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IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND
FOR ALACHUA COUNTY, FLORIDA

CASE NO 01-09-CA-1691

GROG HOUSE, INC., d/b/a GROG
HOUSE; C.S. FOODS, INC., d/b/a
THE COPPER MONKEY; GATOR
UGLY, INC., d/b/a GATOR CITY; and
ROB ZELLER

Plaintiffs,

v.

CITY OF GAINESVILLE, FLORIDA

Defendant.

A True Copy
SADIE DARNELL, SHERIFF
ALACHUA COUNTY, FLORIDA
Served at 1009 on the 20 Day
of April
BY [Signature]
AS DEPUTY SHERIFF

SUMMONS

THE STATE OF FLORIDA:
To Each Sheriff of the State:

YOU ARE HEREBY COMMANDED to serve this summons and a copy of the Complaint for Declaratory Judgment and Injunctive Relief, Plaintiffs' First Request to Produce to Defendant, Plaintiffs' First Set of Interrogatories to Defendant, Notice of Service of Plaintiff's First Set of Interrogatories to Defendant, and Request for Admissions in this action on defendant:

**City of Gainesville, Florida
c/o Mayor Pegen Hanrahan
City Hall
200 E. University Avenue
Gainesville, FL 32601-0490**

Each defendant is hereby required to serve written defenses to the Complaint on plaintiffs' attorneys, whose address is:

Thomas A. Cloud, Esquire
Tracy A. Marshall, Esquire
Rachael M. Crews, Esquire
GrayRobinson, P.A
Post Office Box 3068
Orlando, Florida 32802

30 ~~days~~
within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court at the following address:

J.K. "Buddy" Irby
Clerk Circuit Court
Alachua County Courthouse
P.O. Box 600
Gainesville, FL 32602

either before service on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on 4/1, 2009.

J.K. "BUDDY" IRBY

Clerk of the Circuit Court

(COURT SEAL)



By: Brenda Green
As Deputy Clerk

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Persons with a disability who need any accommodation in order to participate should call Jan Phillips, ADA Coordinator, Alachua County Courthouse, 201 E. University Ave., Gainesville, FL 32601 at (352) 337-6237 within two (2) working days of your receipt of this notice; if you are hearing impaired call (800) 855-8771; if you are voice impaired, call (800) 855-8770.

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EIGHTH JUDICIAL CIRCUIT IN AND
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CASE NO. *01-09-CA-1691*

GROG HOUSE, INC., d/b/a GROG
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UGLY, INC., d/b/a GATOR CITY; and
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CITY OF GAINESVILLE, FLORIDA

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J.K. "BUDDY" IRBY
CLERK OF COURTS
ALACHUA COUNTY, FL.

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**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

Plaintiffs, GROG HOUSE, INC., d/b/a GROG HOUSE; C.S. FOODS, INC., d/b/a
THE COPPER MONKEY; GATOR UGLY, INC., d/b/a GATOR CITY; and ROB ZELLER
(collectively referred to as "Plaintiffs"), by and through their undersigned counsel, sue
Defendant, CITY OF GAINESVILLE (hereinafter "GAINESVILLE"), and allege as
follows:

1. This is an action for a declaratory judgment pursuant to Chapter 86,
Florida Statutes, and for injunctive relief.
2. The amount in controversy exceeds \$15,000.00, exclusive of interest,
costs and attorneys' fees.
3. Venue for this action is Alachua County, Florida because it is the domicile
of the Defendant, GAINESVILLE, and the GAINESVILLE ordinance which is the subject

of this action, Ordinance No 0-07-121, purports to regulate and restrict the customers of certain licensees located in Gainesville, Florida, already regulated by the Beverage Law, Chapters 561-568, Fla. Stat.

4. Plaintiff, GROG HOUSE, INC., d/b/a GROG HOUSE, ("GROG HOUSE"), is a Florida corporation organized under the laws of the State of Florida, holds a 4COP Retail Beverage License issued by the Florida Division of Alcoholic Beverages and Tobacco, is a "licensee" as defined by Section 561.01(14), Fla. Stat., owns and operates the GROG HOUSE, an alcoholic beverage establishment and consumption on licensed premise located in Gainesville, Florida.

5. Plaintiff, C.S. FOODS, INC., d/b/a THE COPPER MONKEY ("C.S. FOODS"), is a Florida corporation organized under the laws of the State of Florida, holds a 4COP Retail Beverage License issued by the Florida Division of Alcoholic Beverages and Tobacco, is a "licensee" as defined by Section 561.01(14), Fla. Stat., owns and operates the COPPER MONKEY, an alcoholic beverage establishment and consumption on licensed premise located in Gainesville, Florida.

6. Plaintiff, GATOR UGLY, INC., d/b/a GATOR CITY ("GATOR UGLY"), is a Florida corporation organized under the laws of the State of Florida, holds a 4COP Retail Beverage License issued by the Florida Division of Alcoholic Beverages and Tobacco, is a "licensee" as defined by Section 561.01(14), Fla. Stat., owns and operates the GATOR UGLY, an alcoholic beverage establishment and consumption on licensed premise located in Gainesville, Florida.

7. Plaintiff, ROB ZELLER ("ZELLER"), is an individual who resides in the City of Gainesville, Alachua County, Florida. ZELLER is the owner, proprietor, and sole

stockholder of GROG HOUSE and C.S. FOODS. ZELLER is fifty percent (50%) owner, proprietor and stockholder of GATOR UGLY.

8. Defendant, GAINESVILLE, is a municipal corporation created under the laws of the State of Florida and organized for the purpose of governing the City of Gainesville, Florida.

9. Plaintiffs, GROG HOUSE, C.S. FOODS, GATOR UGLY and ZELLER, all have standing to bring this action because they will be subject to and affected by GAINESVILLE'S Ordinance No. 0-07-121 (hereinafter "the Ordinance"). All but ZELLER are included in the definition of "Alcoholic Beverage Establishments" as more fully set forth in Paragraph 12 below. ZELLER is the controlling stockholder of the corporations that own and operate the three Alcoholic Beverage Establishments listed above.

CITY OF GAINESVILLE'S ORDINANCE

10. The Ordinance was adopted by GAINESVILLE, through a vote of its City Commission, on February 5, 2009 and takes effect on April 1, 2009. A true and correct copy of the Ordinance is attached hereto as Exhibit "A" and is incorporated herein by reference.

11. The Ordinance creates a new Article III of Chapter 4 of the Gainesville Code of Ordinances entitled the "Underage Prohibition in Alcoholic Beverages Establishments Act." The "Underage Prohibition" Ordinance:

- (1) Regulates the admission of persons under 21 into Alcoholic Beverage Establishments which permit consumption of alcoholic beverages on premises.
- (2) Provides that Alcoholic Beverage Establishments which are the site of specified numbers of Underage Drinking Incidents based on aggregate occupancy load shall, through issuance of an Underage

Prohibition Order by the City Manager or his designee, be restricted from admitting persons under 21 into the establishment after 9:00 pm for specified periods of time ranging from 90 days to 365 days.

- (3) Provides that to be subject to an Underage Prohibition Order, for any quarter period in any alcoholic beverage establishment with a maximum occupancy load of less than 201, the number of incidents must exceed 5; in any alcoholic beverage establishment with a maximum occupancy load of more than 201, the number of incidents must exceed 10.
- (4) Provides exceptions to accommodate employees, service personnel, persons accompanied by parents or legal guardians and special events where alcoholic beverages are not sold, served and not otherwise available to the public.
- (5) Gives the Alcoholic Beverage Establishments a right to request an administrative appeal before a hearing officer prior to the Underage Prohibition Order becoming effective
- (6) Provides for judicial review if the Alcoholic Beverage Establishment does not accept the administrative finding.
- (7) Provides that Alcoholic Beverage Establishments subject to an Underage Prohibition Order must post signage at all public entrances advising of the restriction for the duration of the prohibition.
- (8) Provides that Alcoholic Beverage Establishments which violate the Underage Prohibition Order are subject to Civil Citation which carries a \$500.00 penalty. Continued failure to comply with the Underage Prohibition Order may subject the Alcoholic Beverage Establishment owner/manager or other employees to arrest.

12. The term "Alcoholic Beverage Establishment" includes any establishment that possesses any alcoholic beverage license from the Division of Alcoholic Beverages and Tobacco Bureau of Licensing (hereafter "Division") which permits consumption of alcohol on the premises.

13. GAINESVILLE'S findings, as set forth in the Ordinance, indicate that the purpose of the Ordinance is to regulate retail sales in order to prevent underage drinking. The specific findings are:

(a) Findings and Intent.

- (1) It is the intent of this section to protect and preserve the health, safety, and welfare of the citizens of Gainesville by strengthening enforcement methodologies to enforce the prohibition against consumption of alcoholic beverages by underage patrons.
- (2) Admission of persons under the age of 21 to an alcoholic beverage establishment that has, by its actions, demonstrated an inability to reasonably prevent underage consumption on its premises presents a serious threat to the public health, safety, or welfare of the youth of our community and the citizenry at large.
- (3) An enforcement officer shall not be required to provide a reasonable time period to correct a violation of this section prior to issuing a citation to a person that the officer has reasonable cause to believe has violated this section.

HISTORY OF ALCOHOLIC BEVERAGE LAWS IN FLORIDA

14. The regulation of the sale of alcoholic beverages in the State of Florida is governed by the Federal and State Constitutions, state statutes and some local ordinances.

15. Effective April, 1934, the Twenty-First Amendment of the U.S. Constitution repealed Prohibition and restricted federal congressional power to authorize and regulate the transportation and importation of alcoholic beverages across state lines. The Twenty-First Amendment returned to the states the sole power to regulate and restrict the sale and distribution of alcoholic beverages within their individual borders.

16. Prohibition ended in Florida by separate general election on November 6, 1934, the results of which repealed Florida Constitution's statewide prohibition and

replaced it with the 1885 Constitution's "Local Option" provision permitting each county to decide whether or not alcoholic beverages could be sold in that county. This Local Option provision is continued in the 1968 Florida Constitution as Article VIII, Section 5.

17. Article VIII, Section 2(b), Fla. Const., gives cities the power of self-government not inconsistent with general or special law and authorizes city ordinances not inconsistent with general law. Chapter 166, Fla. Stat., provides the statutory authority of cities and authorizes the establishment and enforcement of regulations for the sale of alcoholic beverages pursuant to general law. This "home rule power," however, cannot be inconsistent with general or special law. See Section 166.021, Fla. Stat.; Art. VIII, Section 2(b), Fla. Const.

18. Since 1935, the state has regulated the manufacture, transportation, distribution, sale and possession of alcoholic beverages via the Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation ("Division" f/k/a the "State Beverage Department"). This regulation is contained in "The Beverage Law," Chapters 561-568, Fla. Stat. See Section 561.01(6), Fla. Stat. The Beverage Law consists of Chapter 561 relating to administration, Chapter 562 relating to enforcement, Chapters 563-565 relating to beer, wine, and liquor, and Chapters 567 and 568, relating to "wet" and "dry" county referenda.

19. The division of powers between the state on the one hand, and cities and counties on the other, is defined in The Beverage Law. The legislature has reserved the primary responsibility for regulating alcoholic beverages and the activities of licensees to the state. See Section 561.02, Fla. Stat. Cities and counties may regulate hours of sale of alcoholic beverages (Section 562.14 and Section 562.45(2)(a), Fla.

Stat.), location of licensed business and the sanitary regulations for such businesses (Section 562.45(2)(a), Fla. Stat.), and the type of entertainment and conduct permitted in licensed establishments (Section 562.45(2)(b), Fla. Stat.). Therefore, cities and counties may exercise their "police powers" for the public health, safety, and welfare to control local aspects of when and where alcoholic beverages are sold (and sanitary conditions relating thereto) via ordinance.

INVALIDITY OF THE ORDINANCE

20. The Ordinance purports to regulate and/or prohibit certain "licensees," "licensed premises," underage drinking, and defenses available to licensees for civil or administrative underage drinking statute violations in the City of Gainesville and provides for penalties of fines or imprisonment for violation of the Ordinance.

21. GAINESVILLE, on one hand, asserts that the Ordinance is valid and enforceable. Plaintiffs, on the other hand, believe that the Ordinance is invalid and not enforceable for the following reasons:

(a) It is expressly preempted by Section 562.45(2)(c) which prohibits local ordinances that regulate or prohibit activities or business transactions of state regulated licensees; and

(b) It is expressly preempted by Section 562.45(2)(c) which prohibits local ordinances that discriminate against state regulated licensees.

EXPRESS PREEMPTION BASED UPON REGULATING OR PROHIBITING ACTIVITIES OR BUSINESS TRANSACTIONS OF STATE REGULATED LICENSEES

22. The Beverage Law comprises a comprehensive set of alcohol beverage laws regulating the manufacture, distribution, sale, and possession of intoxicating liquors (beer, wine and spirits) throughout the state. The state retains primary

regulatory authority over the activities of licensees under the Beverage Law Section 561.02, while limited areas of regulation are specified as being within the purview of city and county regulation.

23. In 1997, the Florida Legislature adopted Chapter 97-165, Laws of Florida (1997), which "reduces the authority of local governments to enact ordinances relating to the manufacture, distribution, sale or advertising of alcoholic beverages. "Senate Staff Analysis and Economic Impact Statement, April 3, 1997, page 1. The title of Chapter 97-165 states that it is an act "prohibiting counties or incorporated municipalities from adopting certain ordinances with respect to alcoholic beverages."

24. This law was codified as Section 562.45(2)(c), Fla. Stat., and prohibits "any ordinance that regulates or prohibits those activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law."

25. The Ordinance invades a variety of activities or business transactions of state regulated licensees including:

(a) Sale of alcoholic beverages on premises (Section 561.14(3), Fla. Stat., which establishes licensing authority over "Vendors"; Section 562.12, Fla. Stat., making it unlawful for any person to sell alcoholic beverages without a license or in any manner inconsistent with that person's license);

(b) Underage Sales of Alcoholic Beverages (Section 562.11(1)(a), Fla. Stat., prohibiting the selling, giving, serving or permitting to be served alcoholic beverages to persons under the age of 21 or to permit a person under 21 years of age to consume such beverages on the licensed premises; Section

562.11(1)(c), prohibiting the use of a false name, misrepresenting one's age, and other matters; Section 562.111, Fla. Stat., prohibiting possession of alcoholic beverages by those under 21 years of age);

(c) Enforcement of laws against underaged drinking (Section 561.02, Fla. Stat., which authorizes the Division to enforce provisions of the Beverage Law; Section 561.29, Fla. Stat., which authorizes license revocation or suspension for violations of the Beverage Law; and Sections 562.11 and 562.111, Fla. Stat., which provide penalties for violations of state underage drinking laws; and

(d) Defenses for licensees to civil and administrative actions for underage drinking violations (Section 562.11(1)(c) Fla. Stat., which provides a complete defense to civil actions based upon underage person's falsely evidencing their age; Fla. Admin. Code Rule 61A-3.052 which provides the same defense for administrative actions).

26. The Ordinance expressly conflicts with state regulation and invades various subject matters of alcoholic beverage regulation which have been preempted by the state. The Ordinance expressly prevents the use of state statutory defenses to violations of the Ordinance (See Section 4-53(c)4 of Ordinance). The Ordinance is therefore invalid because of express preemption by the state.

**EXPRESS PREEMPTION BASED UPON DISCRIMINATION OR INCONSISTENT
TREATMENT OF STATE REGULATED LICENSEES**

The Statute also contains a class of ordinances that are prohibited which includes ordinances that discriminate against state licensees and that treat state licensees in a manner inconsistent with other lawful businesses. Section 562.45(2)(c),

Fla. Stat. provides in pertinent part that “[e]xcept as otherwise provided in the Beverage Law, a local government, when enacting ordinances designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state.”

27. Virtually every provision of the Ordinance violates this statutory prohibition toward local governments.

28. The Ordinance is inconsistent in its manner of treatment of any other lawful business transacted in Florida, since its regulation of customers that may conduct otherwise lawful transactions with the licensee on licensed premises, prohibition of same, and punishment for underage activities is not applied to any other instrumentality or thing that could be illegally used if provided to “underage” persons. For example, cars, boats, aircraft, prescription drugs, firearms, tobacco, pornography and a host of other products are capable of being distributed by adult purchasers to “underage” individuals; yet, the Ordinance discriminates in its application to only sale of alcoholic beverages for on premises consumption. Such a local ordinance completely fails to meet the statutory standard prohibiting discrimination.

29. The Ordinance is invalid as expressly contrary to Section 562.45(2)(c), Fla. Stat., which prohibits discriminatory regulations. These regulations discriminate against licensees because the prohibitions do not apply to other vendor establishments that sell alcoholic beverages, including convenience stores, grocery stores, drug stores, or “package” stores. Such a local ordinance fails to meet the statutory standard prohibiting discrimination and inconsistent treatment.

COUNT I
DECLARATORY JUDGMENT

30. The allegations of Paragraphs 1 through 29 are realleged and incorporated herein by reference.

31. There is bona fide, actual, present and practical need for a declaration as to Plaintiffs' rights, responsibilities and obligations, or lack thereof, and Defendant's rights, responsibilities and obligations, or lack thereof regarding the Ordinance. The declaration deals with a present, ascertained or ascertainable state of facts and a present controversy as to the validity and enforceability of the Ordinance. Plaintiffs have an actual, present, adverse and antagonistic interest in the subject matter, in fact and law. The antagonistic and adverse interests are all before the court by proper process. The relief sought by Plaintiff is not merely the giving of legal advice by the court or the answer to questions propounded by curiosity.

32. All conditions precedent to the initiation and maintenance of this action have been performed, have occurred, are excused or have been waived.

WHEREFORE, Plaintiffs pray that this Honorable Court enter a declaratory judgment confirming:

- (a) That the Ordinance is invalid and not enforceable;
- (b) That the Ordinance is void and outside the subject matter which GAINESVILLE has the authority to regulate; and
- (c) Awarding such supplementary relief as the Court deems just and necessary.

COUNT II
PROSPECTIVE INJUNCTIVE RELIEF AS TO ORDINANCE

33. The allegations of Paragraphs 1 through 29 are realleged and incorporated herein by reference.

34. Pursuant to Section 26.012(3), Fla. Stat., this Court has jurisdiction to hear this request for prospective injunctive relief.


35. Plaintiffs will be irreparably harmed by GAINESVILLE's enforcement of the Ordinance in that the Ordinance provides for fines and imprisonment for activities and transactions which are expressly and implicitly permitted by Florida laws and constitution. Moreover, vendors (including the Plaintiffs), will be subjected to enforcement actions and subjected to liability without any defense based upon statute and basic notions of due process and other statutory and constitutional protections, all under threat of criminal prosecution and fines.

36. No adequate remedy at law exists by which Plaintiffs may receive complete, timely and adequate relief.

37. For the reasons set forth in this Complaint, there is a substantial likelihood Plaintiffs will succeed on the merits and prevail in this action for injunctive and declaratory relief against GAINESVILLE.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enjoin GAINESVILLE from enforcing the Ordinance and to grant whatever further relief this Court deems just and equitable.

Dated this 20th day of March, 2009.


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