CASE NO. 94026005

Part ____ of ____ Parts

# In The Circuit Court for Baltimore City

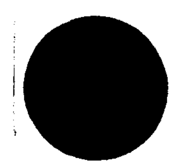
# CIVIL

CL

175296

In the Matter of

MARK T. OLIVER, ETAL
VS.
BOARD OF LIQUOR LICENSE COMMISSIONERS
FOR BALTIMORE CITY



T-2691
OR 28-7-21

② 08

7

# CIVIL POSTPONEMENT FORM

DATE: 7 Nov 94

**Plaintiff(s)** Mark T. Oliver & Hart Oliver Management Co., Inc.

v.

**Defendant(s)** Board of Liquor License Commissioners for Baltimore City

FILED NOV 22 1994 CIRCUIT COURT FOR BALTIMORE CITY

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Computer #: 94026005

File #: ~~CL175?6~~ CL175296

GEN ☐

Jury_____ CT._____ CTF._____ MOT. 2-507 ☐

DOMESTIC JUDGE:____ DOMESTIC MASTER:____

## PLEASE PRINT

**To be postponed from: DATE:** 5 Jan 95 **PRIOR POSTPONEMENTS:** Y☐ N☑

**Postponement requested by:** Petitioners / Appellants

**Postponement reason: (please specify):**

① Acceleration of hearing sought so that Petitioners will be able to use transferred liquor license on New Year's Eve holidays.

② Extension of 90-day period sought to ensure Board's decision is affirmed or reversed on merits, rather than jurisdictional grounds

| Plaintiff(s) Attorneys: | Defendant(s) Attorneys: |
|---|---|
| Greg Miller / Shapiro and Olander | Richard W. Drury |
| 36 S. Charles St. - 20th Fl. | 300 Allegheny Ave. |
| Balto. MD 21201 (410) 385-4218 | Towson Md 21204 |

(410) 337-8702

**New Trial Date:** ____________

**Approved:** ________ **Denied:** ✓ ________: ____________ (JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

CC-55

(14) APW

| MARK OLIVER, ET AL. | * | IN THE |
|---|---|---|
| | * | CIRCUIT COURT |
| v. | * | FOR |
| BALTIMORE CITY BOARD OF LIQUOR LICENSE COMM'RS | * | BALTIMORE CITY |
| | * | CASE NO. 94026005/CL175296 |

* * * * * * * * * * * * *

**ORDER**

This Order is in response to two separate motions filed by Thomas Durel, Cecilia Ives, Arnold Capute, Courtney Capute, Clyde Billings, Benjamin Carlson, Nancy Conrad, Linda Webb, Herbert Zientak, Todd Beckerman, David Levenson, Andrew Mazurek, Joanne Mazurek and the Fells Point Homeowners Association (together, the "Petitioners"): First, a Motion to Interverne, filed April 18, 1994; second, a Motion to Alter or Amend a Judgment, filed June 13, 1994.

Oliver's appeal to this court was filed on January 26, 1994. Yet Petitioners waited until the proverbial eleventh hour before filing their Motion to Intervene. The captioned case was assigned to this court on its fast track docket and was heard on May 5, 1994.

As far as the court is aware, none of the Petitioners attended the hearing on May 5, 1994. The case file was delivered to chambers approximately one week prior to the hearing on May 5, 1994. At that time, the Motion to Intervene had not yet been placed in the court file. Moreover, as of the time of the hearing on May 5, 1994, the Clerk's Office had not forwarded the Motion to Intervene to this court. Nor had Petitioners sent a courtesy copy of the motion to chambers. At the hearing, Counsel never mentioned that such a motion was outstanding. Accordingly, at the time of the hearing and when the court issued its

Memorandum Opinion and Order on June 2, 1994, this court had no knowledge that any such motion was outstanding.

Pursuant to Md. Code Ann., Art. 2B, § 175(b)(1), Petitioners could have appealed the Board's decision to this court. Had they done so, they would have been parties. Lawhorne v. Clinton Liquor Fair, 67 Md. App. 1, 6 (1986). Presumably, they did not appeal because they were satisfied with the Board's decision. However, under Rule 7-204, Petitioners could have filed a response to Oliver's Petition. Had they done so, they would have been parties to the appeal. Petitioners then would have had to comply with Maryland Rules 7-204 and 7-207. Obviously, Petitioners did not file a timely response to the original petition, as required by Rule 7-204(c), and they have never submitted a memorandum of law pursuant to 7-207(a). Lawhorne, 67 Md. App. at 8-9 (a party who had not filed an answer to petition or joined in another party's answer was not a "proper party" before the Circuit Court). Consequently, under Rule 7-207(d), the Petitioners could have been dismissed from the case or barred from presenting argument.

Petitioners' failure to become parties to the appeal does not necessarily foreclose intervention under Md. Rule 2-214. However, based on the facts alleged, Petitioners would not have been entitled to intervene as of right. Rather, the intervention would have been permissive, pursuant to Rule 2-214(b).

The court has discretion to bar permissive intervention where it will unduly delay the adjudication of the matter. Rule 2-214(b)(3). Given the lateness of the proposed intervention, it may well have delayed the previously scheduled hearing of May 5, 1994. See Hartford Ins. Co. v. Birdsong, 69 Md. App. 615, 623-25 (1987) (lateness of motion to intervene is an important factor supporting denial of motion to intervene).

It is also noteworthy that Petitioners' interests were quite similar to those of the Board, and the Board represented those interests adequately. The interests of Petitioners were thus otherwise protected. See Birdsong, 69 Md. App. at 626-30 (1987) (no right to intervene when the only "interest" unique to the party is speculative); see also, Shenk v. Md. Dist. Sav. & Loan; 235 Md. 326 (1984) (mere desire to remain informed is not an "interest").

In sum, this court would have had the discretion to allow intervention by Petitioners at the hearing on May 5, 1994, had it known of the motion. But, because Petitioners failed to attend the hearing, the court's decision has already been issued, and Petitioners' interests are substantially similar to those of the Board, this court, in the exercise of its discretion, will not allow Petitioners to intervene "after the fact." Accordingly, Petitioners' Motion to Intervene is, this 24th day of June, 1994, DENIED. Further, upon consideration of Petitioners' Motion to Alter or Amend a Judgment, it is hereby ORDERED that the motion be, and the same hereby is, DENIED.

Judge Ellen L. Hollander

cc: Alexander R. McMullen, Esq.
George McDowell, Esq.
Melvin J. Kodenski, Esq.

JUN 28 [illegible]

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|---|---|---|
| **MARK OLIVER, ET AL.** | * | **IN THE** |
| **Petitioners** | * | **CIRCUIT COURT** |
| **v.** | * | **FOR** |
| **BALTIMORE CITY BOARD OF LIQUOR LICENSE COMM'RS** | * | **BALTIMORE CITY** |
| | * | **CASE NO. 94026005/CL175296** |
| **Respondents** | | |

* * * * * * * * * * * * *

**MEMORANDUM OPINION AND ORDER**

Introduction

Mark Oliver and Harry Oliver Management Co., Inc., d/b/a The Wharf Rat -- Fells Point ("Petitioners") seek judicial review of the decision of the Board of Liquor License Commissioners ("Respondent" or the "Board") denying a transfer of ownership and location of an existing seven-day BD-7 class beer, wine, and liquor license. On appeal, Petitioners challenge the acceptance by the Board of certain absentee votes, all submitted by affidavit, in opposition to their application for transfer.[1] Additionally, they argue that the Board improperly considered votes in in opposition submitted by three others, who were present at the hearing.

Factual Background

Petitioners own and operate The Wharf Rat bar (the "Bar") in Fells Point, and currently operate the Bar under a LD-75 class liquor license. That license entitles Petitioners

[1]The administrative record, on appeal, has not been sequentially numbered. Accordingly, documents in the record will be described herein by name, so as to permit their identification. References to the transcript of the Board's hearing held on December 30, 1993 are abbreviated by "T", along with the particular page number of the transcript.

to sell alcoholic beverages from 6:00 a.m. until 1:00 a.m. daily, except on Sundays. In July, 1993, Petitioners entered into a contract to purchase an existing Class BD-7 beer, wine, and liquor license, so that they would be able to sell alcohol seven days a week. The contract was made subject to the Board's approval of the transfer. Petitioner's Memorandum at 1.

In August, 1993, Petitioners applied to the Board for approval of the transfer. Thereafter, by letter dated August 18, 1993, the Fells Point Homeowners Association notified the Board of its opposition to the proposed transfer. On December 30, 1993, the Board held a hearing on the application pursuant to Md. Code of 1957 Ann., Art. 2B, § 60(a, e) (1990 & Supp. 1993).[2] At that hearing, the Board determined that there were 47 possible votes (including all half-votes of co-owners of property) which, pursuant to §60(e), could be cast by neighboring property owners and tenants regarding the proposed transfer.[3] T.91. The Board counted 28 full votes in opposition, including 18 votes in opposition submitted by affidavits. Although Petitioners timely objected to the Board's consideration of

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[2]Hereinafter, all statutory references will refer to Md. Code of 1957 Ann., Art. 2B (1990 & Supp. 1993).

[3]§ 60(e) states, in pertinent part, as follows:

> In Baltimore City if it appears that more than 50 percent in numbers of the owners of real or leasehold property situated within 200 feet of the place of business for which application is made are opposed to the granting of the license, or if more than 50 percent of those owners and tenants in combination of real or leasehold property located within 200 feet of the place of business for which an application for a license is made are opposed to the granting of the license, then the application may not be approved, and the license applied for shall be refused. . . . Should any owner of the dwelling participate as a protestant or proponent of the application, then the owner(s) and the tenant of the dwelling shall each have one-half vote. In case of property rented jointly, if one tenant appears in person at the hearing as a protestant, the other tenant's protest may be recorded by an affidavit.

the absentee votes,[4] the Board found that more than 50% of the eligible votes opposed the transfer. Accordingly, the Board denied Petitioners' application.

Scope of Review

The Board's decisions concerning factual issues must be supported by "substantial evidence" on the record. A scintilla of evidence is not enough. Prince George's Co. v. Meininger, 264 Md. 148, 152 (1972). Moreover, this court may not engage in judicial fact-finding. Findings of fact made by the Board are binding upon the reviewing court, if supported by substantial evidence. See Board of County Comm'rs v. Holbrook, 314 Md. 210, 218 (1988). Any inference that can reasonably be drawn from the facts is also to be left to the Board. Snowden v. Mayor & City Council of Baltimore, 224 Md. 443, 448 (1961). "The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." Id.; see also, Baines v. Bd. of Liquor Lic. Comm'rs, Court of Special Appeals, Slip Opinion No. 1221, at 6-7 (filed April 28, 1994). Cf. Eger v. Stone, 253 Md. 533, 542 (1969) (court may not substitute judgment for that of the

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[4]At oral argument, the Board claimed--for the first time--that, as to the affidavits of David Meyers, Elizabeth Meyers, and Friar Piszczatowski, Petitioners did not timely and/or specifically object, either at the hearing or in their post-hearing letter of January 5, 1994, submitted pursuant to Rule 2.07(b)(4). The Board thus claims that the objections have not been preserved for review, and Petitioners are precluded from asserting any error as to receipt of those affidavits. Respondent's assertion of waiver of objection is unsupported by the record. See, e.g., T.5-12, 21-24, 29-30, 31, 36, 37-38, 50, 52, 56, 57, 59, 60, 68, 70, 74, 77, 83, 92, 100, 103, 107-08, 115-17. In fact, the Board allowed Petitioners to have a continuing objection to the submission of affidavits, and invited Petitioners to make specific objections as needed to clarify the record. T.10-12. For a summary of Petitioners' various objections, see Appendix A, attached hereto.

administrative body when a question is "fairly debatable"); Floyd v. County Council of P.G. Co., 55 Md. App. 246, 258 (1983) (court must give due deference to zoning agency, having particular expertise).

But the Board's authority is not unchecked. Where the action of the Board is arbitrary, capricious, or discriminatory, or if the Board has made an erroneous interpretation of law, the decision will not stand. See, e.g., Hardesty v. Zoning Board, 211 Md. 172, 177 (1956); Heath v. Mayor & City Council of Baltimore, 187 Md. 296, 304 (1946). On review, then, this court must consider whether a reasoning mind could have reached the decision of the Board, Holbrook, 314 Md. at 218, and whether the Board properly applied the law.

Discussion

At the heart of the controversy is Rule 2.07(b) of the Rules and Regulations of the Board (April, 1993) (the "Board Rules"). The Rule states, in pertinent part, as follows:

> Protests by owners of real estate within 200 feet of the proposed licensed premises filed pursuant to [Code § 60(e)] must state the location of said real estate. For the purpose of this rule, the word "owner" shall mean the holder or holders of the full legal title as shown by the land records of Baltimore City. All protestants under this subsection must appear in person at the the hearing, provided, however, that the Board shall accept in lieu of personal appearance, an affidavit from such protestant or protestants who in the opinion of the Board have good and sufficient reason for failing to appear at said hearing. Such affidavit shall
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> * * *
>
> (4) state the reason or reasons for the affiant's failure to appear at the hearing. Good and sufficient reason for failing to appear shall not include:
> (i) illness or other physical disability unless such affidavit is accompanied by a written statement signed by a licensed physician confirming such condition;
> (ii) occupation or employment unless such affidavit is accompanied by a

written statement signed by the affiant's employer confirming such fact; and

(iii) absence from the jurisdiction unless the affiant is located more than 50 miles from Baltimore City or is in the military service.

No protests or withdrawals of protest will be accepted after the close of the hearing. No objection to an affidavit of protest will be accepted by the Board after seven (7) days from the date of the hearing. (Emphasis added).

Petitioners raise two primary objections to the Board's decision.[5] First, Petitioners argue that the Board did not have the authority, under Rule 2.07(b), to accept and consider 16 of the 18 affidavits. Second, Petitioners claim the Board should not have accepted the votes of three other people who were present but who, Petitioners argue, did not establish the requisite ownership of property, as set forth in § 60(e).

In response, the Board contends that Rule 2.07(b) must be interpreted in light of Code § 184(b),[6] which, according to the Board, conveys upon an an eligible co-owner of property the unfettered right to present an objection by affidavit. Further, the Board claims that Rule 2.07(b) cannot be interpreted to limit the statutory entitlement. As to the three persons who were physically present at the hearing, the Board argues that it was entitled to accept their

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[5]Appendix A, attached hereto, organizes Petitioner's objections into a table for easier reference.

[6]Section 184 reads, in pertinent part, as follows:

(a) Generally -- In addition to the powers otherwise provided by this article, the Comptroller and the board of license commissioners from . . . Baltimore City . . . have full power and authority to adopt such reasonable rules and regulations as they may deem necessary to enable them effectively to discharge the duties imposed upon them by this article.

(b) Baltimore City -- . . . In case of property owned jointly, if one owner appears in person at the hearing as a protestant, the other owner's protest <u>may</u> be recorded by an affidavit. The Board <u>shall</u> supply a form of acceptable affidavit upon requrest to any person representing himself to be a protestant. (Emphasis added).

testimony as to ownership or authorization to vote.

A. Affidavits

Sixteen affidavits are challenged by Petitioners under Rule 2.07(b). They assert that 14 are defective on the basis of facial irregularities, and that 3 are invalid because of latent defects.[7]

(1) Facial Irregularities

(a) No Explanation Offered In Affidavit

According to Petitioners, three affidavits submitted by co-owners lack any explanation as to why the affiants were not present at the hearing, in contravention of Rule 2.07(b) and § 184.[8] Respondents claim that the three affidavits in fact "asserted 'good and sufficient reason for failing to appear.'" Board's Memorandum, at 3. A cursory examination of these affidavits clearly shows that they do not contain any explanation of absence, as required by Rule 2.07(b)(4). Thus the Board's assertion to the contrary is erroneous.

Alternatively, Respondent argues that § 184(b) permits a co-owner to submit a vote by affidavit, without any explanation or justification, so long as the other co-owner personally appears at the hearing. This contention also must fail. A review of § 184(b) clearly permits a co-owner to submit an affidavit. But § 184(b) must be read in conjunction

[7]Petitioners challenge Friar Piszczatowski's affidavit for a facial irregularity as well as a latent defect.

[8]Affidavits of Joanne Ivory, Joyce Peranio, and Irvin Lentz. Todd Beckerman (husband of Joanne Ivory), Dianna Lentz (wife of Irvin Lentz), and Paul Peranio (husband of Joyce Peranio) were present at the hearing. T.5-10, 48-50, 69-70.

with § 184(a), which authorizes the Board to prescribe whatever reasonable rules and regulations it deems necessary. Respondent has done just that in promulgating Rule 2.07(b); it requires each affiant to state the reason why he/she is not present. Although § 184(b) does not itself require a statement of explanation or excuse in the affidavit, the Board must abide by the rules which it has promulgated. Bd. of Educ. of A.A. Co. v. Barbano, 45 Md. App. 27, 41 (1980).

Administrative agencies of government have broad discretion to adopt rules, regulations, and procedures, though they must be reasonable and consistent with the letter and spirit of the statute under which the agency acts. Sullivan v. Bd. of License Comm'rs for P.G. Co., 293 Md. 113, 121-24 (1982). See also, Baltimore v. William E. Koons, Inc., 270 Md. 231 (1973); Comptroller v. Rockhill, Inc., 205 Md. 226 (1954); John McShain, Inc. v. Comptroller, 202 Md. 68 (1953). Moreover, "'[a]n agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.'" Barbano, 45 Md. App. at 41 (quoting U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1979); see also, Baines, at 5 (quoting Mandel v. U.S. Dep't of Health, Educ. & Welfare, 411 F.Supp. 542, 544 (D.Md. 1976)); Williams v. McHugh, 51 Md. App. 570 (1982); Hopkins v. Md. Inmate Griev. Comm'n, 40 Md. App. 329, 335-36 (1978).

Respondent's construction also ignores the provision of § 184(b) which obligates the Board to provide the appropriate form of affidavit. The use of the word "shall" is presumptively mandatory. Hirsch v. Dep't of Nat'l Resources, 288 Md. 95 (1980); Williams, supra; Pope v. Sec'y of Personnel, 46 Md. App. 716 (1980).

In sum, a protesting co-owner can, by statute, vote either in person or by affidavit. However, if the co-owner chooses to vote by affidavit, the affidavit must comply with whatever reasonable rules the Board establishes as to form. Board Rule 2.07(b) requires more than was offered by Joanne Ivory, Joyce Peranio, and Irvin Lentz, and therefore their affidavits were erroneously considered and counted by the Board.

(b) Distance From Baltimore

Seven affidavits each allege that the respective affiant was more than 50 miles from Baltimore at the time of the hearing.[9] Apart from the conclusory assertions as to distance, no additional information, such as a relevant map, was appended to any of the affidavits to verify the actual distance alleged.[10] The Board accepted the bald assertions of the affiants, even though some of the locations stated, such as Carroll County, Maryland,[11] and Frederick, Maryland,[12] could have been just over or just under the 50 mile limit.

Petitioners argue that the places specified by the affiants were actually within a 50 mile radius from Baltimore, and thus the affiants were not entitled to vote by affidavit.

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[9]Affidavits of Clayborne Hines, Josephine Hines, Shirley Holden, Dorothy Zientak, David Meyers, Elizabeth Meyers, and Friar Maurice Piszczatowski. As to the affidavit of Friar Maurice Piszczatowski, Petitioners also argue it has a latent deficiency. See infra, at page 12.

[10]It is noteworthy that for other excuses, such as illness or employment constraints, the Board *requires* the affiant to attach extrinsic evidence (such as a note from the doctor or employer) substantiating the affidavit. See Rule 2.07(b). Thus, Rule 2.07(b) may well envision that the affiant should produce some substantiation of distance when it is controverted.

[11]Affidavits of Clayborne Hines and Josephine Hines.

[12]Affidavits of David Meyers and Elizabeth Meyers.

Certainly, some locations, such as Los Angeles or Houston, are so obviously more than 50 miles from Baltimore, that a bald allegation would suffice to satisfy the Rule. But where, as here, there is a genuine dispute as to distance, the affiant must bear the burden of proving that the location specified in the affidavit is in fact more than 50 miles from Baltimore.[13] The Board did not meet its burden.

The method of measuring the 50 miles is also at issue here. Respondent gamely argues that the "50 miles" mentioned in Rule 2.07(b)(4)(iii) does not refer to the radial distance from the City. Instead, the Board claims the distance must be measured by the miles one must travel, or elects to travel, to get to Baltimore. This analysis is not supported by logic or law.

A place might be more than 50 miles from Baltimore if measured by one roadway or another, but not if measured "as the crow flies." A method of calculation based on the roadways, either available or used, is unworkable. Unless the distance is measured radially, or "as the crow flies," the parties might then argue about the variation in miles based on the particluar route selected. Far more practical and uniform is the "as the crow flies" method to measure distances.[14] That method has been adopted by the federal courts for purposes of extraterritorial service. Pursuant to F.R.Civ.P. 4(k)(1)(B), a party located outside the district in which the suit is filed may be served with process if the party is served within a 100-mile

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[13]The party offering the affidavit is the one who knows the affidavit will be offered and is the party at the hearing in a position to present proof on that issue.

[14]With this method, all the Board need do is pull out an official map of the Mid-Atlantic States, along with a pre-measured string tied to two pins, and the Board would be able to determine if the affidavit facially complies with Rule 2.07(b).

radius of the steps of the district courthouse. That radius is measured "as the crow flies." Sprow v. Hartford Insurance Co., 594 F.2d 412 (5th Cir. 1979); see also Wright & Miller, 4A Federal Practice & Procedure § 1127, at 330 n.1 (1987); 2 Moore's Federal Practice ¶ 4.42[2.--3], at 397-98 (1994); cf. Fed. R. Civ. Proc. 45(e) (extraterritorial service of subpoena also follows the "as the crow flies" method).

Appended to Petitioner's Memorandum are an affidavit by Lawrence B. Swift ("Swift"), the Highway Mapping Team Manager for the Maryland State Highway Administration, and a map of the State of Maryland, published by the Maryland Department of Transportation. At oral argument, the Board represented to the court that it could consider Petitioner's new evidence. These uncontradicted items collectively establish that all of the affidavits were within a 50 mile radius. Relying on the recent case of Baines v. Bd. of Liquor Lic. Comm'rs, Court of Special Appeals, Slip Opinion No. 1221 (filed April 28, 1994), it appears that this court may not make its own factual finding as to which affiants were within the 50 mile radius at the time of the hearing. Nevertheless, Swift's affidavit and the map serve to demonstrate further why the Board erred in accepting the affiants' bald assertions. Petitioners' objections should have prompted the proponents of the affidavits to offer some proof as to the distance of the various locations, so as to permit the Board to resolve any factual disputes involved.

(c) Time Of Making The Affidavits

The remaining four affidavits[15] aver that the affiants were more than 50 miles from

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[15]Affidavits of David Levinson, Lucretia Fisher, Lisa Kolodny-Hirsch, and Douglas Kolodny-Hirsch.

Baltimore *at the time of making the affidavit.* However, the affidavits show they were made several weeks prior to the date of the hearing, and do not aver unavailability on the date of the hearing.[16] The Board does not really address this argument in any significant way. As worded, these facially apparent deficiencies conflict with the requirements of Rule 2.07(b).[17] Therefore, these particular affidavits should not have been accepted by the Board.

(2) Latent Irregularities

Two other affidavits[18] each properly aver that the affiant was more than 50 miles from Baltimore. However, Petitioners objected to these affidavits,[19] and alleged that the affiants were actually present in Baltimore at the time of the hearing. Again, the burden must fall on the Board to substantiate its claim that the affiants were unavailable. If Petitioners' contentions are true, then the acceptance of the affidavits by the Board would have violated Rule 2.07(b). Barbano, 45 Md. App. at 41. Yet the Board did not make any findings as to whether either affiant was, in fact, in Baltimore at the time of the hearing. Nor did the

[16]These facially apparent irregularities probably resulted from the fact that the affiants merely filled in blanks of form affidavits. Compare, e.g., Affidavits of Craig Spillman, Myrna Poirier, and Friar Piszczatowski (words, "am in" have been struck, and "will be in" have been inserted by hand) with Affidavits of David Levinson, Lucretia Fisher, Lisa Kolodny-Hirsch and Douglas Kolodny-Hirsch (words, "am in" are not struck).

[17]Rule 2.07(b) does not explicitly state that the affidavit must aver unavailability "at the time of the hearing." Nevertheless, the Rule is nonsensical unless those words are implicitly included.

[18]Affidavits of Nancy Heaton and Craig Spillman.

[19]Petitioners objected to the affidavit of Nancy Heaton after the evidentiary phase ended but before the Board adjourned, T.115-17. Petitioners objected to the affidavit of Craig Spillman in a post-hearing letter dated January 5, 1994, filed pursuant to Rule 2.07(b). See also, Petitioners' Memorandum, at 9-10.

Board seek any substantiation of the claim of unavailability. Respondent has since conceded that Craig Spillman was in Baltimore at the time of the hearing, and that his vote by affidavit, in opposition to the transfer, should be voided. Board's Memorandum, at 1. The Board's failure to consider or resolve the Petitioners' objections was arbitrary and capricious, and cannot stand.

In addition, Petitioners objected to the affidavit of Friar Maurice Piszczatowski, voting on behalf of the Franciscan Order, as having a latent deficiency. The Friar was allegedly unable to attend the hearing.[20] But Petitioners claim that the affidavit fails to state why the Franciscan Order, which owns the property, could not send someone else to attend the hearing. While Petitioners apparently concede that Piszczatowski had authority to speak for the Franciscan Order, they maintain that Friar Piszczatowski is not the same as the Franciscan Order itself. Rule 2.07(b) requires all protestants to be present to protest, and the Rule seemingly would apply to organizations as well as individuals. Accordingly, if the Franciscan Order wished to protest and Friar Piszczatowski could not attend, it had the burden of demonstrating that it could not have sent anyone else. This it failed to do.

B. Property Ownership

Petitioners argue that three votes should not have been accepted because the persons casting the votes had not proven ownership consistent with the record title.[21] Petitioners objected as follows: to the vote of Evelyn Boyce, whose property was titled under her

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[20]See supra, note 10 and accompanying text.

[21]Petitioners' Memorandum, at 7-9, 19-22.

deceased husband's name; to the vote of the "South Durham Street Improvement Association, Inc." ("South Durham"), whose property was titled under the name of the "Durham Street Improvement Association, Inc." ("Durham"); and to the vote of the Baltimore City Department of Housing and Community Development (the "Department") on behalf of the Mayor and City Council of Baltimore as title owners.

These objections are without merit. The Board properly accepted testimony from Evelyn Boyce concerning her ownership of her deceased husband's land. The Board also was entitled to consider the testimony of William Rohram, agent for South Durham, concerning the identity of the two similarly named corporations. The Board was further entitled to rely on the testimony of Dorothy Dobbyn, a representative of the Department, concerning the Department's authority to object on behalf of the Mayor and City Council. Here, the Board, as finder of fact, had substantial evidence before it upon which it could reasonably find that the people representing themselves as individuals authorized to vote in fact had the requisite authority.

Conclusion

For the reasons previously stated, the Board erred in accepting the affidavits of Joanne Ivory, Joyce Peranio, Irvin Lentz, Clayborne Hines, Josephine Hines, Shirley Holden, Dorothy Zientak, David Meyers, Elizabeth Meyers, Friar Maurice Piszczatowski, David Levinson, Lucretia Fisher, Lisa Kolodny-Hirsch, Doublas Kolodny-Hirsch, and Craig Spillman, whose combined objections total 10 votes. The Board also should have made a finding as to whether Nancy Heaton was present in Baltimore at the time of the hearing, and

thus unable to vote by affidavit. As a result, the Board should have tallied no more than 18 votes in opposition, out of 47 eligible votes. The Board then should have proceeded, pursuant to § 60(e), to hold a hearing on fitness and accomodation.

Based on the foregoing, it is, this 2 day of June, 1994, by the Circuit Court for Baltimore City, ORDERED that the decision of the Board be, and the same hereby is, REVERSED. Costs to be paid by Respondent.

Judge Ellen L. Hollander

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## APPENDIX A

| Voter Name | Vote Method | Other owner of record | Vote value | Grounds for Objection |
|---|---|---|---|---|
| Joanne Ivory | Affidavit | Todd Beckerman | 0.5 | no excuse provided |
| Joyce Peranio | Affidavit | Paul Peranio | 0.5 | no excuse provided |
| Irvin Lentz | Affidavit | Dianna Lentz | 0.5 | no excuse provided |
| Dorothy Zientak | Affidavit | Herbert Zientak | 0.5 | < 50 miles from Baltimore |
| Clayborne Hines | Affidavit | Josephine Hines | 0.5 | < 50 miles from Baltimore |
| Josephine Hines | Affidavit | Clayborne Hines | 0.5 | < 50 miles from Baltimore |
| David Meyers | Affidavit | Elizabeth Meyers | 0.5 | < 50 miles from Baltimore |
| Elizabeth Meyers | Affidavit | David Meyers | 0.5 | < 50 miles from Baltimore |
| Shirley Helberg | Affidavit | none | 1 | < 50 miles from Baltimore |
| Friar Maruice Piszczatowski | Affidavit | Franciscan Order | 1 | < 50 miles from Baltimore & Friar is not owner |
| Lisa Kolodny-Hirsch | Affidavit | Douglas Kolodny-Hirsch | 0.5 | affidavit made too early |
| Douglas Kolodny-Hirsch | Affidavit | Lisa Kolodny-Hirsch | 0.5 | affidavit made too early |
| David Levinson | Affidavit | none | 1 | affidavit made too early |
| Lucretia Fisher | Affidavit | none | 1 | affidavit made too early |
| Nancy Heaton | Affidavit | none | 1 | affiant in Baltimore |
| Craig Spillman | Affidavit | none | 1 | affiant in Baltimore |
| Evelyn Boyce | In person | Husband (deceased) | 1 | not record property owner (owner is "Charles Boyce & Wife") |
| Dorothy Dobbyn, Balto Dep't of Housing & Community Dev. | In person | Mayor & City Council | 1 | voter did not produce written authorization from the M&CC to the Dep't H&CD |
| Durham St. Improvement Assoc. | In person | South Durham St. Improvement Assoc. | 1 | voter's corporate name is not identical to that of the record property owner |

D. Lee
2-4-10
Image 20

**Subject:** MSA SC 5458-82-150, 1994 cases
**From:** Jennifer Hafner <jenh@mdsa.net>
**Date:** Thu, 04 Feb 2010 12:15:14 -0500
**To:** Ray Connor <rayc@mdsa.net>, Doris Byrne <dorisb@mdsa.net>, Sheila Simms <sheilas@mdsa.net>, Edward Papenfuse <edp@msa.md.gov>

I have added the following two cases to the work order

OLIVER ET AL VS.BD. OF LIQUOR LICENSE Box 32 Case No. 94026005 [MSA T2691-5740, OR/28/7/21]
File should be named msa_sc5458_82_150_[full case number]-####

WOJLOH VS REIFER, ETAL Box 222 Case No. 94143054 [MSA T2691-5930, OR/28/11/19]
File should be named msa_sc5458_82_150_[full case number]-####