a lawful business use requires consideration of the useful life of the business. *Harris v. Mayor and City Council of Baltimore*, 35 Md. App. 572, 371 A.2d 706 (1977) (15 years considered reasonable amortization period for use of multi family dwelling). Petitioners request that Council Bill No: 16-14 be declared unconstitutional for failure to provide a reasonable amortization period.

Writing for the Court of Special Appeals, Judge Zarnoch ruled:

“The partial restriction on the hours of operation contained within the definition of ‘hookah lounge’-bearing all of the hallmarks of traditional police power legislation-does not affect whether any particular site within Baltimore County may or may not be operated as a hookah lounge, and is not a zoning law. For this same reason, Appellants’ amortization claim is inapplicable: the requirement to close at midnight does not prohibit use as a hookah lounge, and therefore does not render Towson Nights a nonconforming use. Instead, our inquiry hinges on whether requiring hookah lounges to close at midnight is an otherwise valid exercise of the County’s police power.”

The Court of Special Appeals does not address whether, and at what point, a restriction on hours of operation effectively puts the hookah lounge out of business. The uncontroverted evidence at the zoning hearing was that 90% of Petitioner’s hookah lounge business occurred between the hours of 11:00 P.M. and 2:00 A.M.. Enforcing the hours of operation restriction is tantamount to a discontinuance of the use and requires an amortization period for its cessation. The requirement that hookah lounges conform within 45 days is therefore an amortization period and is under any circumstances not sufficient to meet the constitutional requirement of cessation within a reasonable time after the expiration of the useful life of the use.

II. BALTIMORE COUNTY ACTED *ULTRA VIRES* IN THE ENACTING OF TIME RESTRICTIONS IN A ZONING LAW.

Bill No. 16-14 was enacted as a zoning regulation. The restrictions on hours of operation are contained in the zoning law definition of “hookah lounge.” There is no effort to enact legislation to provide for the licensing of hookah establishments and there was no effort to otherwise exercise lawful police powers over hookah lounges. As enacted, the

definition of hookah lounges is strictly zoning regulation that contains temporal restrictions.

The authority of Baltimore County, a charter county, to enact zoning regulations is derived from the Express Powers Act, Local Government Article Subtitle 2. Express Powers of Charter Counties. Specifically, Local Government Article §10-206 provides a general grant of police powers, but limited to the extent not preempted or in conflict with public general law (and in no event allowing regulation of alcoholic beverages). Furthermore, Local Government Article §10-324(a) authorizes local laws related to zoning to promote public safety, health, morals and welfare.

Hours of operation are not included in the express grant of authority to enact zoning regulations. In *Trip Associates, Inc. v. Mayor and City Council of Baltimore*, 392 Md. 563, 898 A.2d 449 (2006), the Court of Appeals held that the increase in the days and hours of operation of a business was an intensification of a use and not an expansion of a non-conforming use, thereby recognizing that hours of operation are generally not an appropriate subject for zoning regulations. As the hours of operation of a lawful business are the not subject of zoning regulations, Bill No. 16-14 should be declared void as an unauthorized exercise of Baltimore County's zoning power.

III. BILL NO. 16-14 VIOLATES SUBSTANTIVE DUE PROCESS (OR THE SUBSTANTIAL RELATIONSHIP TEST) AS AFFORDED BY ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND/OR THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The time restrictions contained in Bill No. 16-14, requiring hookah lounges to close

between 12:00 midnight and 6:00 A.M. every day is an irrational and arbitrary regulation. The due process clause of the Maryland Constitution is contained in Article 24 of the Maryland Declaration of Rights. The Fourteenth Amendment to the U.S. Constitution also provides for due process of law. Assuming without conceding that Baltimore County had the legal authority to enact Bill No.16-14 under its general police power, the hours of operation provisions of that law are irrational, arbitrary, unreasonable and a denial of substantive due process.

Under the rational basis test, the regulation must bear some rational relation to a legitimate governmental interest and the court can supply any conceivable rational basis that it determines to uphold the law in question. The rational basis test, however, is not toothless and purely arbitrary laws shall be stricken as a denial of substantive due process. *Bruner v. Zawacki* 997 F.Supp.2d 691 (E.D. Kentucky, 2014) (arbitrary regulation of moving company); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (cert. den. 134 S.Ct. 423) (arbitrary regulation of casket making business).

In *Levinson v. Montgomery County*, 95 Md. App. 307, 620 A.2d 961 (1993), the Court of Special Appeals, citing *Goldman v. Crowther*, 147 Md. 282, 182 A.50 (1925) recognized a heightened level of scrutiny under Article 24, the due process clause, of the Maryland Declaration of Rights in the context of zoning matters, termed the “substantial relationship test.” The broad test of validity is whether the zoning law bears a substantial relationship to the public health, comfort, order, safety, convenience, morals, and general welfare, and such

zoning enjoys a strong presumption of validity and correctness under the heightened level of scrutiny. *Levinson v. Montgomery County*, *supra*. The substantial relationship test has been recognized in many other jurisdictions. See *McQuillen Mun. Corp.* §19:11, 3d ed. (2004). Although the validity of the substantial relationship test has been called into question in *Prince George County v. Ray's Used Cars*, 398 Md. 632, 922 A.2d 495 (2007) (case dismissed for failure to exhaust administrative remedies), it has not been overruled.

The provisions of Bill No. 16-14 requiring that hookah lounges close from midnight to 6:00 A.M. is irrational and arbitrary. There is no stated purpose for the closing hour in the preamble to Bill No. 16-14. While the health concerns of tobacco smoke would support a rational basis for the regulation of smoking, smoking hookah is no more or less harmful at 12:00 midnight than it is at 12:00 noon. Therefore, smoking regulation does not support a rational basis for the closing hour. Baltimore County argues that there are concerns of late night crowds of intoxicated persons leaving the bars, criminal activity and after hours drinking. The courts have universally held that it is irrational and arbitrary to limit the hours of operation of a purely lawful business. *Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury*, 307 A.D.2d 1043, 763 N.Y.S. 2d 674 (2003) and *Louhal Properties, Inc. v. Strada*, 191 Misc. 2d 746, 743 N.Y.S. 2d 810 *affd*, 307 A.D.2d 1029, 763 N.Y.S. 2d 773 (2003). In order to justify a limitation on the hours of operation, there must be some attribute of the business that would justify a closing hour, other than that the late hours may attract the criminal element and that increased police resources would be required if business

were to remain open after a given hour. There is simply no rational justification put forth by Baltimore County, and no rational justification that is otherwise plausible that smoking hookah causes secondary effects of inappropriate behavior or nuisance activities.

Although alcohol consumption may form the basis for the legal limitation of hours of operation, possible alcohol consumption does not justify the cessation of an entire lawful use. If alcohol consumption is the culprit, then regulate alcohol and not hookah. In this case, Baltimore County is pre-empted from regulating the consumption of alcoholic beverages in business establishments as a result of the enactment of Alcoholic Beverages Article §13-2501. The State of Maryland is not restricted from regulating the use of alcohol. In any event, Towson Nights is no longer allowing consumption of alcoholic beverages on its premises.

It is irrational, arbitrary and illegal to pass a law banning all hookah lounges because of an isolated event at a particular hookah lounge. If the use is purely harmless, but there is activity that would be deemed a nuisance at a particular business, then the appropriate course of action would be to pursue the offending business and not shutter all businesses. See, *Johnson v. Town of Philadelphia*, 94 Miss. 34, 47 So. 526 (1908).

Applying the rational basis test, there is no legally justifiable reason for imposing a closing hour on hookah lounges other than consumption of alcohol which is pre-empted by state law. Likewise, under the substantial relationship test, Baltimore County cannot impose unreasonable and unnecessary restrictions on the use of property in pursuit of lawful

activities under the guise of the police power. Baltimore County can no more limit the hours of operation of a hookah lounge than they can limit the hours of operation of an all night diner or all night convenience store. Absent a declaration of martial law, any potential or perceived rowdiness of patrons must be dealt with on a case by case basis and not by closing an entire type of business or all business in a particular area.

IV. BILL NO. 16-14 VIOLATES EQUAL PROTECTION UNDER ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS AND/OR THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The time restrictions contained in Bill No. 16-14 require hookah lounges to close between midnight and 6:00 A.M. every day. Liquor Licensed establishments, BYOB establishments except for hookah lounges, and businesses that are subject to the Baltimore County Admissions and Amusement Tax are all subject to a 2:00 A.M. closing restriction (while restaurants, billiard rooms and convenience stores, are among the businesses exempt from this regulation and are allowed to remain open 24 hours a day). Baltimore County Zoning Regulations Article 4, §437.1 and §437.2. 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. Cigar bars that do not provide entertainment are similarly allowed to remain open 24 hours a day. The 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.

Regulation of alcoholic beverages has its own unique history in the United States and

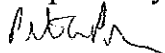
no citation is necessary for the proposition that it is legal to regulate the days and hours of sale and consumption of alcoholic beverages. Likewise, other businesses such as strip clubs have been deemed to generate “secondary effects” of the criminal element who tend to frequent such business and limitation of the hours of operation have been permitted. See, *Legend Night Club v. Miller*, 637 F.3d 291 (4th Cir.2011). Regulation of business hours of other businesses have been upheld where they are reasonably related to a legitimate object of the police power, such as for the protection of the employees, and are not discriminatory. McQuillen Mun. Corp. §24:327, 3d ed. (2004). Nevertheless, the regulation of hours of operation must be reasonable and uniform. In McQuillen §24:329 at page 351 it is stated:

“Accordingly, ordinances governing hours of business cannot discriminate as to those in the same or similar business under like circumstances, and an ordinance so discriminating is void.”

While the propriety of enacting time restrictions in zoning regulations is called into question in Argument II above, Baltimore County Zoning Regulations Article 4 §437.2 allows similar businesses providing entertainment to remain open until 2:00 A.M. and §437.1 allows similar business that do not provide entertainment such as cigar bars to remain open 24 hours a day. The distinction between the businesses provided a 2:00 A.M. closing under §437.2 and hookah lounges goes beyond an imperfect distinction and amounts to a purely arbitrary one. *Piscatelli v. Board of Liquor License Commissioners for Baltimore City*, 378 Md. 623, 837 A.2d 931 (2003). There is no distinction between smoking tobacco contained in a cigar and smoking tobacco contained in a hookah pipe. As a result, there is no rational

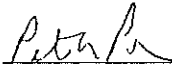
distinction in regulating hours of operation of cigar bar and a hookah lounge.

WHEREFORE, Sabhi Hookah, Inc., Petitioner requests that this Court issue its Writ of Certiorari to the Court of Special Appeals of Maryland so that this case be certified to this Court for review and determination.

Respectfully submitted,

/s/ Peter A. Prevas
Prevas & Prevas
American Building, Suite 702
231 East Baltimore Street
Baltimore, MD 21202
410-752-2340
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January 2019, I mailed, first class, postage prepaid a copy of the foregoing Petition for a Writ of Certiorari to Michael E. Field, County Attorney, R. Brady Locher, Assistant County Attorney, Department of Permits, Approvals & Inspections, 111 West Chesapeake Avenue, Room 112, Towson, MD 21204 and Peter Max Zimmerman, Esquire, People's Counsel for Baltimore County, Carole S. Demilio, Esquire, Deputy People's Counsel, The Jefferson Building, 105 West Chesapeake Avenue, Suite 204, Towson, MD 21204.



PETER A. PREVAS

This Petition contains 3,883 words.

Irvin M. Baddock, et al., v. Baltimore County, Maryland, No. 1271, September Term, 2017. Opinion by Zarnoch, J.

LOCAL GOVERNMENTS – CHARTER COUNTIES – LEGISLATIVE AUTHORITY

Requiring hookah lounges in the County to close at midnight was a valid exercise of Baltimore County’s police power, regardless of whether the restriction was encompassed within the Baltimore County Zoning Regulations’ definition of “hookah lounge.”

CONSTITUTIONAL LAW – DUE PROCESS

Requiring hookah lounges in the County to close at midnight was rationally related to public safety concerns, as well as to public health concerns about exposure to tobacco smoke, and therefore did not violate due process.

CONSTITUTIONAL LAW – EQUAL PROTECTION

Requiring hookah lounges, but not similar businesses, to close at midnight was not an arbitrary distinction that violated equal protection.

Circuit Court for Baltimore County
Case No. 03-C-17-000957

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1271

September Term, 2017

IRVIN M. BADDOCK, ET AL.

v.

BALTIMORE COUNTY, MARYLAND

Meredith,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 28, 2018

Pursuant to Maryland Uniform Electronic Legal
Materials Act
(§§ 10-1601 et seq. of the State Government Article) this document is authentic.



2018-11-28
10:12-05:00

In *Alice in Wonderland*, the blue caterpillar appeared content to smoke a hookah by day. Here, we primarily consider whether legislation requiring hookah lounges to close at midnight violates due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. Finding no Constitutional or other legal infirmity, we uphold the restriction as a valid exercise of Baltimore County’s police power.

BACKGROUND & PROCEDURAL HISTORY

In May 2014, the Baltimore County Council passed a bill that requires hookah lounges in the County to close between midnight and 6:00 a.m. every day. Specifically, the bill amended the Baltimore County Zoning Regulations (“BCZR”) to include a definition of “Hookah Lounge” that restricts hookah lounges’ hours of operation. The definition of “Hookah Lounge,” codified at Article 1, §101.1 of the BCZR, is as follows:

HOOKAH LOUNGE—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 a 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 12:00 midnight.

This restriction on hours of operation prompted the corporation that operates the Towson Nights hookah lounge (“Towson Nights”), along with the landlord of the Towson Nights premises (collectively, “Appellants”), to challenge the bill on constitutional and other grounds.

Towson Nights contends that, absent the County ordinance, approximately 90% of its business would take place between 11:00 p.m. and 2:00 a.m.¹ (Before the bill went into effect, Towson Nights stayed open until 2:00 a.m. Sunday through Thursday, and until 3:00 a.m. on Fridays and Saturdays.) Thus, Appellants claim that the restriction on business hours was tantamount to a cessation of the business's lawful use, which should have entitled Towson Nights to an "amortization" period longer than the 45 days given to comply with the act.² Appellants further argue: (1) the County's placement of time restrictions in a zoning ordinance is *ultra vires*; (2) the requirement to close at midnight violates substantive due process; and (3) singling out hookah lounges, but not similar businesses, violates equal protection.

¹ Towson Nights maintains that it has all necessary business permits, including a valid trader's license from the State authorizing the sale of tobacco products.

² The Court of Appeals has explained that the concept of amortization applies when a new zoning ordinance prohibits a property's then-lawful use: "[a] property owner establishes a non-conforming use if . . . the property was being used in a then-lawful manner before, and at the time of, the adoption of a new zoning ordinance which purports to prohibit the use on the property. Such a property owner has a vested constitutional right to continue the prohibited use, subject to local ordinances that may prohibit 'extension' of the use and seek to reduce the use to conformance with the newer zoning through an 'amortization' or 'abandonment' scheme." *County Council of Prince George's County v. Zimmer Dev. Co.*, 444 Md. 490, 513 n. 16 (2015) (Internal citation omitted).

Section 2 of the Baltimore County ordinance 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." As discussed further below, the County's requirement that hookah lounges close at midnight does not constitute a prohibition of any property's use as a hookah lounge, and therefore the concept of amortization is inapplicable here.

The bill's constitutionality was first upheld by an administrative law judge, and then, upon a *de novo* appeal, by the Board of Appeals of Baltimore County.³ The Circuit Court for Baltimore County affirmed the Board's decision. Appellants timely appealed.

DISCUSSION

I. Restricting Hookah Lounges' Hours of Operation Was an Exercise of the County's Police Power.

Contrary to Appellants' position, Baltimore County did not act *ultra vires* by enacting time restrictions in a zoning regulation. Here, the provision restricting hours of operation is an exercise of the County's police power and not a zoning law, regardless of whether the restriction is encompassed within the BCZR definition of "hookah lounge." *See Piscatelli v. Bd. of Liquor License Comm'rs*, 378 Md. 623, 639 (2003) (expressly holding that an act by the General Assembly requiring certain liquor licensees in Baltimore City to cease operations at 2:00 a.m. was "not a zoning law"); *id.* ("Simply because an enactment . . . affects the activities which are otherwise allowed or disallowed under local zoning regulations, does not make the [] enactment a 'zoning law.'"); *see also, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012) (A legislature's choice of label does not control whether a provision falls within the legislature's constitutional power); *Shaarei Tfiloh Congregation v. Mayor and City Council of Balt.*, 237 Md. App. 102, 137 (2018) ("[I]n evaluating whether a development fee is a regulatory charge or a tax, the purpose of the enactment governs rather than the

³ Appellants had earlier filed a Complaint for Declaratory Relief in the Circuit Court for Baltimore County that was dismissed for failure to exhaust administrative remedies.

legislative label.”) (Internal quotation marks omitted) (quoting *E. Diversified Props., Inc. v. Montgomery County*, 319 Md. 45, 53 (1990)).

Elsewhere in its ordinance, the Baltimore County Council generally authorized hookah lounges as a permitted use.⁴ The partial restriction on hours of operation contained within the definition of “hookah lounge”—bearing all the hallmarks of traditional police power legislation—does not affect whether any particular site within Baltimore County may or may not be operated as a hookah lounge, and is not a zoning law. For this same reason, Appellants’ amortization claim is inapplicable: the requirement to close at midnight does not prohibit use as a hookah lounge, and therefore does not render Towson Nights a nonconforming use.⁵ Instead, our inquiry hinges on whether requiring hookah lounges to close at midnight is an otherwise valid exercise of the County’s police power.

“The power of a political subdivision of this State to enact laws depends on the extent to which the General Assembly has delegated to it its legislative powers which are plenary, except as limited by constitutional provisions.” *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 158 (1969) (Internal quotation omitted). As a charter county,

⁴ As codified at Article 2, §230.1 of BCZR, the bill added “Hookah Lounge” to the list of Business, Local (B.L.) Zone permitted uses.

⁵ Because the bill does not transform use as a hookah lounge into a nonconforming use, the question posed by *Trip Associates, Inc. v. Mayor and City Council of Baltimore*—whether increasing the frequency of use at a nonconforming use location constitutes a permissible intensification of use or an improper expansion of use—is inapposite. See generally 392 Md. 563 (2006).

Baltimore County received a grant of express powers from the General Assembly. *See id.* at 159 (explaining how, pursuant to Article XI-A of the Maryland Constitution, the General Assembly “provide[s] a grant of express powers for such County or Counties as may thereafter form a charter”). Accordingly, Baltimore County has the authority to pass local laws upon all matters covered by its grant of express powers from the General Assembly. Those express powers specify that, as a charter county, Baltimore County may “pass any ordinance, resolution, or bylaw not inconsistent with State law that . . . may aid in maintaining the peace, good government, health, and welfare of the county.” Md. Code (2013), Local Government Article, § 10-206(a)(2). In short, Baltimore County has the express power to pass ordinances to protect the public’s health and safety. For the reasons discussed in greater detail below, the County’s restriction on hookah lounges’ hours of operation falls squarely within this ambit.

II. Requiring Hookah Lounges to Close at Midnight Does Not Violate Due Process.

Appellants contend that requiring hookah lounges to close at midnight is an irrational and arbitrary violation of substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.

Economic regulation is valid under the United States Constitution when it “rests upon some rational basis within the knowledge and experience of the legislators.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Likewise, when determining whether an ordinance satisfies Article 24 of the Maryland Declaration of Rights, “we ask

rhetorically whether the legislative enactment, as an exercise of the legislature’s police power, bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of the State or municipality.” *Tyler v. City of College Park*, 415 Md. 475, 500 (2010). “The rational basis test is highly deferential; it presumes a statute is constitutional and should be struck down only if the reviewing court concludes that the Legislature enacted the statute irrationally or interferes with a fundamental right.” *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 67 (2010). Courts thus “perform a very limited function” when determining whether an economic regulation pursues legitimate governmental ends through rational means: a legislative enactment “will not be held void if there are any considerations relating to the public welfare by which it may be supported.” *Tyler*, 415 Md. at 500. “Where there are plausible reasons for the legislative action, the court’s inquiry is at an end.” *Id.* at 502.

In attempting to argue that the time restrictions are not rationally related to either the public’s health or safety, Appellants claim: (1) mere concerns about *potential* late-night criminal activity are not a rational justification for the bill; (2) isolated instances of rowdiness by hookah lounge patrons must be dealt with on a case-by-case basis of enforcement, rather than through a categorical regulation aimed at all hookah lounges in the County; and (3) potentially valid health concerns about exposure to tobacco smoke are not rationally addressed by simply requiring hookah lounges to close at midnight. We are not persuaded. To the contrary, the County’s regulation is plainly a rational attempt at protecting the public’s safety and welfare.

Preventive measures aimed at shielding the public from potential exposure to criminal activity can be a valid exercise of the police power. *See Dawson v. State*, 329 Md. 275, 285-86 (1993) (establishment of “preventative” and “prophylactic” 24-hour drug-free zones around schools was a “reasonable way for the General Assembly to limit the potential exposure of children to [] activities” such as drug dealing). And here, the record amply demonstrates reasonable grounds for public safety concerns. In the executive summary of the bill prepared for Councilmembers by the County’s Legislative Counsel, the County stated that in a six-month-period prior to the bill’s adoption, there were 37 arrests and 39 calls for service at various hookah lounges throughout the County—all occurring after 9:00 p.m.⁶ The executive summary also observed that police had received disturbance and loud music calls in connection with hookah lounges throughout the County, as well as calls connecting hookah lounges to underage drinking, assault, CDS violations, and handgun violations. Moreover, we note the grim irony that two separate stabbing incidents occurred outside Appellants’ own hookah lounge after midnight on the very day that the bill went into effect.

⁶ According to a 2016 memo from the Legal Resource Center for Public Health Policy at the University of Maryland School of Law that was included in the record, police in neighboring Baltimore City had “responded to nearly 1,600 service calls between January 1 and August 29, 2015 at locations within 250 feet of the City’s 19 hookah bars and lounges. Included among these service calls were more than 120 violent crime calls.” (Footnotes omitted).

Additionally, public health concerns about exposure to tobacco smoke rationally support the County's regulation of operating hours.⁷ The County's executive summary of the ordinance observed that "[a] typical one-hour-long hookah smoking session involves inhaling 100-200 times the volume of smoke inhaled from a single cigarette." According to one scientific study of hookah lounges in the Baltimore region that was included in the record, indoor airborne concentrations of particulate matter and carbon monoxide were not only "markedly elevated in waterpipe cafes," but "markedly greater than expected compared with venues allowing cigarette smoking." Christine M. Torrey, et al., *Waterpipe Cafes in Baltimore, Maryland: Carbon Monoxide, Particulate Matter, and Nicotine Exposure*, 25(4) J. Exposure Sci. & Envtl Epidemiology 405, 405-10 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4333110/>. The study further found that the mean concentrations of particulate matter measured in the Baltimore region's hookah lounges "greatly and consistently exceeded" the EPA and World Health Organization's 24-hour ambient air quality standards, and that the overall average concentration of carbon monoxide was twice the EPA's 8-hour standard. *Id.* Despite hookah's relatively benign reputation, the scientific literature has linked hookah use to "health problems including chronic bronchitis, lung cancer, oral cancer, prostate

⁷ For the purposes of this decision, we need not address how the County's ordinance interacts with the prohibitions and exceptions of the Clean Indoor Air Act, Md. Code (1982, 2009 Repl. Vol.), Health-General Article, §§ 24-504 and 24-505. We simply note that § 24-510 states: "Nothing in this subtitle shall be construed to preempt a county or municipal government from enacting and enforcing more stringent measures to reduce involuntary exposure to environmental tobacco smoke."

cancer, heart disease and pregnancy complications similar to those seen with cigarette smoking. It has also been tied to the hepatitis C virus and herpes from sharing mouthpieces.” *Hookah Is Not Harmless, Experts Say*, 29 No. 13 Westlaw J. Tobacco Industry 6 (2014). In a 2016 memo to the People’s Counsel for Baltimore County that was included in the record, the Legal Resource Center for Public Health Policy at the University of Maryland School of Law observed that nearly one in four college undergraduates use hookah, “surpassing all other tobacco products among this population,” and at least half of the hookah lounges in Maryland were then “within 2 miles of a college campus.” The 2016 memo further stated that “hookah smoke contains many of the same harmful components found in cigarette smoke, including nicotine, tar, and various heavy metals,” and that during a one-hour session a hookah user may inhale “9 times the amount of carbon monoxide as a single cigarette.”

Before turning to our equal protection analysis, we briefly address a few other claims raised by Appellants in the context of due process. First, Appellants seem to suggest that the County’s time restrictions were irrational (or at least, that the County’s motives were not discernible) because there was no stated purpose for the time restrictions contained within a preamble to the bill. Such a claim is without merit. Preambles are “infrequently used” in legislation and are “sometimes desirable”—hardly required. *Wash. Gas Light Co. v. Md. Pub. Serv. Comm’n*, 460 Md. 667, 684 (2018) (quoting Dep’t Leg. Servs., *Legislative Drafting Manual 2013*, at 152-53 (2012)). Additionally, Appellants contend that the County’s regulation might actually be a back-door attempt at the sort of alcohol regulation preempted by the Alcoholic Beverages

Article. On the one hand, this claim is a little curious for Appellants to make, considering that Towson Nights no longer allows the consumption of alcohol on its premises. In any event, the claim is meritless. For the reasons discussed above, the County has valid health and safety reasons to regulate hookah lounges on the basis of *hookah use*, and for other public safety concerns that need not relate to alcohol.

III. Limiting the Restriction to Hookah Lounges Does Not Violate Equal Protection.

Appellants contend that requiring hookah lounges—but not similar businesses such as cigar bars, liquor licensed establishments, other “BYOB” establishments that are not hookah lounges, restaurants, billiard rooms, and convenience stores—to close at midnight is an arbitrary distinction that violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.

In the context of economic regulation, equal protection “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Frey v. Comptroller of Treasury*, 422 Md. 111, 177 (2011) (quoting *Neifert v. Dep’t of Env’t*, 395 Md. 486, 506 (2006)). Legislative bodies are permitted to make commercial classifications that distinguish between entities; provided a “classification is not purely arbitrary and has a rational basis, the statute does not violate the Equal Protection Clause.” *Frey*, 422 Md. at 163 (quoting *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 439 (1977)); see *Lonaconing Trap Club, Inc. v. Md. Dep’t of Env’t*, 410 Md. 326, 343 (2009) (A classification is presumptively constitutional and will not be voided “if there are any

considerations relating to the public welfare by which it can be supported[.]”) (Internal citations and quotation marks omitted). Moreover, “[u]nderinclusiveness does not create an equal protection violation under the rational basis test. The Constitution does not demand that the Legislature strike at all evils at the same time or in the same way.” *Lonaconing*, 410 Md. at 346 (Internal citations and quotation marks omitted). “Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, [Supreme Court] decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.” *Frey*, 422 Md. at 163 (2011) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)) (alteration in original).

Similarly, equal protection review of economic regulation under Article 24 of the Maryland Declaration of Rights “is nearly identical to the due process examination. In such a case, we employ the least exacting and most deferential standard of constitutional review, namely, rational basis review, under which a legislative classification will pass constitutional muster so long as it is rationally related to a legitimate governmental interest.” *Tyler*, 415 Md. at 501 (Footnote omitted). Under this analysis, a legislative enactment will be upheld “unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court may conclude only that the governmental actions were arbitrary or irrational.” *Id.* Likewise, a legislative body is “not required by equal protection to attack all aspects of a problem at the same time; rather, [it] may select one phase of a problem and apply a

remedy there, neglecting for the moment other phases of the problem.” *Id.* (Internal quotation marks and citation omitted).

As described above, legitimate concerns for the public safety and welfare undergird the County’s requirement that hookah lounges close at midnight. Over a six-month period prior to the bill’s enactment, Baltimore County police made 37 late-night arrests related to hookah lounges, and police received calls linking hookah lounges to underage drinking, assault, CDS violations, and handgun violations. To repeat a few of the public health concerns—significant concentrations of particulate matter and carbon monoxide have been measured at hookah lounges, and during a one-hour smoking session a typical hookah user will inhale a volume of smoke equivalent to 100 or more cigarettes. Hookah lounges seem to have particular appeal to college students, and as of 2016 at least half of the hookah lounges in the State were within two miles of a college campus. As such, the fact that the County did not require other businesses that offer late-night diversions to close at midnight does not create an arbitrary distinction that rises to the level of an equal protection violation—especially considering that there has been no contention by Appellants that the County drew upon suspect distinctions or trammelled upon any fundamental rights in differentiating between late-night establishments. Despite Appellants’ characterization of hookah lounges as basically equivalent to other sites of late-night diversion (especially cigar bars), we determine that the County’s distinction is reasonable. *See Piscatelli*, 378 Md. at 645 (reasonable to conclude that patrons of one type of establishment offering entertainment “might be more likely to disturb the public in the early morning hours than the patrons” of similar businesses).

Furthermore, we reiterate that a concern for the public safety does not require Baltimore County to “strike at all evils . . . in the same way” by, for instance, requiring all sites that offer late-night entertainment to close at midnight. *Lonaconing*, 410 Md. at 346. Indeed, requiring hookah lounges to close at midnight could very well free up police resources to address safety concerns that arise at the 2:00 a.m. hour when bars close. The County’s restriction rationally “advances the legitimate government objective of protecting the citizenry,” *id.*, and we do not discern an equal protection violation.

In sum, we hold that Baltimore County’s requirement that hookah lounges close at midnight is a valid exercise of the County’s police power, and neither violates due process nor equal protection.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANTS.**

PETITION OF IRVIN M. BADDOCK, Trustee
of the Richard K. Adolph, Residuary Trust
10711 Red Run Boulevard
Owings Mills, MD 21117

and

SAHBI HOOKAH, INC
t/a Towson Nights
28 West Pennsylvania Avenue
Towson, MD 21204

Petitioners

FOR JUDICIAL REVIEW OF THE DECISION
OF THE BOARD OF APPEALS OF
BALTIMORE COUNTY
105 West Chesapeake Avenue, Suite 203
Towson, MD 21204

IN THE MATTER OF:
IRVIN M. BADDOCK, Trustee
RICHARD K. ADOLPH, Residuary Trust
SAHBI HOOKAH, INC.
PETITION FOR SPECIAL HEARING
CASE NO.: 16-089-SPH

ORDER DATED: JANUARY 9, 2017

IN THE

CIRCUIT COURT

FOR BALTIMORE COUNTY

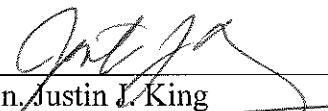
CASE NO. 03-C-17-000957

ORDER

This matter appeared before the Court on August 3, 2017, for oral argument on the merits of the above captioned Petition of Judicial Review. After consideration of the petition and all memoranda in support and opposition thereto, this Court, for the reasons stated on the record, has determined that Baltimore County Bill 16-14, having taken effect on May 18, 2014, is constitutional and lawful. Accordingly, on this 7 of August, 2017, it is hereby

ORDERED that the Opinion and Order of the Board of Appeals for Baltimore County issued on January 9, 2017, is **AFFIRMED**, and it is further

ORDERED that the instant Petition for Judicial Review is **DENIED**.



Hon. Justin J. King
Circuit Court for Baltimore County



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

April 7, 2017

4/10/17
TO WCL
file

RECEIVED
APR 07 2017
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

VIA HAND-DELIVERY

Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

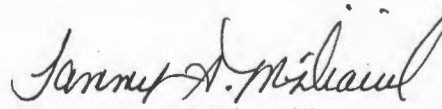
RE: In the matter of: Irvin M. Baddock, Trustee of the
Richard K. Adolph Residuary Trust
(SAHBI Hookah, Inc.)
Civil Action No.: 03-C-17-000957
Board of Appeals Case No.: 16-089-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,


Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Peter A. Prevas, Esquire
Irvin Baddock, Trustee of the Richard K. Adolph Residuary Trust
Nasser Taha/SAHBI Hookah, Inc.
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
R. Brady Locher, Assistant County Attorney/PAI
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

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:
IRVIN M. BADDOCK, TRUSTEE OF THE
RICHARD K. ADOLPH RESIDUARY TRUST

AND

SAHBI HOOKAH, INC.
T/A TOWSON NIGHTS

FOR JUDICIAL REVIEW OF THE OPINION OF
THE BOARD OF APPEALS
OF BALTIMORE COUNTY
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204

CIVIL ACTION
NO. : 03-C-17-000957

IN THE MATTER OF:
IRVIN M. BADDOCK, TRUSTEE OF THE
RICHARD K. ADOLPH RESIDUARY TRUST
(SAHBI HOOKAH, INC.)

BOARD OF APPEALS CASE NO.: 16-089-SPH

* * * * *

**PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE
AND THE BOARD OF APPEALS OF BALTIMORE COUNTY**

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

**ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND
DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS
OF BALTIMORE COUNTY**

October 8, 2015	Petition for Special Hearing filed by Peter A. Prevas, Esquire on behalf of Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust-Legal Owners, and SAHBI Hookah, Inc.-Lessee, under Section 500.7 of the Baltimore County Zoning Regulations to approve the continued use of the Premises as a Hookah Lounge, including hours of operation from 12 midnight to 6:00 a.m. every day.
October 22, 2015	Entry of Appearance filed by People's Counsel for Baltimore County.
October 29, 2015	Notice of Zoning Hearing – December 14, 2015
November 24, 2015	Certificate of Publication in newspaper
November 25, 2015	Request to Reschedule Hearing filed by Peter A. Prevas, Esquire
December 10, 2015	New Notice of Zoning Hearing – February 22, 2016
February 2, 2016	Certificate of Publication in newspaper
February 3, 2016	Certificate of Posting.
February 18, 2016	Zoning Advisory Committee comments.
February 22, 2016	Hearing held before the Administrative Law Judge
March 14, 2016	Post-Hearing Memorandum of People's Counsel for Baltimore County
March 23, 2016	Opinion and Order of the Administrative Law Judge wherein the Petition for Special Hearing pursuant to BCZR § 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 was DENIED.
April 22, 2016	Notice of Appeal, Appeal Petition, and Entry of Appearance filed by Peter A. Prevas, Esquire on behalf of Irvin Baddock, Trustee of the Richard K. Adolph Residuary Trust, and SAHBI Hookah, Inc., Respondents/Appellants.
April 26, 2016	Appeal received by Board of Appeals.
May 10, 2016	Notice of Assignment issued by the Board.

July 12, 2016 Letter to Chairman of the Board of Appeals from People's Counsel for Baltimore County asking the Board accept the trial transcript and all exhibits before ALJ Beverungen as the *de novo* trial testimony.

July 14, 2016 Letter to People's Counsel for Baltimore County from Chairman of the Board of Appeals advising that the zoning hearing will be held *de novo*, but encourage Counsel to proffer facts or testimony at the hearing, and that all witness should be present for all hearing dates.

July 21, 2016 Board convened for a Hearing.

Exhibits submitted at the Hearing before the Board of Appeals:

Petitioners' Exhibit No.

- 1 – Building Permit #B828872 issued 11/22/2013
- 2 – Use and Occupancy Permit #B828872 issued 4/11/2014
- 3 – Complaint for Declaratory and Injunctive Relief filed by SAHBI Hookah, Inc.

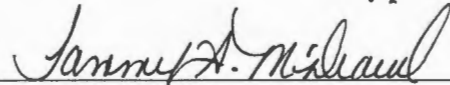
People's Counsel Exhibit No.

- 1 – Baltimore County Council Resolution No. 100-13 regarding hookah lounges
- 2 – Baltimore Sun Article "Balto. Co. Council considering action on hookah lounges" dated 10/15/2013
- 3 – Baltimore Sun Article "As interest in hookah lounges ignites, Baltimore County eyes regulations" dated 10/21/2013
- 4 – WBALTV.com Article "Baltimore County Council acts on hookah lounge complaints dated 10/22/2013
- 5 – WBAL Radio Article "Local Hookah Lounges under the Microscope after Complaints" dated 10/22/2013
- 6 – Baltimore County Council Bill No. 16-14 relating to hookah Lounges with Executive Summary dated 3/31/2014
- 7 – WBALTV Article "Hookah Lounge regulations again questioned after shooting" dated 2/4/2014
- 8 – Baltimore County iWatch Article "Following Stabbings, Hookah Legislation Takes Effect" dated 5/19/2014
- 9 – Statistics relating to BCPD calls for service to hookah lounge locations from 2013 through 2015
- 10 – Binder prepared by Detective Paul Merryman – Police Department documents
- 11 – 2007 Laws of Maryland Chapter 502 – "Clean Indoor Air Act of 2007"
- 12 – Clean Indoor Air Act of 2007 – General Information

- 13A – Order, Circuit Court for Baltimore County dated 11/17/2014, Case No. 03-C-14-007690
- 13B – Docket Report, Circuit Court for Baltimore County, Case No. 03-C-14-007690 (printed 7/19/16)
- 14A – Order, Circuit Court for Baltimore County dated 5/25/2016, Case No. 03-C-15-014309
- 14B – Docket Report, Circuit Court for Baltimore County, Case No. 03-C-15-014309 (printed 7/19/16)

- September 6, 2016 Memorandum of People's Counsel for Baltimore County.
- September 9, 2016 Memorandum in Lieu of Closing Argument filed by R. Brady Locher, Assistant County Attorney, on behalf of Baltimore County, Maryland.
- September 9, 2016 Petitioner's Closing Brief filed by Peter A. Prevas, Esquire, on behalf of SAHBI Hookah, Inc., and Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust, Petitioners/Appellants.
- October 6, 2016 Board convened for Public Deliberation.
- January 9, 2017 Opinion and Order issued by the Board wherein the 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 was DENIED.
- January 31, 2017 Petition for Judicial Review filed in the Circuit Court for Baltimore County by Peter A. Prevas, Esquire, on behalf of Irvin M. Baddock, Trustee of the Richard K. Adolph Residuary Trust and SAHBI Hookah, Inc. t/a Towson Nights, Petitioners/Appellants.
- February 6, 2017 Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
- February 8, 2017 Certificate of Compliance sent to all parties and interested persons.
- April 7, 2017 Transcript of testimony filed.
- April 7, 2017 Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.



Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Peter A. Prevas, Esquire
Irvin Baddock, Trustee of the Richard K. Adolph Residuary Trust
Nasser Taha/SAHBI Hookah, Inc.
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
R. Brady Locher, Assistant County Attorney/PAI
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

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

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

* * * * *

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, 2014,¹ Towson Nights' hours of

¹ 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.²

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.³

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

² 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.

³ 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.⁴ 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-

⁴ 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 2007.⁵

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,⁶ 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.

⁵ 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.

⁶ 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.*⁷ 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

⁷ 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.⁸ The City Ordinance prohibited the expansion "in any manner" of a Class III nonconforming use.

⁸ "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

"(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 Rights⁹ and the Fourteenth Amendment to the United States Constitution¹⁰ 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.¹¹ 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

⁹ 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."

¹⁰ 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...."

¹¹ 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 out 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.¹² *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.¹³

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

¹² 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.

¹³ 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.¹⁴ 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.

¹⁴ 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*.¹⁵ 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 passed¹⁶ shows that the County exercised its police power under its county charter¹⁷ and §4-102 (6) of the Land Use Article¹⁸ to promote the public health, morals, safety and welfare of the citizens of Baltimore County.

¹⁵ 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."

¹⁶ 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."

¹⁷ 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.

¹⁸ §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

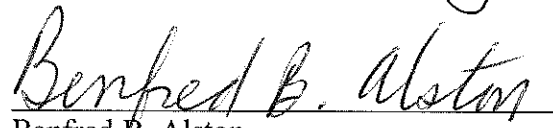
THEREFORE, IT IS THIS 9th day of January, 2017, by the
Board of Appeals of Baltimore County,

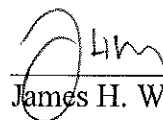
ORDERED that Petitioner's Petition for Special Hearing to approve the use of 28 W. Pennsylvania Avenue, Towson, Maryland as a hookah lounge during the operating hours of 12:00 midnight to 6:00 a.m. every day is **DENIED**.

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

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

January 9, 2017

Peter A. Prevas, Esquire
Prevas & Prevas
American Building, Suite 702
231 East Baltimore Street
Baltimore, Maryland 21202

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

R. Brady Locher, Assistant County Attorney
Department of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

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



KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

April 26, 2016

RECEIVED
APR 26 2016

Peter A. Prevas, Esq.
American Building, Suite 702
231 East Baltimore Street
Baltimore, Maryland 21202

BALTIMORE COUNTY
BOARD OF APPEALS

RE: **APPEAL TO BOARD OF APPEALS** - Petition for Special Hearing
Property: 28 W. Pennsylvania Avenue
Case No.: 2016-0089-SPH

Dear Mr. Prevas:

Please be advised that an appeal of the above-referenced case was filed in this Office on April 22, 2016. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals ("Board").

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to contact the Board at 410-887-3180.

Sincerely,

A handwritten signature in black ink, appearing to be "L. Stahl", written over a horizontal line.

LAWRENCE M. STAHL
Managing Administrative Law Judge
for Baltimore County

LMS:sln

c: Baltimore County Board of Appeals
Peter Max Zimmerman, People's Counsel for Baltimore County
Brady Locher, Esq. Assistant County Attorney, Dept. of Permits, Approvals & Inspections

APPEAL

**Petition for Special Hearing
(28 W. Pennsylvania Avenue)
9th Election District – 5th Councilmanic District
Legal Owners: Richard K. Adolph & Irwin M. Baddock
Lessee: SAHBI HOOKAH, INC.
Case No. 2016-0089-SPH**

Petition for Variance Hearing (October 8, 2015)

Zoning Description of Property

Notice of Zoning Hearing (December 10, 2015 and October 29, 2015)

Certificate of Publication (February 2, 2016 and November 24, 2015)

Certificate of Posting (February 2, 2016) – Bruce E. Doak

Entry of Appearance by People's Counsel – October 22, 2015

Petitioner(s) Sign-in Sheet – One

Citizen(s) Sign-in Sheet – One

Zoning Advisory Committee (ZAC) Comments

Petitioner(s) Exhibits:

1. Building Permit issued 11-22-13
2. U & O permit issued 4-11-14
3. Circuit Court Complaint

People's Counsel Exhibits:

1. Resol. 100-13
2. Balto. Sun story 10-15-13
3. Balto. Sun story 10-21-13
4. WBAL TV story 10-22-13
5. WBAL Radio story 10-22-13
6. Bill 16-14
7. WBAl TV story 2-4-14
8. Balto. County Gov't Website story re: stabbings 5-19-14
9. Statistics regarding BCPD calls for service
10. Binder prepared by Detective Merryman
11. 2007 Laws of Md. Chapter 502
12. Clean Indoor Air Act of 2007-information

Miscellaneous (Not Marked as Exhibits)

Post-Hearing Memorandum of People's Counsel for Baltimore County

Administrative Law Judge Order and Letter (DENIED March 23, 2016)

Notice of Appeal – Peter A. Prevas, Esq., April 22, 2016



KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

March 23, 2016

Peter A. Prevas, Esq.
American Building, Suite 702
231 East Baltimore Street
Baltimore, Maryland 21202

RE: Petition for Special Hearing
Case No. 2016-0089-SPH
Property: 28 W. Pennsylvania Avenue

Dear Mr. Prevas:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Office of Administrative Hearings at 410-887-3868.

Sincerely,

A handwritten signature in black ink, appearing to read "JEB", with a long horizontal line extending to the right.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln
Enclosure

c: Peter Max Zimmerman, Esq. Peoples Counsel
Brady Locher, Esq. Assistant County Attorney, Dept. of Permits, Approvals & Inspections

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		
Legal Owners	*	FOR BALTIMORE COUNTY
SAHBI HOOKAH, INC.		
Lessee	*	Case No. 2016-0089-SPH
Petitioners		
* * * * *		

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.

A handwritten signature in black ink, appearing to read 'JEB', with a long horizontal line extending to the right.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

CHECKLISTSupport/Oppose/
Conditions/
Comments/
No CommentComment
ReceivedDepartment10/22DEVELOPMENT PLANS REVIEW
(if not received, date e-mail sent _____)N/C10/23DEPS
(if not received, date e-mail sent _____)N/C11/2FIRE DEPARTMENT
PLANNING
(if not received, date e-mail sent _____)C10/12STATE HIGHWAY ADMINISTRATION
TRAFFIC ENGINEERINGno ObjCOMMUNITY ASSOCIATIONADJACENT PROPERTY OWNERS

2/5/16 email from Brendan J. O'Connor
 ZONING VIOLATION (Case No. 1507603 - Larry's order attached)
 PRIOR ZONING (Case No. _____)

NEWSPAPER ADVERTISEMENT

Date:

2/2/16

SIGN POSTING

Date:

1/24/15
2/2/15by DOAK

PEOPLE'S COUNSEL APPEARANCE

Yes



No



PEOPLE'S COUNSEL COMMENT LETTER

Yes



No



Comments, if any: _____

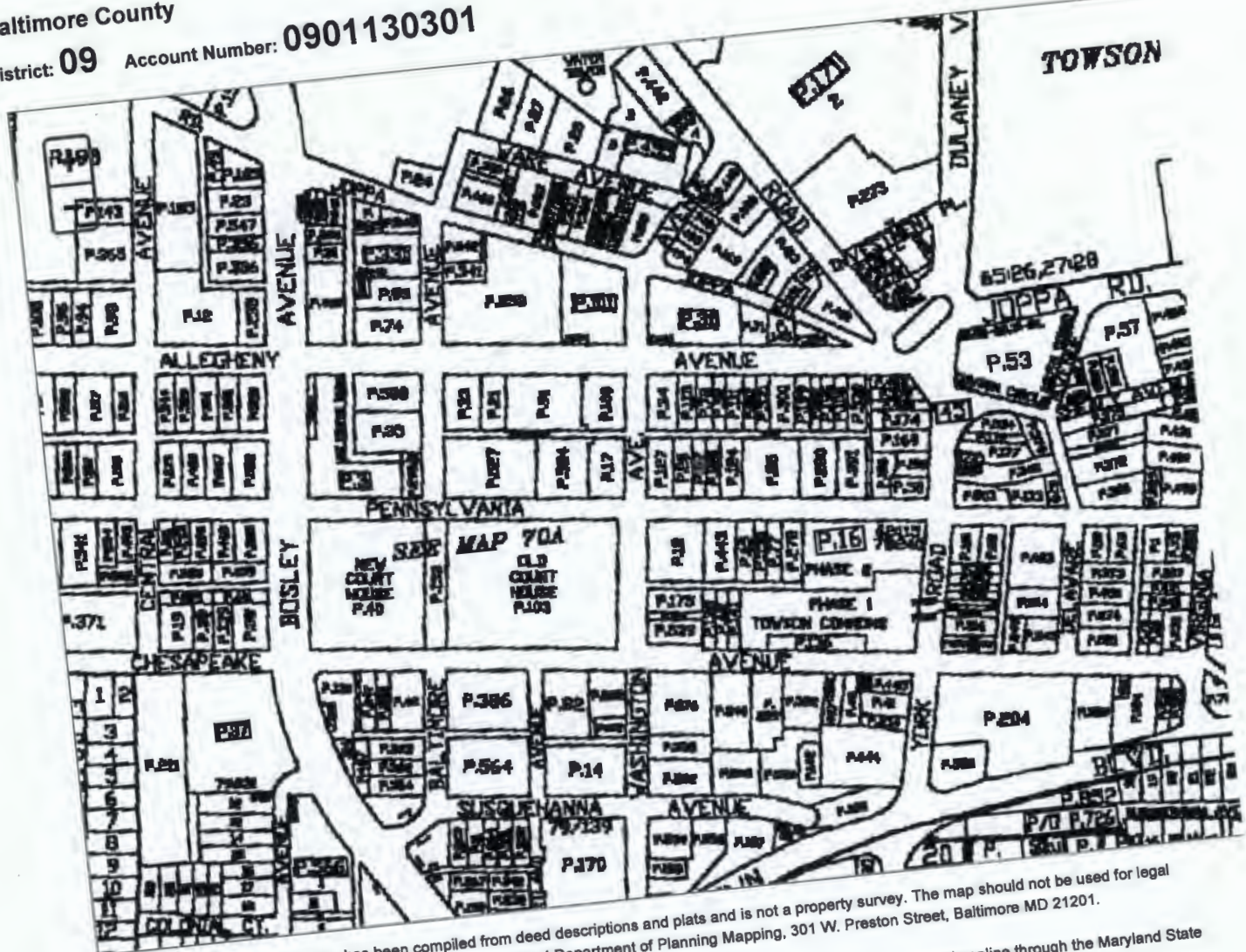
Real Property Data Search (w1)

Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map		View GroundRent Redemption		View GroundRent Registration	
Account Identifier:		District - 09 Account Number - 0901130301			
Owner Information					
Owner Name:	ADOLPH FRANCES W BADDOCK IRVIN M TRUSTEE		Use:	COMMERCIAL	
Mailing Address:	STE 101 10711 RED RUN BLVD OWINGS MILLS MD 21117-5138		Principal Residence:	NO	
			Deed Reference:	/11833/ 00447	
Location & Structure Information					
Premises Address:		28 PENNSYLVANIA 0-0000		Legal Description:	NS PENNSYLVANIA AV 28 PENNSYLVANIA AVE 150 E WASHINGTON AV
Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section: Block: Lot: Assessment Year: Plat No: Plat Ref:
070A	0011	0067		0000	2014
Special Tax Areas:			Town: NONE		
			Ad Valorem:		
			Tax Class:		
Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use	
2013	2949		6,000 SF	06	
Stories	Basement	Type	Exterior	Full/Half Bath	Garage Last Major Renovation
		OFFICE BUILDING	SIDING		2014
Value Information					
	Base Value	Value As of 01/01/2014	Phase-in Assessments As of 07/01/2015 As of 07/01/2016		
Land:	450,000	450,000			
Improvements	559,200	634,000			
Total:	1,009,200	1,084,000	1,059,067	1,084,000	
Preferential Land:	0			0	
Transfer Information					
Seller: ADOLPH RICHARD KEEN		Date: 10/07/1996		Price: \$0	
Type: NON-ARMS LENGTH OTHER		Deed1: /11833/ 00447		Deed2:	
Seller: ADOLPH RICHARD K		Date: 06/14/1995		Price: \$0	
Type: NON-ARMS LENGTH OTHER		Deed1: /11083/ 00403		Deed2:	
Seller:		Date:		Price:	
Type:		Deed1:		Deed2:	
Exemption Information					
Partial Exempt Assessments:	Class	07/01/2015		07/01/2016	
County:	000	0.00			
State:	000	0.00			
Municipal:	000	0.00 0.00		0.00 0.00	
Tax Exempt:	Special Tax Recapture:				
Exempt Class:	NONE				
Homestead Application Information					
Homestead Application Status: No Application					

Baltimore County

District: **09** Account Number: **0901130301**

The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (<http://www.plats.net>).

Property maps provided courtesy of the Maryland Department of Planning.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (<http://www.mdp.state.md.us/OurProducts/OurProducts.shtml>).

TO: PATUXENT PUBLISHING COMPANY
Tuesday, February 2, 2016 Issue - Jeffersonian

Please forward billing to:

Peter Prevas
Prevas & Prevas
231 E. Baltimore Street
Baltimore, MD 21202

410-752-2340

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0089-SPH

28 W. Pennsylvania Avenue

Northside of Pennsylvania Avenue, 195 ft. east of intersection with Washington Avenue

9th Election District – 5th Councilmanic District

Legal Owners: Richard Adolph & Irvin Baddack, Residuary Trust and Trustee

Contract Purchaser/Lessee: Sahbi Hookah, Inc.

Special Hearing to determine whether or not the Administrative Law Judge should approve the continued use of the premises as a Hookah Lounge, including hours of operation from 12 midnight to 6 a.m. every day.

Hearing: Monday, February 22, 2016 at 11:00 a.m. in Room 205, Jefferson Building,
105 West Chesapeake Avenue, Towson 21204



Arnold Jablon

Director of Permits, Approvals and Inspections for Baltimore County

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

TO: PATUXENT PUBLISHING COMPANY
Tuesday, November 24, 2015 Issue - Jeffersonian

Please forward billing to:

Peter Prevas
Prevas & Prevas
231 E. Baltimore Street
Baltimore, MD 21202

410-752-2340

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0089-SPH

28 W. Pennsylvania Avenue

Northside of Pennsylvania Avenue, 195 ft. east of intersection with Washington Avenue
9th Election District – 5th Councilmanic District

Legal Owners: Richard Adolph & Irvin Baddack, Residuary Trust and Trustee

Contract Purchaser/Lessee: Sahbi Hookah, Inc.

Special Hearing to determine whether or not the Administrative Law Judge should approve the continued use of the premises as a Hookah Lounge, including hours of operation from 12 midnight to 6 a.m. every day.

Hearing: Monday, December 14, 2015 at 11:00 a.m. in Room 205, Jefferson Building,
105 West Chesapeake Avenue, Towson 21204



Arnold Jablon

Director of Permits, Approvals and Inspections for Baltimore County

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

Duplicate

BALTIMORE COUNTY, MARYLAND
INTER-OFFICE CORRESPONDENCE



TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: November 2, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 28 W Pennsylvania Avenue

INFORMATION:

Item Number: 16-089

Petitioner: Richard K. Adolph, Irvin M. Baddack

Zoning: BM, CT

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether or not the Administrative Law Judge should approve the continued use of the premises as a Hookah Lounge, including the hours of operation from 12 midnight to 6:00 am every day.

The Department recommends the petitioned zoning relief be DENIED.

Be advised that the Department recommends the time and location restrictions regarding Hookah Lounges and Vapor Lounges contained in County Council Bill No. 16-14 as adopted April 14, 2014 and made part of the BCZR are appropriate.

For further information concerning the matters stated herein, please contact Krystle Patchak at 410-887-3480.

Division Chief: Kathy Catebach
AVA/KS

C: Krystle Patchak



PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

Address 28 W. Pennsylvania Ave. Towson MD 21204 which is presently zoned BM / CT
 Deed References: Liber 11833, folio 447 10 Digit Tax Account # 0 9 0 1 1 3 0 3 0 1
 Property Owner(s) Printed Name(s) Richard K. Adolph, Reidiary Trust

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. XXX a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve the continued use of the Premises as a **Hookah Lounge**, including hours of operation from 12 midnight to 6:00 A.M. every day.

2. _____ a Special Exception under the Zoning Regulations of Baltimore County to use the herein described property for

3. _____ a Variance from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons:
 (Indicate below your hardship or practical difficulty or indicate below "TO BE PRESENTED AT HEARING". If you need additional space, you may add an attachment to this petition) SEE ATTACHED Complaint for Declaratory and Injunctive Relief previously filed with the Circuit Court for Baltimore County, Case No: 03-C-14-007690; specifying 4 bases that Bill No.16-14 is unlawful.

1) 45 day amortization period denies due process; 2) limiting hours of operation in a zoning regulation is ultra vires; 3) denies substantive due process; 4) denies equal protection.

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

Contract Purchaser/Lessee:

SAHBI HOOKAH, INC.

Name- Type or Print

[Signature]

Signature

28 W. Pennsylvania Avenue, Towson MD

Mailing Address City State

21204 / 410-916-6677 / N/A
 Zip Code Telephone # Email Address

Attorney for Petitioner:

PETER A. PREVAS Prevas and Prevas

Name- Type or Print

Signature

American Building, Suite 702
 231 East Baltimore Street, Baltimore MD

Mailing Address City State

21202 / 410-752-2340 / prevasandprevas@verizon.net
 Zip Code Telephone # Email Address

Legal Owners (Petitioners):

RICHARD K. ADOLPH IRVIN M. BADDACK,
 Residuary Trust / Trustee

Name #1 - Type or Print

Name #2 - Type or Print

[Signature]

Signature #1

Signature #2

10711 Red Run Blvd. Owings Mills MD

Mailing Address City State

21117 / 410-356-1000 / N/A
 Zip Code Telephone # Email Address

Representative to be contacted:

PETER A. PREVAS Prevas and Prevas

Name - Type or Print

Signature

American Building, Suite 702
 231 East Baltimore Street, Baltimore MD

Mailing Address City State

21202 / 410-752-2340 / prevasandprevas@verizon.net
 Zip Code Telephone # Email Address

ORDER RECEIVED FOR FILING

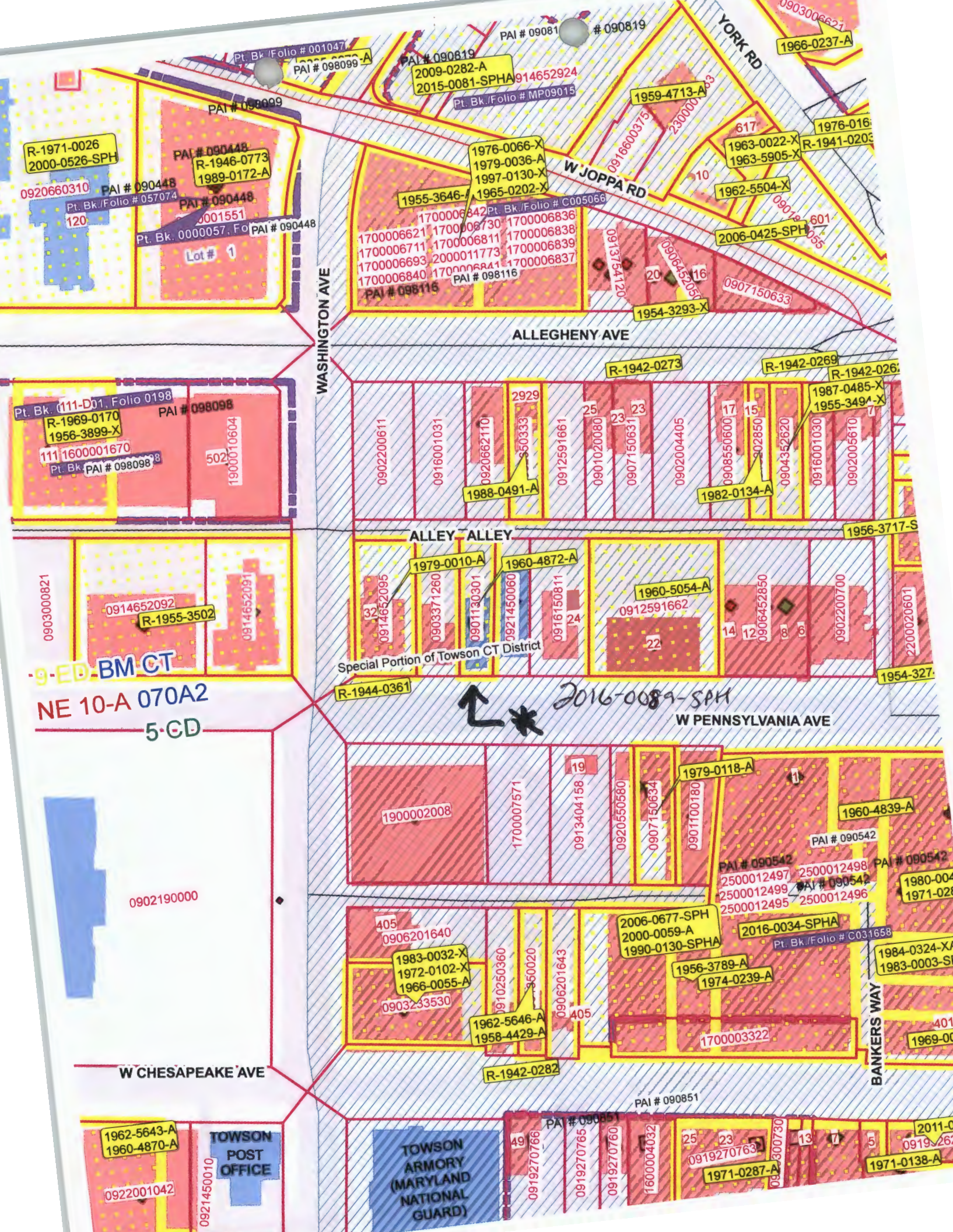
Do Not Schedule Dates: Reviewer JS

Date 3/23/16 REV. 10/4/11

By Den

CASE NUMBER 2016-0089-SP4 Filing Date 10/8/15

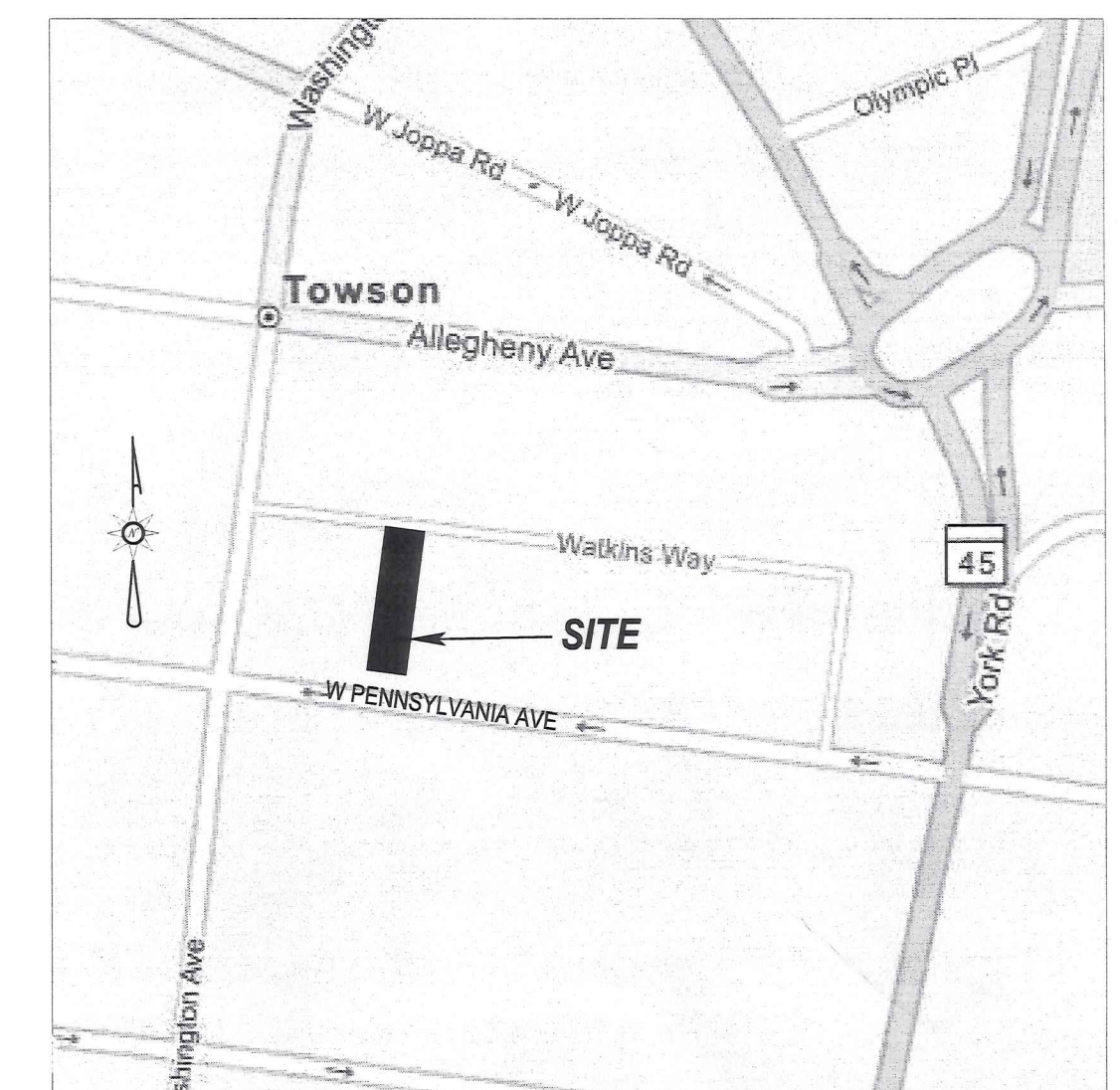
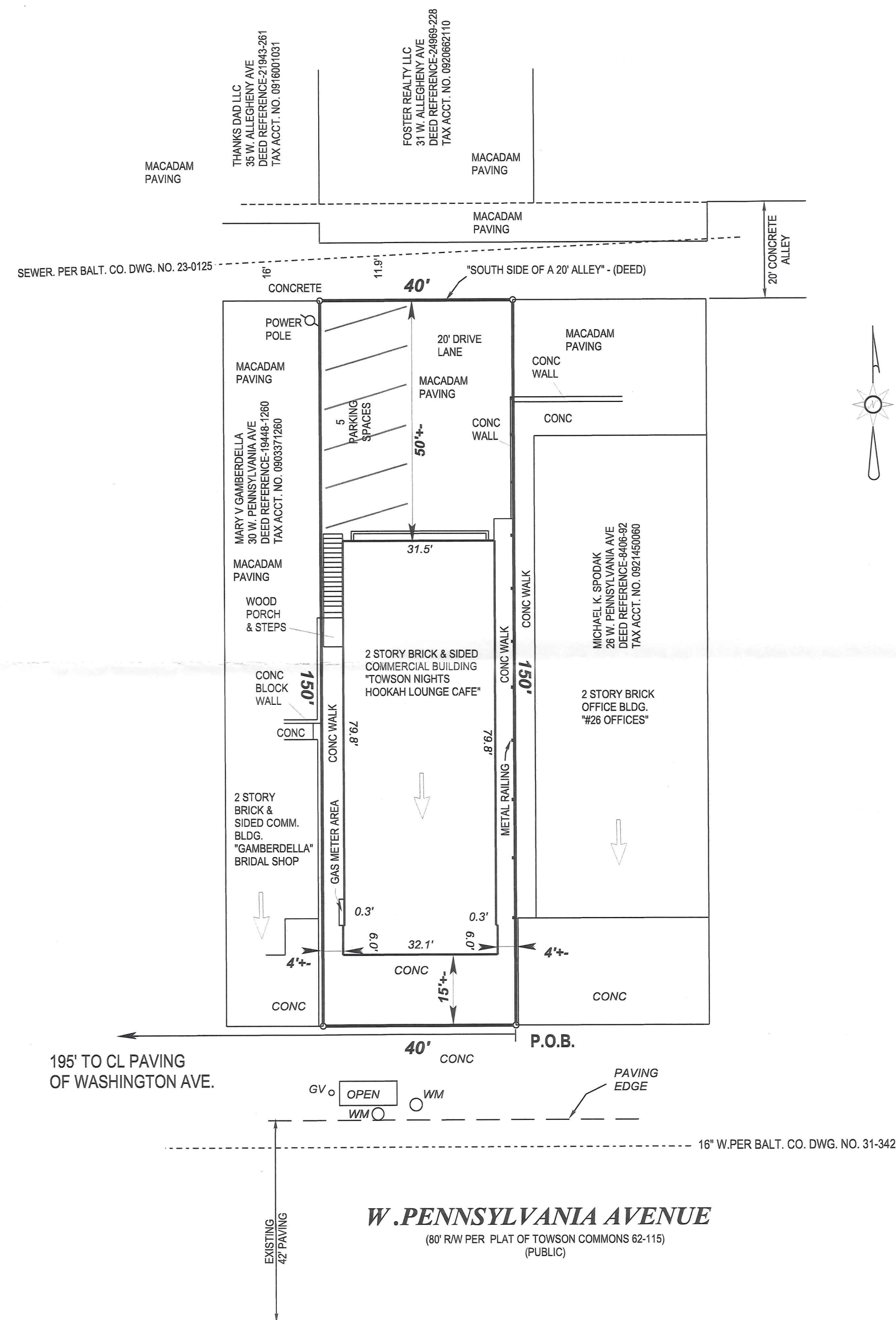




NOTES:

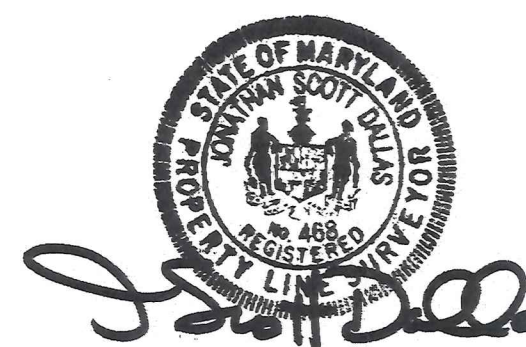
1. OWNER: ADOPHL FRANCES W BADDOCK IRVIN M TRUSTEE
C/O PETER PREVAS, PREVAS AND PREVAS
231 E. BALTIMORE ST. BALTIMORE, MD. 21202
(410-752-2340)
2. SITE AREA: 6000 Sq. Ft. OR 0.125 Ac+-
3. BUILDING AREA:
TOTAL 2706 Sq. Ft.
(FOOTPRINT)
4. UTILITIES:
PUBLIC SEWER
PUBLIC WATER
PUBLIC STORM DRAIN
5. THE SITE LIES WITHIN ZONE "X" AS SHOWN
ON F.I.R.M. 2400100265F DATED SEPTEMBER 26, 2008.
6. EX. STRUCTURE = 2 STORY
7. DEED REF.: SM 11833-447 ETC.
8. TAX ACCOUNT: #0901130301
9. ELECTION DISTRICT: 9TH
10. COUNCILMANIC DISTRICT: 5TH
11. CENSUS TRACT: 490703
12. WATERSHED: JONES FALLS
13. ZONING: BM CT
(PER BALT. CO. "MY NEIGHBORHOOD" WEBSITE)
14. TAX MAP: #070A, PARCEL 0067
15. PREVIOUS ZONING CASES ON FILE: 1960-4872-A
DATE: JAN. 6, 1960
REASON FOR VARIANCE: TO PERMIT AN OFFICE BUILDING
TO HAVE 10 OFF STREET PARKING SPACES INSTEAD OF
THE REQUIRED 21 SPACES.

GRANTED FEB. 11, 1960
16. THE SITE DOES NOT LIE WITHIN THE CHESAPEAKE BAY
CRITICAL AREA.
17. THERE ARE NO HISTORIC FEATURES ON THE SITE NOR
IS THE SITE ITSELF HISTORIC.
18. FIVE EXISTING PARKING SPACES AS SHOWN
19. NO KNOWN PERMITS ON FILE.
20. FLOOR AREA RATIO: $2706 \times 2 = 5412 / 6000 = 0.902$
21. NO KNOWN PREVIOUS DRC MEETINGS
22. THERE ARE NO EXISTING PARKING LOT LIGHTING FIXTURES.



VICINITY MAP
1"=200'

J.S. DALLAS, INC.
SURVEYING & ENGINEERING
P.O. BOX 26
BALDWIN, MD. 21013
(410) 817-4600



10-07-2015

DATE _____

**SITE PLAN TO ACCOMPANY
PETITION FOR ZONING HEARING
#28 W. PENNSYLVANIA AVENUE**

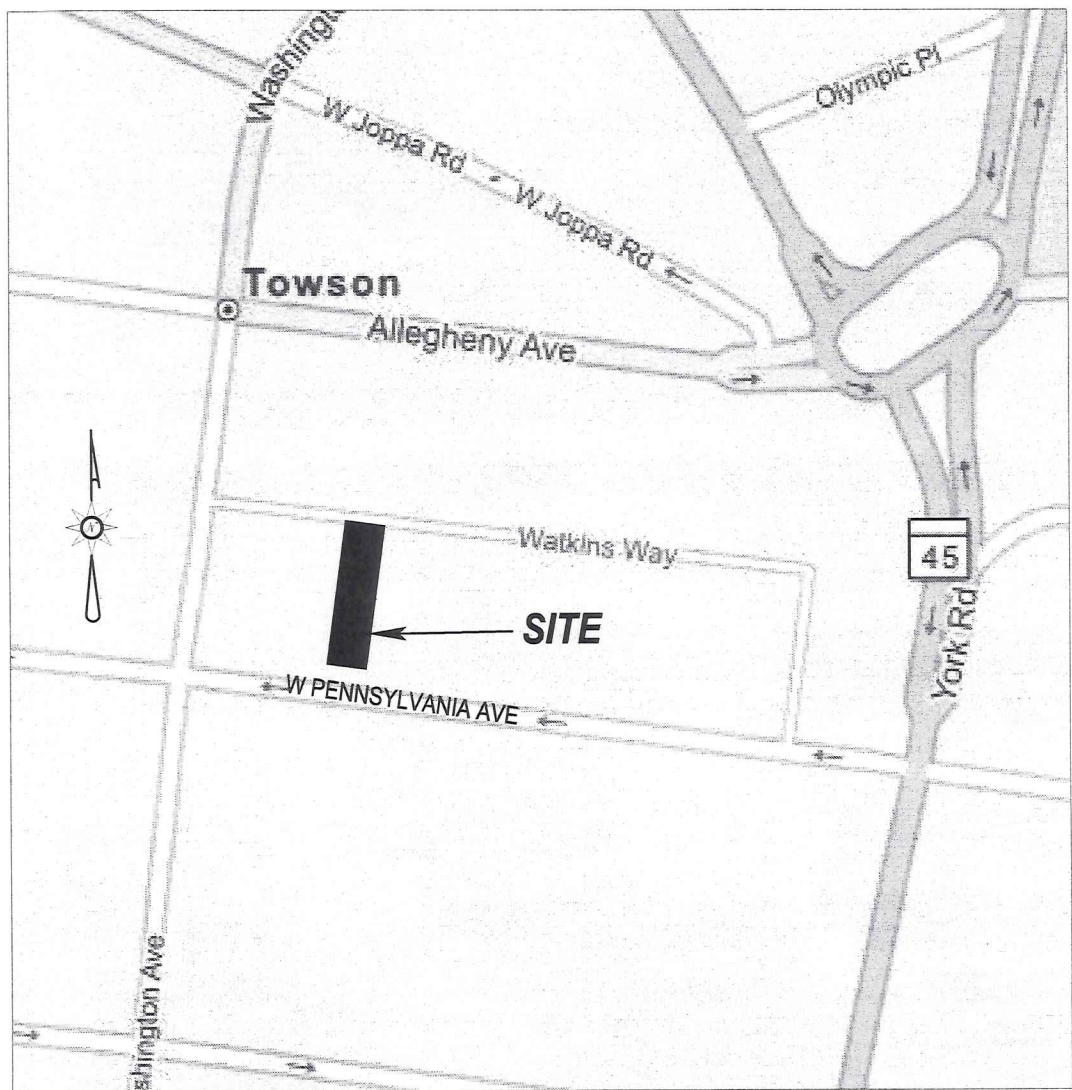
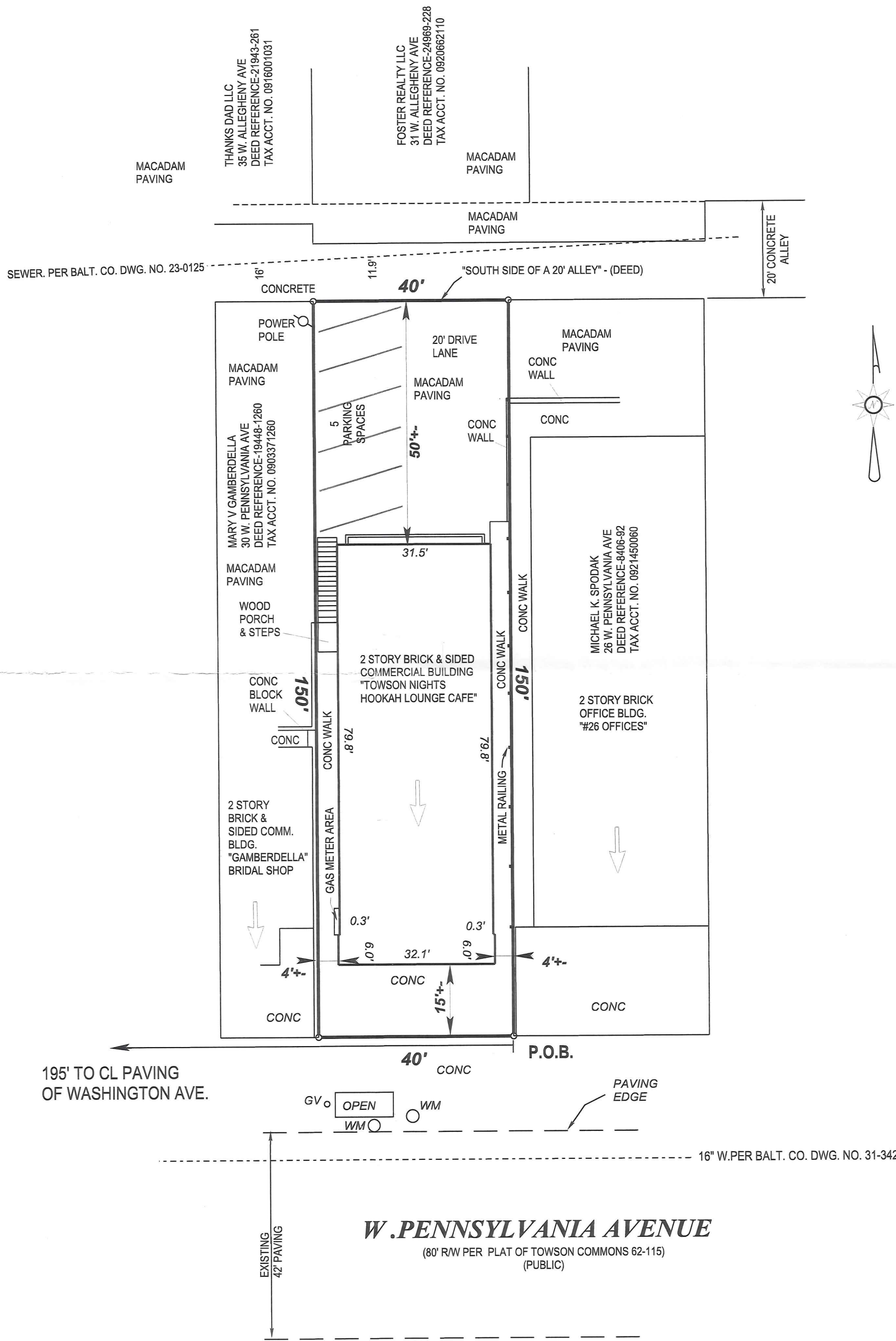
**DEED REFERENCE-
SM 11833-447 ETC.
MAP 070A PARCEL 0067
9TH ELECTION DISTRICT
BALTIMORE COUNTY, MD.
1"=20'**

FILE NAME		
15-1549.trv		
SCALE	DATE	DRAWN BY
20 Ftl/in	10-7-2015	R.N.G.
JOB	REVISION	SHEET
28 W. PENN.	1/1	1/1

NOTES:

1. OWNER: ADOPLH FRANCES W BADDOCK IRVIN M TRUSTEE
C/O PETER PREVAS, PREVAS AND PREVAS
231 E. BALTIMORE ST. BALTIMORE, MD. 21202
(410-752-2340)
2. SITE AREA: 6000 Sq. Ft. OR 0.138 Ac+-
3. BUILDING AREA:
TOTAL 2706 Sq. Ft.
(FOOTPRINT)
4. UTILITIES:
PUBLIC SEWER
PUBLIC WATER
PUBLIC STORM DRAIN
5. THE SITE LIES WITHIN ZONE "X" AS SHOWN
ON F.I.R.M. 2400100265F DATED SEPTEMBER 26, 2008.
6. EX. STRUCTURE = 2 STORY
7. DEED REF.: SM 11833-447 ETC.
8. TAX ACCOUNT: #0901130301
9. ELECTION DISTRICT: 9TH
10. COUNCILMANIC DISTRICT: 5TH
11. CENSUS TRACT: 490703
12. WATERSHED: JONES FALLS
13. ZONING: BM CT
(PER BALT. CO. "MY NEIGHBORHOOD" WEBSITE)
14. TAX MAP: #070A, PARCEL 0067
15. PREVIOUS ZONING CASES ON FILE: 1960-4872-A
DATE: JAN. 6, 1960
REASON FOR VARIANCE: TO PERMIT AN OFFICE BUILDING
TO HAVE 10 OFF STREET PARKING SPACES INSTEAD OF
THE REQUIRED 21 SPACES.

GRANTED FEB. 11, 1960
16. THE SITE DOES NOT LIE WITHIN THE CHESAPEAKE BAY
CRITICAL AREA.
17. THERE ARE NO HISTORIC FEATURES ON THE SITE NOR
IS THE SITE ITSELF HISTORIC.
18. FIVE EXISTING PARKING SPACES AS SHOWN
19. NO KNOWN PERMITS ON FILE.
20. FLOOR AREA RATIO; 2706 X 2 =5412 / 6000 = 0.902
21. NO KNOWN PREVIOUS DRC MEETINGS
22. THERE ARE NO EXISTING PARKING LOT LIGHTING FIXTURES.



VICINITY MAP
1"=200'

J.S. DALLAS, INC.
SURVEYING & ENGINEERING
P.O. BOX 26
BALDWIN, MD. 21013
(410) 817-4600



10-07-2015

DATE

2016-0089-SPH
**SITE PLAN TO ACCOMPANY
PETITION FOR ZONING HEARING
#28 W. PENNSYLVANIA AVENUE**

DEED REFERENCE-
SM 11833-447 ETC.
MAP 070A PARCEL 0067
9TH ELECTION DISTRICT
BALTIMORE COUNTY, MD.
1"=20'

FILE NAME		
15-1649.trv	DATE	DRAWN BY
SCALE	10-7-2015	R.N.G.
20 Fylin	REVISION	SHEET
JOB	1/1	1/1
28 W. PENN.		