STATE OF MARYLAND

BOARD OF LIQUOR LICENSE COMMISSIONERS

FOR BALTIMORE CITY
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BALTIMORE, MARYLAND 21202-3258

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February 27, 2009

Ms. Angela Gibson
Mayor's Liaison to the City Council
Mayor's Office
Room 250, City Hall
100 North Holliday Street
Baltimore, Maryland 21202

Re: Bill 08-0163 Live Entertainment Licensing

Dear Ms. Gibson:

Attached please find information which this agency received from the Attorney General's office concerning licensing provisions for live entertainment at establishment holding alcoholic beverage licenses.

Very truly yours,

Samuel T. Daniels, Jr.
Executive Secretary

Comments

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

November 14, 2008

The Honorable Lisa A. Gladden
4811 Liberty Heights Avenue
Baltimore, Maryland 21207

Dear Senator Gladden:

You have asked for advice as to whether a proposed Baltimore City Ordinance would be preempted by the provisions of Article 2B of the Annotated Code of Maryland. It is my view that, to the extent that the licensing provisions of the ordinance would apply to alcoholic beverages licensees, it would be preempted.

City Council Bill 08-0163 would eliminate live entertainment and dancing as a zoning category and instead create a licensing requirement, to be administered by a new Board of Licenses for Live Entertainment, applicable to any restaurant, tavern or dance club that provides live entertainment or dancing.[1] Live entertainment is broadly defined to include any entertainment that is performed live by one or more persons, whether or not done for compensation, whether or not admission is charged, and whether the entertainment is a principal, accessory or other use of the premises and includes musical and theatrical acts, circuses, aerial and acrobatic performances, dance performances, participatory dancing, magic acts, karaoke, a disc jockey, poetry recitals and book readings, performance art, comedy, and similar activity. It does not, however, include adult entertainment or one day non-recurring events exempted by a rule or regulation of the Board of Licenses for Live Entertainment.

The proposed ordinance would require that each restaurant, tavern and dance hall presenting live entertainment have a license for that purpose. The license would set out the types of entertainment that may be performed under the license, the days and hours of operation, the term of the license, and any other limitations applicable to that particular class of license. In designating

[1] The bill defines a restaurant as a business establishment that provides food to the public for on-premises consumption, whether or not it serves alcoholic beverages. A tavern is defined as a business establishment that provides alcoholic beverages to the public for on-premises consumption, whether or not it serves food. A dance hall is an establishment that provides patrons with an opportunity to dance to recorded or live music, whether or not it serves food or alcoholic beverages. An establishment that does not serve food or alcoholic beverages, where everyone stands still, is not covered by the ordinance.

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classes and specifying limitations, the Board is to consider the use of amplification, noise levels and the need for noise proofing; limits on the size of the establishment, or of the portion of the establishment used for entertainment; the number of live entertainers; exterior lighting; whether to limit the live entertainment to dancing only; the proximity of schools, religious institutions and parks; the capacity of the venue; the volume and types of pedestrian and vehicular traffic in the area; and the establishment and maintenance of a traffic management plan, a parking management plan, an indoor and outdoor security plan, and a sanitation plan. A hearing on the application is required if there are more than ten objections from property owners or residents within a ten block radius and mediation is unable to resolve them. A similar provision applies with respect to license renewal.

It seems clear that the provisions of the proposed ordinance fall within the police power granted to the City by Article II, § 27 of the Charter as well as the express power to "license, regulate and restrain theatrical and other public amusements" granted by Article II, § 41. However, this authority does not mean that regulations falling within these powers might not be preempted by State law.

Article 2B, § 10-202(e)(2)(i) and (ii) provide that "[o]n receipt of ... a request for live entertainment on the licensed premises ... the Board of License Commissioners for Baltimore City shall advertise and post notice of the ... request" on the premises described in the application. The Board is also required to hold a public hearing on each request and to use the standards listed in § 10-202(a)(2) in deciding whether to approve a request. § 10-202(e)(2)(iv) and (v). These standards are whether the granting of the license is necessary for the accommodation of the public, whether the applicant is a fit person to receive the license for which application is made, whether the applicant has made a material false statement or has practiced fraud in connection with the application, whether the operation of the business will unduly disturb the peace of the neighborhood, and whether there are other reasons, in the discretion of the Board of License Commissioners why the license should not be issued. § 10-202(a)(2)(iii).[2]

While this authority is somewhat bare bones, the history of the provision makes clear that the legislation was intended to provide the authority for a full regulatory system under which a licensee must have permission from the Board of License Commissioners in order to present entertainment, and that failure to comply, or to meet any conditions set, can lead to disciplinary action against the licensee.

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[2] Article 2B, § 10-202(e)(2) was added by Chapter 167 of 1998. At that time, the applicable standards were those that now appear in § 10-202(a)(2)(iii). The standards that now appear in § 10-202(a)(2)(ii) were added by Chapter 475 of 2001. That Act also added language as § 10-202(a)(2)(i) reflecting that "this paragraph" does not apply in Baltimore City. It is my view that this exclusion applies only to § 10-202(a)(2)(ii) and not § 10-202(a)(2)(iii), and that the latter provision, which was set out in Chapter 167 of 1998 continues to govern applications subject to § 10-202(e)(2).

Regulation of entertainment by the Board of License Commissioners dates to 1941, when the General Assembly enacted Chapter 849 of 1941, which provided:

> The Board of License Commissioners of Baltimore City may authorize the issuance of an additional permit, to be known as a special amusement permit, to the holders of Class D beer, wine and liquor licenses in Baltimore City who regularly specialize in the entertainment of their patrons by providing approved types of amusement such as singing, dancing, music (other than recorded music or radio programs), floor shows, acrobatic acts, theatricals or moving pictures. Such a special permit shall authorize the holder thereof to keep for sale and sell all alcoholic beverages at all hours except between the hours of 2 A. M. and 6 A. M. of each day. The provisions of Section 43 of this Article shall not apply to such permits, nor shall the provisions of Section 39 except that no person under the age of eighteen shall be employed in such establishments for the sale of alcoholic beverages.

This provision now appears as Article 2B, § 8-203. It is my understanding, however, that no special amusement permits are currently issued because the licensees providing entertainment all took the option offered by Chapter 197 of 1965, which created the Class B-D-7 beer, wine, and liquor license and provided that:

> All present restaurant licensees having a valid Class B beer, wine and liquor license and all present licensees having a valid Class D beer, wine and liquor license with the special amusement license shall at their option automatically be entitled to exchange their present license for a Class B-D-7 license; provided, however, that all special restrictions imposed on the particular Class B or Class D with special amusement license being exchanged shall remain in effect and apply to the new license until changed by the license commissioners.

While this change effectively eliminated the special amusement permits, the Board of License Commissioners apparently continued to regulate the provision of entertainment, requiring that licensees apply for permission to conduct entertainment, and holding hearings on these applications. This practice continued until a decision of the Circuit Court for Baltimore City holding that the Board lacked this authority. This led the General Assembly to enact Chapter 167 of 1998, adding the provisions in Article 2B, § 10-202(e) which relate to live entertainment. The Fiscal and Policy Note for Senate Bill 304 of 1998, which became Chapter 167, reflects that the bill "codifies prior and current practices," and that the "board used to hold hearings and post notices for applications for live entertainment ... until recent circuit court opinion held that the board did not have this statutory authority." This history makes clear that the intention of the language in Article 2B, § 10-202(e) is to provide authorization for the long-standing practice of the Board of License Commissioners of limiting live entertainment to those licensees that had sought and received authority from the Board for that purpose.

Thus, under the authority of § 10-202(e)(2), an alcoholic beverages licensee that wishes to present live entertainment must apply to the Board of License Commissioners for permission to do so. The Board of License Commissioners may grant or deny this authority only after posting notice, holding a hearing, and considering a broad variety of factors, including the character of the applicant, the public interest, the peace of the neighborhood and any other factor that the Board of License Commissioners finds relevant.[3]

The Court of Appeals has established that state law may preempt local law in one of three ways: 1) preemption by conflict, 2) express preemption, or 3) implied preemption. *Allied Vending v. Bowie*, 332 Md. 279, 297-298 (1993). In this instance, there is no express preemption of regulation by the City of entertainment presented by alcoholic beverage licensees. Whether the legislature intends to occupy the field is a closer question. Looking to the factors set out in *Allied Vending v. Bowie*, 332 Md. 279, 299-300 (1993), no clear answer emerges. On the one hand, the ordinance regulates in an area in which some local control has traditionally been allowed. In fact, the Charter expressly grants authority in this area. State law also expressly provides concurrent local authority in the area with respect to zoning, and the Board of License Commissioners recognizes this local authority. *See* Article 2B, § 9-103. Moreover, the City presumably regulated entertainment and amusements at some level well before the enactment of Chapter 849 of 1941, which appears to have been the first grant to the Board of License Commissioners related to this subject.[4] On the other hand, the State law provides for pervasive administrative regulation, State legislation addresses the same aspects of entertainment offered by alcoholic beverage licensees as are addressed by the proposed ordinance, and, most importantly, a "two-tiered regulatory process existing if local laws were not preempted would engender chaos and confusion." *Allied Vending, Inc. v. Bowie*, 332 Md. 279, 299-300 (1993).

It is my view, however, that it is unnecessary to determine whether the State has occupied the field by implication, because the licensing requirements of the proposed ordinance, as applied to alcoholic beverages licensees, are in conflict with State law. "A local ordinance is preempted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law." *Talbot County v. Skipper*, 329 Md. 481,

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[3] That this procedure was not merely a formality, but led to denials of authority to present live entertainment both before and after the adoption of § 10-202(e) is shown by the denial of the request of Kisling's for live entertainment, which led to the court case holding that the Board lacked the authority to regulate entertainment, and the adoption of Chapter 49 of 1999, which created a "simplified" process for an establishment in Ward 26, precinct 7 of the City that had apparently been unable to get authorization from the Board. That bill had a two-year sunset.

[4] Chapter 849 enacted what is now Article 2B, § 8-203(c), which authorizes the issuance of a "special amusement license." It is my understanding that special amusement licenses are no longer issued, as the holders have switched to B-D-7 licenses as permitted by § 8-203(d)(4).

487, n. 4 (1993). State law clearly contemplates that an alcoholic beverage licensee may not present live entertainment if it does not have the permission of the Board of License Commissioners, and conversely, that a licensee that has the required permission of the Board of License Commissioners may present live entertainment. The proposed ordinance purports to put a parallel, and largely duplicative licensing requirement on these licensees, with grant of the license resting on similar factors as are considered under State law. The presumed effect would be that some alcoholic beverage licensees who are permitted to present live entertainment under State law would be barred from doing so, while licenses might be issued by the Board of Licenses for Live Entertainment to alcoholic beverage licensees who have been denied permission for live entertainment by the Board of License Commissioners, thus purporting to permit action that the State law forbids. Additional problems would arise if the Board of Licenses for Live Entertainment attempted to place restrictions on an entertainment license with respect to the type of entertainment permitted or the days and hours of operation, that are different from those imposed by the Board of License Commissioners.

For these reasons, it is my view that the proposed ordinance would be preempted by State law with respect to alcoholic beverages licensees. It could, however, be enforced for premises that do not hold alcoholic beverage licenses.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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