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070941

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January 15, 2009

**MEMORANDUM IN OPPOSITION TO
CITY OF GAINESVILLE PROPOSED ORDINANCE # 070941
"Underage Prohibition in Alcoholic Beverage Establishments"**

I. FIRST PROBLEM WITH ORDINANCE -NO DEFENSES ALLOWED, EVEN IF OWNER NOT RESPONSIBLE. A VIOLATION OF FUNDAMENTAL FAIRNESS.

A. A BUSINESS LICENSE IS A PROPERTY RIGHT WHICH REQUIRES SOME CULPABILITY TO ADVERSELY AFFECT.

ORDINANCE (14)(b) 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.

While the Intent of the ordinance presumes some responsibility on the part of an owner, the punishment is automatic when alleged underage drinkers are merely cited by law enforcement, a violation of fundamental Due Process because there is no meaningful notice to the owner or legal review. Florida courts have consistently ruled that a business license is a property right protected by the Florida Constitution, which cannot be adversely affected except by a procedure which provides Due Process, both fundamental and procedural. Under this proposed ordinance, the owner is guilty even if he has no responsibility by the express terms of the ordinance, a violation of Fundamental Due Process, and no procedural Due Process right to challenge "incidents" as they occur, or to defend against liability after they occur.

Mr. Zeller has 125 employees contributing to the economy, and a long standing policy of strict enforcement of the prohibition of underage drinking.

B. STATE DEFENSES TO CIVIL LIABILITY PRECLUDED. EVEN WHEN THE PATRON HAS COMMITTED A CRIME, THE INNOCENT OWNER IS PUNISHED.

ORDINANCE (3) Upon the timely filing of request for a hearing, **The lack of actual knowledge of, acquiescence to, participation in, or responsibility for any Underage Drinking Incident for this hearing on the part of the owner or agent shall not be a defense by such owner or agent.** (5) If the hearing officer finds, by a preponderance of the evidence, that (a) the requisite number of Underage Drinking Incidents have occurred within a quarter to subject the alcoholic beverage establishment to issuance of the Underage Prohibition Order; (b) the city complied with the procedural requirements of Sec. 4-53(d)(1); and (c) none of the exceptions of Sec. 4-54 are applicable, then the hearing officer shall prepare a recommended order that upholds the issuance of the Underage Prohibition Order.

This provision is fundamentally unfair and is pre-empted by state law. The legislature and the State Division of Alcoholic Beverages and Tobacco have both incorporated fundamental fairness as defenses.

Florida Administrative Code 61A-3.052 Identification to Verify Age.

(1) A licensee who has been cited in an administrative action for violations of Sections 562.11(1)(a) and 859.06, Florida Statutes, **shall have a defense to any administrative action if the underage person falsely evidenced that he was of legal age to purchase the alcoholic beverage, cigarettes, or tobacco products or consume the alcoholic beverage product and the appearance of the person was such that an ordinarily prudent person would believe the person is of legal age to purchase or consume those products, and if the licensee attempted to verify the person's age by checking one of the following forms of identification with respect to the person:**

- (a) A driver's license, issued by any government agency, domestic or foreign, provided it includes a photograph;
- (b) Identification cards issued by any state, provided it includes a photograph;
- (c) Passports;
- (d) An identification card issued by any branch of the United States military which shows the customer is currently serving in the United States Armed Services or is a family member of a person currently serving in the United States Armed Services.

Florida Statute 562. 11. Selling, giving, or serving alcoholic beverages to person under age 21; providing a proper name; misrepresenting or misstating age or age of another to induce licensee to serve alcoholic beverages to person under 21; penalties

(c) A licensee who violates paragraph (a) shall have a complete defense to any civil action therefor, except for any administrative action by the division under the Beverage Law, if, at the time the alcoholic beverage was sold, given, served, or permitted to be served, the person falsely evidenced that he or she was of legal age to purchase or consume the alcoholic beverage and the appearance of the person was such that an ordinarily prudent person would believe him or her to be of legal age to purchase or consume the alcoholic beverage and if the licensee carefully checked one of the following forms of identification with respect to the person: a driver's license, an identification card issued under the provisions of s. 322.051 or, if the person is physically handicapped as defined in s. 553.45(1), [FNI] a comparable identification card issued by another state which indicates the person's age, a passport, or a United States Uniformed Services identification card, and acted in good faith and in reliance upon the representation and appearance of the person in the belief that he or she was of legal age to purchase or consume the alcoholic beverage. Nothing herein shall negate any cause of action which arose prior to June 2, 1978.

(2) It is unlawful for any person to misrepresent or misstate his or her age or the age of any other person for the purpose of inducing any licensee or his or her agents or employees to sell, give, serve, or deliver any alcoholic beverages to a person under 21 years of age, or for any person under 21 years of age to purchase or attempt to purchase alcoholic beverages.

(a) Anyone convicted of violating the provisions of this subsection is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) Any person under the age of 17 years who violates such provisions shall be within the jurisdiction of the judge of the circuit court and shall be dealt with as a juvenile delinquent according to law.

C. REVOCATION OF CITY BUSINESS LICENSE PREEMPTED BY STATE LAW.

See-

"A city may not enact an ordinance revoking the occupational license of an establishment that is found to be selling alcoholic beverages to underage persons." Op. Atty. Gen., 2001-44, June 28, 2001. [copy attached].

II. SECOND PROBLEM WITH ORDINANCE- NO SHOWING OF ACTUAL UNDERAGE DRINKING FOR ANY PARTICULAR "INCIDENT", OR OPPORTUNITY TO DEFEND.

ORDINANCE Sec. 4-51. Definitions.

"Underage Drinking Incident" means any physical arrest or notice to appear (NTA) issued for possession or consumption of an alcoholic beverage by a person under the age of 21 which results in an adjudication of guilt, finding of guilt with adjudication withheld, waiver of right to contest the violation, plea of no contest including, but not limited to, payment of fine or civil penalty, or entering into an agreement for deferred prosecution."

Sec. 4-52.(b) The final result of any Underage Drinking Incident which may subject an alcoholic beverage establishment to an Underage Prohibition Order, need not occur within the quarter of the Underage Drinking Incident.

A. A CHARGE OF UNDERAGE DRINKING IS JUST THAT, A CHARGE. IT IS NOT EVIDENCE THAT UNDERAGE DRINKING ACTUALLY OCCURRED.

Florida courts have always held that criminal charges are not evidence of guilt. This ordinance turns the constitutional presumption of innocence upside down; the owner is presumed guilty even if the alleged underage drinker is never convicted! As any attorney will tell you, the swift resolution of a minor charge is often done for convenience, not guilt. This is especially true for out of town people who would otherwise suffer the inconvenience of returning for court.

B. NO NOTICE TO OWNER IN ORDER TO INVESTIGATE AND DEFEND AGAINST ANY INCIDENT AS THEY OCCUR.

There is no provision in the ordinance for notice to the owner until the requisite number of "incidents" have occurred and the order is being issued. This precludes the owner from investigating and defending against each incident. The simplest example is the defense that the "incident" did not occur in the beverage establishment. Or that the person is, in fact, 21. Or that the underage drinker obtained alcohol from another location.

III. THIRD PROBLEM WITH ORDINANCE- DISCRIMINATION AGAINST LARGER ESTABLISHMENTS.

ORDINANCE Sec. 4-51. Definitions.

"Underage Prohibition Order"

(a) An alcoholic beverage establishment shall be issued an Underage Prohibition Order if the following number of Underage Drinking Incidents have occurred **at such alcoholic beverage establishment** during any quarter as the term is defined herein:

- (1) Aggregate **occupancy load less than 201: five or more.**
- (2) Aggregate **occupancy load of 201 or greater: ten or more.**

Establishments' occupancy loads range from at least 44 to more than 1,000. Since the number of "incidents" are driven solely by enforcement actions, the larger establishments will generate more

"incidents". The ordinance should have a sliding scale based on occupancy, such as 5 per each 200 occupancy. Some examples: Balls = 44, Salty dog = 125, Grog House = 234, Gator City = 791, Copper Monkey = 88, Swamp = 269, The Venue (Old Southern Music Hall) = 723, 238 West = 1199, Whiskey Room = 467.

IV. FOURTH PROBLEM WITH ORDINANCE- VAGUE AS TO LOCATION OF "INCIDENT".

ORDINANCE (a) An alcoholic beverage establishment shall be issued an Underage Prohibition Order if the following number of Underage Drinking Incidents have occurred **at such alcoholic beverage establishment** during any quarter as the term is defined herein:

"At such alcoholic beverage establishment" is vague. At a minimum, the "incident" must have occurred within the licensed establishment, since that is the only location under the control of the owner.

V. FIFTH PROBLEM WITH ORDINANCE- PENALTIES DRACONIAN, WITH NO ABILITY TO CORRECT PROBLEM.

(a) **First order: 90 days.** If a **second Underage Prohibition Order is issued within 3 years** of the first issued and effective Underage Prohibition Order, then the second order shall have the following duration: (b) **Second order: 180 days.** If a third Underage Prohibition Order is issued within 3 years of the first issued and effective Underage Prohibition Order, then the third order shall have the following duration: (c) **Third and subsequent orders: 365 days.**

(12) Any Underage Drinking Incident which occurs while an alcoholic beverage establishment is subject to an Underage Prohibition Order shall count toward another violation. Any prohibition against admittance of patrons under 21 which results from an Underage Prohibition Order issued while an Underage Prohibition Order is already in effect against the owner, agent or establishment shall run consecutively.

The penalties will have significant financial impact on business owners. The ordinance is unclear whether the Prohibition Order goes with the establishment or the owner. If the owner is forced to sell the establishment for hardship reasons, will the penalty continue for the new owner? If the owner implements corrective practices, is there any relief?

VI. SIXTH PROBLEM WITH ORDINANCE- "OWNER" VS "ESTABLISHMENT"
VS "PREMISES", WHO GETS PUNISHED?

ORDINANCE (b) The final result of any Underage Drinking Incident which may **subject an alcoholic beverage establishment** to an Underage Prohibition Order...

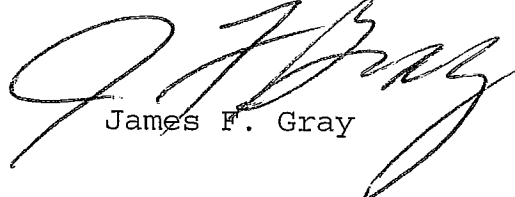
(14) Any Underage Prohibition Order, once effective, shall be **valid against the owner** or agent of the alcoholic beverage establishment **and any alcoholic beverage establishment operating at the same premises.**

The ordinance is unclear as to the effect of the Order of Prohibition as punishment is for the owner or only the specific beverage establishment. Is this to be determined by the Division's licensing of the establishment? By the City's occupation license? By the leased or owned "premises"?

VII. SEVENTH PROBLEM IN GENERAL- OFF DUTY GPD NOT ALLOWED TO
CHECK IDENTIFICATION.

One rather simple solution that would curb under age drinking would be for off duty GPD officers to be free to be hired by owners to check identification at the doors of these establishments. This is prohibited by GPD policy, which should be changed.

Respectfully Submitted,



James F. Gray

Number: AGO 2001-44
Date: June 28, 2001
Subject: Alcoholic beverages, revocation of occupational license

Mr. Alan C. Jensen
Atlantic Beach City Attorney
Post Office Box 50457
Jacksonville Beach, Florida 32240-0457

RE: ALCOHOLIC BEVERAGES--MUNICIPALITIES--regulation of alcoholic beverages preempted to state; municipality may not revoke occupational license for licensee's selling alcoholic beverages to underage persons. ss. 205.043, 205.053, 205.0532, 561.705-706, 562.11 and 562.45, Fla. Stat.

Dear Mr. Jensen:

You ask substantially the following question:

May the City of Atlantic Beach enact an ordinance providing for the revocation of the occupational license for an establishment found to be selling alcoholic beverages to underage persons?

In sum:

The City of Atlantic Beach may not enact an ordinance providing for the revocation of the occupational license for an establishment found to be selling alcoholic beverages to underage persons without conflicting with the state's regulation of the sale of alcoholic beverages.

Section 205.042, Florida Statutes, authorizes municipalities to levy, by resolution or ordinance, an occupational license tax for the privilege of engaging in a business, profession, or occupation within its jurisdiction. Specific conditions upon this authority are set forth in section 205.043, Florida Statutes, including that licenses be based upon a reasonable classification, be uniform throughout the class and that they be valid for no more than one year, expiring on September 30 of each year.

Any person who engages in a business subject to a license tax without first obtaining a local occupational license is subject to a 25 percent penalty, in addition to any other penalties provided by law or ordinance.[1] If the tax remains unpaid for 150 days after the initial notice of tax due, the person is subject to civil actions and penalties, as well as costs and fees and a penalty of up to \$250.[2]

Section 205.0532, Florida Statutes, specifies that a local government issuing an occupational license "may revoke or refuse to renew such license if the individual, business, or entity, or

parent company of such individual, business, or entity, is doing business with Cuba." Besides the civil actions and penalties that are contemplated under Chapter 205, Florida Statutes, for failure to pay the occupational license tax, the authority to revoke or refuse to renew an occupational license for engaging in business with Cuba appears to be the only legislatively recognized sanction for specific behavior by the holder of an occupational license.

It is the Legislature that possesses the inherent authority to impose taxes upon professions and businesses, such that units of local government must derive their taxing power from the state.[3] This office has previously concluded that Chapter 205, Florida Statutes, preempts the regulation of local occupational license taxes and precludes a local government from enacting an ordinance otherwise affecting the issuance or sale of such licenses.[4]

Section 562.11(1)(a), Florida Statutes, makes it

"unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises. Anyone convicted of violation of the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."

Section 561.706, Florida Statutes, however, states that "[t]he license of a vendor qualified as a responsible vendor under this act may not be suspended or revoked for an employee's illegal sale or service of an alcoholic beverage to a person who is not of lawful drinking age"[5]

It is "unlawful for any person to violate any provision of the Beverage Law, and any provision of the Beverage Law for which no penalty has been provided shall be guilty of a misdemeanor of the second degree"[6] The Beverage Law[7] further provides that nothing contained within its terms is to be construed to preclude a county or municipality from enacting ordinances regulating the hours and location of places of business, and prescribing sanitary regulations for licensees.[8] Moreover, counties and municipalities may enact ordinances regulating the type of entertainment and conduct permitted in a licensed establishment.[9]

The statute further provides, however, that counties and municipalities may not enact ordinances regulating or prohibiting activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law.[10]

The state regulations contained in the Beverage Law clearly cover the area of conduct that the city proposes to regulate and, therefore, would preempt the city's efforts to impose the additional penalty of revoking an establishment's occupational license for serving alcoholic beverages to underage persons.[11]

Accordingly, it is my opinion that the City of Atlantic Beach may not enact an ordinance providing for the revocation of the occupational license for an establishment found to be selling alcoholic beverages to underage persons.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tls

[1] Section 205.053(2), Fla. Stat.

[2] Section 205.053(3), Fla. Stat.

[3] *Cf.*, *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 317 (Fla. 1976), *pet. for cert. den.*, 444 U.S. 867 (1979); *Belcher Oil Company v. Dade County*, 271 So. 2d 118, 122 (Fla. 1972). *See generally*, 53 C.J.S. *Licenses* s. 9.

[4] *See*, Ops. Att'y Gen. Fla. 90-25 (1990) (county has no authority to establish by ordinance any system for issuing or selling occupational licenses other than as provided in Ch. 205, Fla. Stat.); 84-65 (1984) (Ch. 205, Fla. Stat., sets forth the exclusive procedure for the issuance or sale of occupational licenses and the collection of occupational license taxes; county may not establish any method for selling such licenses or collecting such taxes in conflict therewith); 84-91 (1984) (power conferred and duty imposed on county tax collector by s. 205.053, Fla. Stat., to issue or sell county occupational licenses or to collect the county occupational license tax and to apportion and distribute the revenues may not be transferred by ordinance to the local government code enforcement board).

[5] Section 561.705, Fla. Stat., sets forth the criteria to qualify as a responsible vendor under the "Florida Responsible Vendor Act," Chapter 561, Fla. Stat.

[6] Section 562.45(1), Fla. Stat.

[7] Chapters 561, 562, 563, 564, 565, 567, and 568, Fla. Stat.

[8] Section 562.45(2)(a), Fla. Stat.

[9] Section 562.45(2)(b), Fla. Stat.

[10] Section 562.45(2)(c), Fla. Stat. *Cf.*, *Board of County Commissioners of Lee County v. Dexterhouse*, 348 So. 2d 916 (Fla. 2d DCA 1977), *affirmed*, 364 So. 2d 449 (Fla. 1978), *appeal dismissed*, 441 U.S. 918 (1979) (ordinance prohibiting display of female breasts in establishment

licensed to sell alcoholic beverages for consumption on the premises was directed at discipline and good order of persons while in such establishments did not interfere or conflict with state's regulation of the sale of alcoholic beverages and was not void on theory that the state had preempted the right to regulate the field).

[11] *Cf.*, Op. Att'y Gen. Fla. 83-67 (1983), in which this office concluded that a noncharter county has the police power and home rule power to prohibit by ordinance the consumption of alcoholic beverages, including beer, on a semi-public parking lot, public street or public right-of-way and the carrying, transporting, or possession of unsealed alcoholic beverages, including beer, except in the original package with the seal unbroken, on a semi-public parking lot, public street, or public right-of-way; such an ordinance does not conflict with s. 562.453, Fla. Stat., nor does regulation of such activity appear to be preempted to the state or otherwise restricted by general or special law.