

**Society of the Free Church of St. Mary the Virgin v
New York State Liq. Auth.**

2012 NY Slip Op 30714(U)

March 21, 2012

Supreme Court, New York County

Docket Number: 110285/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C. New
Justice

PART 23

SOCIETY OF ROS CHURCH OF
ST. MARK THE
EVANG.
ALY STATES LICENSURE AUTHORITY

INDEX NO. 110385/11
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. 28

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4, 5, 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3-21-12 New York New York Entered: [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Application of THE SOCIETY OF THE FREE
CHURCH OF ST. MARY THE VIRGIN,

Petitioner,

Index No. 110285/11

Motion Date: 12/6/11

Motion Seq. No.: 001

For a Review Pursuant to Article 78 of the Civil Practice Law
and Rules,

- against -

NEW YORK STATE LIQUOR AUTHORITY, LOGAN'S
SANCTUARY LLC,

Respondents.
-----X

BARBARA JAFFE, JSC:

For petitioner:

Roger Juan Maldonado, Esq.
Dennis P. Doyle, Esq.
Balber Pickard *et al.*
1370 Ave. of the Americas
New York, NY 10019
212-246-2400

For SLA:

Donald T. Martin, Esq.
317 Lenox Ave.
New York, NY 10027
518-474-3114

For Logan's:

Terrence R. Flynn Jr., Esq.
Flynn & Flynn PLLC
198 Beach 102nd St.
Rockaway, NY 11694
718-945-1000

By order to show cause dated September 12, 2011 and verified petition dated September 8, 2011, petitioner brings this Article 78 proceeding seeking a judgment annulling, vacating, and setting aside a determination rendered by respondent New York State Liquor Authority (SLA) on June 30, 2011, revoking the determination, and awarding petitioner its costs, disbursements, and attorney fees. Respondents oppose.

L. BACKGROUND

Petitioner The Society of the Free Church of St. Mary the Virgin (the Church) owns real property located at 133-145 West 46th Street and 134-144 West 47th Street in Manhattan.

DECISION & JUDGMENT

UNFILED JUDGMENT

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Respondent Logan's Sanctuary LLC (the Hotel) owns real property located at 132 West 47th Street, next door to the Church's property. The Hotel's main entrance is within 200 feet of a public entrance of the Church. (Affidavit of Reverend Stephen Gerth, dated Sept. 8, 2011 [Gerth Affid.]).

The Church's property consists of a complex of buildings, including the Church, the Rectory, the Mission House, and the Rector House. The Church currently permits a non-profit theater group to use, at specified times, part of the third floor of its Parish House and storage space in the Church basement. Until February 2009, the Church had the same arrangement with another theater group. (Gerth Affid.).

On January 9, 2007, the Hotel submitted a first liquor license application to the SLA. (Verified Petition, dated Sept. 8, 2011 [Pet.], Exh. A). Pursuant to section 64(1) of the Alcoholic Beverage Control Law, any person may apply for a license to sell liquor at retail to be consumed on the premises where it is sold, and such a license "shall be issued to all applicants except upon good cause shown." Section 64(7)(a) of the Law prohibits the grant of such a license, as pertinent here, on the same street and within 200 feet of a building used exclusively as a church (200-foot rule). Section 64(7)(d-1) provides that a place of worship does not cease to be used "exclusively" as a place of worship "by incidental uses that are not of a nature to detract from the predominant character of the building as a place of worship . . ."

By letter dated August 6, 2007, the SLA asked the Church to respond in writing as to how its premises are occupied and used. (*Id.*, Exh. B). By letter dated September 12, 2007, the Church stated that it permits two not-for-profit theater groups to use certain space at the premises at specified times. (*Id.*, Exh. C).

By notice dated December 27, 2007, the SLA disapproved the Hotel's application based on its proximity to the Church and the 200-foot rule, and the Church's September 2007 letter stating that the premises were used exclusively as a church. (*Id.*, Exh. D).

By letter dated September 15, 2008, the Hotel asked the SLA to reconsider its application on the grounds that two theater groups were operating within the Church's premises, that the groups' presentations were unrelated to church activities and produced for the general public, and that they charged admission for their shows. (*Id.*, Exh. F).

By request dated September 22, 2008, counsel for the SLA recommended that the Chairman of the SLA's Board deny the request for consideration on the ground that the two theater groups were not-for-profit organizations and therefore their use of the Church's premises constituted an incidental use. The Chairman denied the request the same day. (*Id.*, Exh. G).

By letter dated September 24, 2008, SLA denied the Hotel's request. (*Id.*).

However, on September 26, 2008, SLA's counsel submitted a request for reconsideration to the Chairman, arguing that the SLA had wrongly relied solely on the Church's September 2007 letter in concluding that the church's premises were used exclusively as a church, and counsel therefore recommended that the Chairman reconsider "whether [SLA] had sufficient information before it regarding the use of the building, since it appears that no independent investigation was done." (*Id.*, Exh. H).

On September 30, 2008, the Chairman approved the request and directed that the Hotel's application be returned to SLA's Licensing Bureau for a "complete, documented investigation" into the issue presented. (*Id.*, Exh. H).

By letter dated November 5, 2008, the Church again informed the SLA that both groups

were not-for-profit entities using the Church's space, and that their addresses were separate from the Church's premises. (*Id.*, Exh. E).

By facsimile dated December 5, 2008, the Church informed the SLA that each theater group agreed to pay \$16,979 for its use of the premises for the 2008-2009 season. (Verified Answer, dated Oct. 26, 2011 [Ans.], Exh. 1).

At a full SLA board meeting held on December 18, 2008, the SLA denied the Hotel's application by a vote of two to one based on its investigation revealing that the two theater groups were non-profit charitable organizations that used part of the Church's premises for rehearsals and performances with their offices located elsewhere, and that although they charged admission for the performances, they derived most of their income from donations. The SLA thus concluded that the Church's premises are used exclusively as a church. (Pet., Exh. I).

In 2010, the Hotel commenced an Article 78 proceeding against the SLA seeking an order setting aside the denial of its request for a liquor license. (*Id.*, Exh. J). By stipulation dated March 18, 2010, the parties agreed that the SLA would grant reconsideration of and allow argument on the Hotel's application. (*Id.*, Exh. K). In June 2010, the parties advised the court that they had settled the proceeding. (*Id.*, Exh. M).

By letter dated March 16, 2010, the Hotel again asked the SLA to reconsider its request for a license before the SLA's full board. (Ans., Exh. 7). On April 5, 2010, counsel for the SLA submitted a request for reconsideration based on its investigation into the Church's use of the premises. (*Id.*, Exh. 8).

By letter dated April 30, 2010, the Church responded to a third inquiry by the SLA

regarding the theater groups' use of its space, observing that one of the groups was no longer operating there, and that receipts from ticket sales from the shows went to the other theater group that still operates there. The Church also enclosed a copy of a contract between it and the group which required that it make monthly or bi-monthly "donations" toward certain charges associated with its use of the premises, which totaled \$17,522 between 2009 and 2010, and which reflected that the group presented Shakespearean plays. (Pet., Exh. L).

On May 6, 2010, the SLA determined that the Church's premises were not used exclusively as a church. (Ans., Exh. 6).

By letter dated August 24, 2010, the SLA issued the Hotel a conditional letter of approval. (Ans., Exh. 5).

On February 3, 2011, the SLA issued the Hotel a main liquor license. (Ans., Exh. 6).

On June 30, 2011, the SLA permitted an alteration to the license by allowing the Hotel to install two additional bars on its premises; it did not consider or reconsider its determination to grant the main liquor license. (*Id.*, Exh. E).

II. CONTENTIONS

The Church argues that the SLA's decision to grant the Hotel a liquor license is arbitrary and capricious and an abuse of discretion as it issued no written opinion explaining its decision to reverse itself and grant the license and failed to notify the Church of its decision. It also contends that the determination is affected by an error of law as the license was issued in violation of the 200-foot rule and its premises are used exclusively as a church. (Pet.).

The SLA asserts that its determination that the Church's premises were not being used

exclusively as a church is rationally based on the documents submitted to it and its own investigation, that it provided the Church with the required notice of its proceeding and determination, and that it was not required to issue a written determination when it granted the license to the Hotel. It also maintains that the Church failed to challenge its determination to grant the license in a timely manner, and may not extend the statute of limitations by challenging its June 2011 decision on the Hotel's license alteration. (Affirmation of Donald T. Martin, Esq., dated Oct. 27, 2011).

The Hotel also argues that the Church's challenge is time-barred, that the Church lacks standing to challenge the approval of the license, and that the SLA's decision to grant the license was rationally based and neither arbitrary nor capricious. (Affirmation of Terrence R. Flynn Jr., Esq., dated Nov. 9, 2011).

In reply, the Church maintains that it has standing because the SLA's grant of the license harmed it by creating an atmosphere detrimental to religious worship, which harm falls within the zone of interest set forth in section 64 of the Alcoholic Beverage Control Law, and otherwise reiterates its prior arguments. (Reply Memo. of Law, dated Nov. 8, 2011).

III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st

Dept 1996]). Moreover, the determination of an administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.”

(*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

The SLA’s interpretation of a statute is entitled to deference unless the interpretation is irrational or unreasonable. (*Matter of Rose Group Park Ave. LLC v New York State Liq. Auth.*, 2012 WL 162636, 2012 NY Slip Op 00310 [1st Dept.], *citing Matter of Fineway Supermarkets v State Liq. Auth.*, 48 NY2d 464 [1979]).

Here, the evidence before the SLA reflects that the Church had contracted with two theater groups to use space in its premises in exchange for annual rental fees, that the groups, although not-for-profit, charged admission for their shows, and that the shows were apparently not related to the Church or its mission. Consequently, the SLA’s determination that the groups’ uses of the premises were not incidental, and that the Church’s premises were not being used exclusively as a church, is neither arbitrary nor capricious, nor irrational. (*See Matter of Le Parc Gourmet, Inc. v New York State Liq. Auth.*, 95 AD2d 855 [2d Dept 1983] [church building not occupied exclusively as church as it was used by commercial theater group and for private teaching program and concerts]; *Matter of Taft v New York State Liq. Auth.*, 84 AD2d 623 [3d Dept 1981] [church rented out premises by written lease to non-profit organization, which engaged in non-religious activities, was not funded by church, and over which church had no

control, thus indicating independent rather than incidental use]; *compare also Brasero Rest., Inc. v New York State Liq. Auth.*, 176 AD2d 462 [1st Dept 1991] [premises not exclusively used as church where it was rented out for baseball card and jewelry shows, oriental rug sales, and as embassy], *with Matter of Favez Rest., Inc. v State Liq. Auth.*, 66 NY2d 978 [1985] [church premises occupied exclusively as church where premises used as residence for pastor's family and pastor also conducted church-related work there]; *Matter of AJ & J Rest. Corp. v New York State Liq. Auth.*, 205 AD2d 530 [2d Dept 1994], *lv denied* 84 NY2d 805 [church premises used as guest quarters for visiting church members]).

While the SLA reversed itself in granting the license, it is undisputed that its earlier denial was based solely on the Church's 2007 letter in which it stated that its premises were being used exclusively as a church, and that its later decision was based on a full investigation and review of documents submitted to it by the Church and the Hotel. Therefore, the SLA's reversal, in itself, does not establish that its grant of the license was arbitrary, capricious, or irrational.

In any event, the Church has failed to challenge the SLA's grant of the main license in a timely manner, as that decision was rendered in February 2011, more than four months before the Church commenced this proceeding. (CPLR 217[1]; *Camperlengo v State Liq. Auth.*, 16 AD2d 342 [1st Dept 1962] [SLA's reconsideration of denial of application constituted final determination that was reviewable within four months thereafter]). And the Church has not established that the SLA's grant of permission to alter the license constitutes a new and independent determination warranting reconsideration of the main license application.

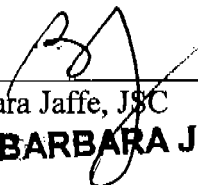
The Church has also failed to establish that the SLA was required to provide it with actual or written notice of its determination to grant the Hotel's application, as section 54 of the Alcoholic Beverage Control Law requires only that if the SLA grants a liquor license, it shall forward it to the applicant, whereas if it disapproves the license, it must provide the reasons therefor and notify the applicant.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 21, 2012
New York, New York

MAR 21 2012

MAR 21 2012

UNFILED JUDGMENT

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