



Lawyers for Neighborhoods & Nonprofits

November 18, 2015

Board of Liquor License Commissioners for Baltimore City
231 E. Baltimore Street, 6th Floor
Baltimore, MD 21202

Dear Commissioners and Staff of the BLLC for Baltimore City:

Please find attached my comments on the Proposed Alcoholic Beverages and Adult Entertainment Rules and Regulations for the Board of Liquor License Commissioners for Baltimore City.

I've submitted substantive comments on the Proposed Rules as a whole, but I wanted to highlight two main issues of concern.

Missing Sections: There are two vital issues that are missing from the Proposed Rules altogether: (1) a list of the factors from Art. 2B § 10-202(a)(2) that the Board must consider in determining whether to approve an application, and (2) procedures for applying for an extension of time to keep an unused license unexpired under Art. 2B § 10-504(d). A properly functioning BLLC must know these provisions of law, and the public and licensees should also know exactly what the relevant provisions are.

Substitutions of Licensees: Article 2B § 10-301(a)(2) creates a way for the BLLC to substitute corporate officers on a license for a corporation or club at the annual renewal of the license. The Board has historically interpreted this section to mean that if less than 50% of the ownership of a corporation is changing hands, no notice to the community or public hearing is required. As long as the new licensee is not a felon, under the background check done by the Board, the license transfer to the new licensee is automatic. The BLLC can do a better job of informing communities of these substitutions and providing an avenue for a public hearing. Communities deserve notice of changes to the licensees for a liquor license in their neighborhoods.

Please see my attached comments for more detailed thoughts and ideas on these Proposed Rules.

Sincerely,

Becky Lundberg Witt
Staff Attorney

Becky Lundberg Witt - comments on the Draft Rules and Regulations for Alcoholic Beverages Licenses; October 2015.

p5: Rule 1.01(i) – Definition of “Club”

Is there a provision in Article 2B or in case law that would distinguish two different definitions of “club”? It is unclear why the definition of club would not apply to clubs applying for BWL licenses under Art. 2B § 7-101(b) and (d).

p5: Rule 1.01(r) – Definition of “Non-profit organization”

State law defines the corporate structure of an organization, but the Internal Revenue Code describes an organization’s tax status. Federal law does not describe whether an organization is nonprofit, but whether it is tax exempt from federal income taxes. The two concepts of nonprofit structure and tax exemption are related and sometimes overlap, but they mean different things and are mostly regulated at different levels.

This could be rewritten for clarity: are we only including tax exempt organizations under IRC §501(c)? Or, more specifically, 501(c)(3) charitable organizations? How about 501(c)(4) social welfare organizations or 501(c)(6) business leagues?

p7: Rule 1.03(a) – Appointment and Confirmation

This rule should incorporate 88 Op. Att’y Gen. 136 (2003), which can be found at <http://www.oag.state.md.us/Opinions/2003/88oag136.pdf>. The opinion states that, if the Governor appoints commissioners while the Senate is out of session, the commissioners must be confirmed by the Senate when it is next in session.

p8: Rule 1.04(c) – Rule and Regulations review

Article 2B § 15-112(d)(9)(iv) actually *requires* that the Board review their rules and regulations every five years; change “may” to “shall.”

p11: Rule 1.10(d) – Temporary Licenses for Non-profit Organizations

See comments above, on Rule 1.01(r). The IRS does not evaluate whether an organization is a nonprofit. It evaluates whether an organization is *tax-exempt*. These two categories are evaluated at two different levels: state law defines nonprofit organizations, and federal tax law defines tax exemption status.

Also, it is unclear whether this section refers to fiscally sponsored organizations. Often times, smaller organizations enter into fiscal sponsorship agreements with established 501(c)(3) tax-exempt nonprofits. I think the third sentence of this rule is intended to cover those relationships, but the wording is imprecise.

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p11: Rule 1.10(f) – Temporary Licenses – Considerations

This rule should apply to every temporary special event license application, not just those over 500 guests.

p11: Rule 1.10(g) – Conditional Approval of Temporary Licenses

Approving any incomplete application is probably bad practice.

Article 2B § 10-202(a)(4)(iv)-(vii) lays out the requirements that each application be complete, with all required documents submitted, before the Board is allowed to consider the request at a hearing. Temporary special event licenses are not included within 10-202(a)(4), so it's not statutorily required that they be treated the same, but, given the history of the agency's recordkeeping and follow through, it seems unlikely that the Board is actually going to get complete information from the temporary license applicants this way.

pp15-16: Rule 2.03(c) – Substitution of Corporate Officers or Members of a Partnership

There is nothing in Article 2B that exempts substitution of corporate officers or members of a partnership from having to be approved through a public hearing. Citizens of Baltimore City need to know who their licensees are, and the only way for that knowledge to disseminate is by public posting and a public hearing. These hearings can go on an expedited or consent docket, to save time, but it should be subject to a public hearing. At a minimum, the public should be given notice and be allowed to request a public hearing. Otherwise, there is a huge discrepancy between public notice for transfers of over 50% ownership and transfers of under 50% ownership. Unless a potential substitute officer is a felon, it is basically an automatic transfer of the license, and this is not good for public health and safety. Article 2B does not contain any 50% threshold within it.

pp17-18: Rule 2.04(b) – Protests of Renewal

The rule should be reworded to be clear that the protests need to be filed during the month of March, between March 1 and March 31, not just "before close of business on March 31."

p18: Rule 2.05(d) – Transfers to Existing Establishments

On what date does the clock start for this 180-day period? It is unclear on which date the license is "transferred." The date that the transfer is approved at a public hearing? The date that the licensee/applicant submits all of the required paperwork? Also, which license is in use after the transfer? Presumably the transferred license, not the old one that is waiting to be transferred elsewhere?

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pp18-19: Rule 2.04(e) - "Public need and accommodation"

The rules should be clearer about what the agency means by "public need and accommodation." See the excerpted section from Article 2B § 10-202(a)(2) on page 5 of these comments, which lists the criteria that the Board must consider for most new and transferred license. The term "public need and accommodation" is an incomplete and misleading term, because it leaves out a lot of the criteria that are relevant to the Board's decision-making.

p19 - Rule 2.05(g) – 180-day Transfer Rule

This rule is unnecessarily confusing. The rule could just adopt the 10-503(d)(4) language, which is: "A transfer of any license shall be completed not more than 180 days after the Board approves the transfer." There is no reason to refer to § 10-504(d) when discussing transfers, under the analysis in 100 Op. Att'y Gen. 29 (2015), (available at <http://www.oag.state.md.us/Opinions/2015/100OAG29.pdf>). Article 2B § 10-504(d) refers to hardship extensions; these are not available to applicants for a transfer.

p23 - Rule 2.11(b) – Reasons for Reconsideration.

Calvert County Planning Comm'n v. Howlin Realty Mgmt., 772 A.2d 1209 (2000), applying analysis from an earlier case, *Zoning Appeals Board v. McKinney*, 423 A.2d 263 (1980), limits reconsiderations to *solely* situations in which an administrative agency has made an error, either of law or fact. This rule should be amended to make clearer that this is a complete list of situations in which the Board can reconsider its decision, not just a list of suggestions.

p25 - Rule 3.01 – Ownership and Operation.

What does the agency mean by "any financial interest"? The agency, from my understanding, has historically interpreted this rule, which is borrowed verbatim from the current rules, to mean that licensees have to disclose the names of their full-time managers, but management is not really a financial interest. On the other hand, it would be extremely helpful to know who owns security interests in liquor licenses in Baltimore City; it seems like security interests should be included in "financial interest."

p26 - Rule 3.05 – Alcohol Awareness Certification.

Is it just one person per licensed premises who's required to be TAM-certified? This isn't clear from the rule.

p32 – Rule 4.10 – False Statements.

What is the penalty for making a false statement in an application, denial of the application? In Article 2B § 10-202(a)(2)(ii)(3), if the Board finds that an applicant has made a *material* false statement, the Board *must* deny the application. But this section refers to material or immaterial statements, so the punishment could be different for immaterial false statements.

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p33 – Rule 4.15(c) – Sexual Practices and Obscenity.

Part (c) of Rule 4.15 says that the rule doesn't apply to adult entertainment establishments, but this isn't quite accurate: part (a) of the rule *does* apply to adult entertainment licensees. Part (b) does not, so the rule should be updated to reflect this.

Also, in part (a), it isn't clear to me what the difference between a "patron" and a "frequent" might be. The rules should contain a definition of "frequent" if they are going to include the term.

pp34-35 – Rule 4.20(c) – Class BD-7 Licenses.

This rule is a relaxed version of the prior incarnation of the rule, Rule 5.03, which defined the BD-7 tavern license.

The Rules Committee discussed the word "habitually" in this rule, which is not a word that makes sense in this context. Habitually means "by habit," which does not describe the sale and service of alcoholic beverages. In committee, other terms were suggested that made more sense: consistently and routinely.

This new rule sets a new grandfather date for plexiglass/bulletproof glass partitions: the effective date of these new rules. BLLC staff has stated during the committee meetings that they have not enforced this rule at all in the past and that many licensees have added plexiglass since 1993, the former grandfather date. The BLLC commissioners have even approved the addition of plexiglass in the past several years, apparently unaware of the prohibition against doing so in the current rule. Many communities oppose the use of plexiglass and feel as though the addition of the glass lessens licensees' incentives to manage properly their establishment.

The idea that a BD-7 owner is in compliance if there is an on-sale area that *could hypothetically* be accessed is an extremely low threshold and not in keeping with the plain language definition of "tavern."

- Merriam-Webster's definition of tavern: "an establishment where alcoholic beverages are sold to be drunk on the premises."
- Oxford Dictionary: "An establishment for the sale of beer and other drinks to be consumed on the premises, sometimes also serving food."
- Webster's New World Dictionary: "a place where liquors, beer, etc. are sold to be drunk on the premises; saloon; bar."

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Suggested Additions to the Rules and Regulations

Article 2B § 10-202(a)(2) – Application Approval Factors

The proposed rules do not contain the factors that the Board must consider when deciding whether to approve an application. These factors may be what the rules consider to be “public need and accommodation,” a phrase that appears a few times in the proposed rules. However, the criteria really should all be included in the rules, for a full understanding for the public and for the regulated parties.

“(i) Before approving an application and issuing a license, the board shall consider:

1. The public need and desire for the license;
2. The number and location of existing licensees and the potential effect on existing licensees of the license applied for;
3. The potential commonality or uniqueness of the services and products to be offered by the applicant’s business;
4. The impact on the general health, safety, and welfare of the community, including issues relating to crime, traffic conditions, parking, or convenience; and
5. Any other necessary factors as determined by the board.

(ii) The application shall be disapproved and the license for which application is made shall be refused if the Board of License Commissioners for the City or any county determines that:

1. The granting of the license is not necessary for the accommodation of the public;
2. The applicant is not a fit person to receive the license for which application is made;
3. The applicant has made a material false statement in his application;
4. The applicant has practiced fraud in connection with the application;
5. The operation of the business, if the license is granted, will unduly disturb the peace of the residents of the neighborhood in which the place of business is to be located; or
6. There are other reasons, in the discretion of the board, why the license should not be issued.”

It is extremely important that the public, applicants for liquor licenses, and the commissioners and staff of the BLLC know and understand this list of criteria.

Article 2B § 10-504(d) – Hardship Extension Requests

There is no mention in the Rules and Regulations of how and when the Board will consider hardship extension requests.

Article 2B § 10-504(d) states:

“(2) 180 days after the holder of any license issued under the provisions of this article has closed the business or ceased active alcoholic beverages business operations of the business for which the license is held, the license shall expire unless:

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(i) An application for approval of a transfer to another location or an application for assignment to another person pursuant to § 10-503(d) of this subtitle has been approved or is then pending;

(ii) An application pursuant to § 10-506 of this subtitle has been approved or is then pending; or

(iii) A written request for a hardship extension, as provided in this subsection, is filed within the 180-day period.

(3) The licensee or other appropriate interested parties may make a written request to the Board for an extension of the life of the license due to undue hardship, for a time period of no more than a cumulative period of 360 days after the date of closing or cessation of alcoholic beverages business operations of the business for which the license is held.

(4) After a hearing conducted on the extension request, on a finding that undue hardship currently exists causing the closing or cessation of business operations, the Board may grant an extension of the life of the license for a time period not to exceed 360 days as defined in paragraphs (3) and (5) of this subsection.

(5) It is the intent of this subsection that the total time period for which a license may be deemed unexpired under paragraph (2) of this subsection is 180 days if no undue hardship extension is granted, and no more than 360 days if an undue hardship extension has been granted. The time period begins at the earlier of the closing of the business or cessation of alcoholic beverages business, and shall be tolled only upon the filing of an application or request described in paragraph (2) of this subsection, the expiration period to begin running again, cumulatively to the time period before the filing of the application or request, upon the occurrence of the later to occur of the following events:

(i) Final action of the Board granting or denying a request authorized by paragraph (3) of this subsection;

(ii) Final action of the Board denying an application described under paragraph (2)(i) or (ii) of this subsection; or

(iii) Final judgment of the appellate court when judicial review of the Board's action on an application or request authorized by paragraph (2) or (3) of this subsection has been sought, or on dismissal of a petition for judicial review.

(6) If an application or request to the Board described in paragraph (2) or (3) of this subsection is withdrawn, there shall be no tolling of the period for automatic expiration of the license and it shall be deemed as if no such application or request was filed.

These requirements should be included in the Rules, perhaps in a simplified form.

Article 2B § 10-301(j)(4) – Public Hearings for Businesses Closed over 90 Days

Article 2B § 10-301(j)(4) says that: (4) Notwithstanding any other provision of this article, and except where extenuating circumstances exist, before a licensed premises in Baltimore City that has been closed for at least 3 consecutive months may be reopened: (i) The Board of Liquor License Commissioners shall hold a public hearing; and (ii) The licensee shall obtain approval from the Board of Liquor License Commissioners to reopen.”

This rule is also not reflected in the current rules and should be added, for the edification of licensees and communities.

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Article 2B § 10-202(a)(4) – Completeness of Application Requirements

"(v) 1. A license hearing may not be scheduled unless the Board determines that the application is complete. 2. A complete application with all submitted documents shall be posted online at least 14 days before the hearing date.

(vi) The postponement of a hearing shall be posted online not less than 72 hours before the hearing date.

(vii) 1. To incorporate a change in the application document after the Board or the Board's designee has determined the application to be complete, the applicant shall submit the change to the Board not later than 15 days before the scheduled hearing."

This section of Article 2B is not reflected in the rules and it should be added, perhaps as part of Rule 2.07, which is titled "Submission of Materials to the Board in Preparation for Public Hearings."

Becky Lundberg Witt - comments on the Draft Rules and Regulations for Adult Entertainment Licenses; October 2015.

Rule 2.05(d) – Protest of the Renewal of a License

This rule should make clear that a protest of an adult entertainment license must be submitted to the Board *during* the renewal period, not just before the end of the renewal period. This was recently the subject of an appeal from a Spring 2015 protest of renewal, and this was the interpretation of the judge on that issue.