STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOWLING CENTERS ASSOCIATION OF FLORIDA, INC.,	)	
Petitioner,	)	
and	)	
ST. PETERSBURG KENNEL CLUB, INC.,	)	
Intervenor,	)	
vs.	)	Case No. 03-4776RP
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 27, 2004, in Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Harold F. X. Purnell, Esquire
and Rutledge, Ecenia, Purnell & Hoffman, P.A.
Intervenor: Post Office Box 551
Tallahassee, Florida 32302-0551

For Respondent: Michael A. Martinez, Esquire
Department of Business and
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STATEMENT OF THE ISSUE

Whether proposed Rules 61A-7.003, 61A-7.007, 61A-7.008, and 61A-7.009 constitute invalid exercises of delegated legislative authority, pursuant to Section 120.52(8), Florida Statutes,[1/] for the reasons described by Petitioner in its Petition.

PRELIMINARY STATEMENT

Petitioner, Bowling Centers Association of Florida, Inc., filed a Petition challenging proposed Rules 61A-7.003, 61A-7.007, 61A-7.008, and 61A-7.009 with the Division of Administrative Hearings on December 19, 2003, and was assigned to the undersigned on December 30, 2003.

A Notice of Hearing was issued on December 31, 2003, scheduling a formal hearing for January 27, 2004. On January 12, 2004, St. Petersburg Kennel Club, Inc., filed a Motion to Intervene which was granted. The parties filed a Pre-hearing Stipulation on January 24, 2004.

At hearing, Petitioner presented the testimony of Sanford Finkelstein. Petitioner's Exhibit numbered 1 was admitted into evidence. The parties offered the deposition testimony of Deborah Pender and Marie Carpenter which were admitted as Joint Exhibits 1 and 2. Respondent did not introduce any evidence other than the joint exhibits.

A Transcript consisting of one volume was filed on February 10, 2004. The parties requested 15 days from the filing of the Transcript in which to submit proposed final orders. The request was granted and the parties timely filed Proposed

Final Orders which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner and Intervenor are companies whose substantial interests will be affected by the proposed rules and they have standing to bring this rule challenge.

2. The State of Florida, Department of Business and Professional Regulation (the Department), is the state agency responsible for adopting the proposed rules which are the subject matter of this proceeding.

3. The Division of Alcoholic Beverages and Tobacco (the Division) is vested with general regulatory authority over the alcoholic beverage industry within the state.

4. The Division issues both general and special alcoholic beverage licenses. See Chapters 561-565, Fla. Stat.

5. The general licenses which permit consumption on the premises are: 1COP licenses which permit consumption of beer and certain wine and distilled spirit products; 2COP licenses which permit consumption of beer, wine, and certain distilled spirit products; and 4COP licenses which permit the consumption of beer, wine, and all distilled spirits. See §§ 563.02(1)(b)-(f), 564.06(5)(b), and 561.20(1), Fla. Stat.

6. The 4COP licenses are known as quota licenses, are issued based on the population of the county, and are limited in number. § 561.20(1), Fla. Stat. Quota liquor licenses range in value, depending on the county involved, from a low of

approximately $20,000, to a high of approximately $300,000. (stipulation of parties)

7. The SBX or special bowling license is issued by the Division pursuant to Section 561.20(2)(c), Florida Statutes. The owner or lessee of a bowling establishment having 12 or more lanes and necessary equipment to operate them may obtain this special license which permits consumption of beer, wine, and distilled spirits. Alcohol can only be sold for consumption on the licensed premises.

8. Another special alcoholic beverage license listed in proposed Rule 61A-7.003 is the 12RT license. The holder of such a license must be a caterer at a dog track, horse track, or jai alai fronton. In this context, Section 565.02(5), Florida Statutes, reads in pertinent part as follows:

> (5) A caterer at a horse or dog racetrack or jai alai fronton may obtain a license upon the payment of an annual state license tax of $675. Such caterer's license shall permit sales only within the enclosure in which such races or jai alai games are conducted, and such licensee shall be permitted to sell only during the period beginning 10 days before and ending 10 days after racing or jai alai under the authority of the Division of Pari-mutual Wagering of the Department of Business and Professional Regulation is conducted at such racetrack or jai alai fronton. . . .

9. Petitioner participated, to some degree, in the rule development process. The extent of that participation is unclear from the record.

10. The text of the proposed rules as published in their final form in the Florida Administrative Weekly on October 10, 2003, is as follows:

61A-7.003 Premises Not Eligible For Smoking Designation.

Licensed premises shall not be designated as a stand-alone bar if the qualifications for licensure require the premises be devoted predominantly to activities other than the service of alcohol. The following licenses are not eligible for a stand-alone bar designation:

S	=	Special Hotel
SH	=	Special Hotel in counties with population of 50,000 or less
SR	=	Special Restaurant issued on or after January 1, 1958
SRX	=	Special Restaurant
SBX	=	Special Bowling
SAL	=	Special Airport
SCX	=	Special Civic Center
SCC	=	Special County Commission
SPX	=	Pleasure, Excursion, Sightseeing, or Charter boats
X	=	Airplanes, Buses, and Steamships
IX	=	Railroad Cars
XL	=	Passenger Waiting Lounge operated by an airline
PVP	=	Passenger Vessels engaged in foreign commerce
FEX	=	Special Public Fairs/Expositions
HBX	=	Special Horse Breeders
HBX	=	Special County Commission
11AL	=	American Legion Post permitted to sell to general public
11C	=	Social, Tennis, Racquetball, Beach, or Cabana Club
11CE	=	Licensed vendors exempt from payment of surcharge tax
11CS	=	Special Act Club License
11CT	=	John and Mable Ringling Museum
11GC	=	Golf Club
11PA	=	Symphony, Live Performance Theatre, Performing Arts Center
12RT	=	Dog or Horse Track or Jai Alai Fronton
13CT	=	Catering

Specific Authority 386.2125, 561.695(9) FS.
Law Implemented 386.203(11), 561.695 FS.
History--New

61A-7.007 Formula For Compliance With Required Percentage of Gross Food Sales Revenues.

In order to determine compliance, the division shall use the formula of gross food sales revenue, including but not limited to non-alcoholic beverages, divided by gross total sales revenue, in any consecutive six-month period. The results of the formula will represent the percentage of food sales revenues as defined herein and in s. 561.695, Florida Statutes.

Specific Authority 386.2125, 561.695(9) FS. Law Implemented 386.203(11), 561.695(6) FS. History--New

61A-7.008 For Percentage of Gross Alcohol Sales Revenue Formula.

In order to determine compliance, the division shall use the formula of gross alcohol sales revenue divided by gross total sales revenue, in any consecutive six-month period.

Specific Authority 386.2125, 561.695(9) FS. Law Implemented 386.203(11), 561.695(6) FS. History--New

61A-7.009 Method Used to Determine Whether an Establishment is Predominantly Dedicated to the Serving of Alcoholic Beverages.

In order to determine whether an establishment, other than one holding a specialty license designated in Rule 61A-7.003, F.A.C., is predominantly dedicated to the serving of alcoholic beverages, the division shall compare the percentage of gross food sales revenue with the percentage of gross alcohol sales revenue. If the percentage of gross alcohol sales revenue is greater than that of the gross food sales revenue, an establishment is deemed predominantly dedicated to the serving of alcoholic beverages.

> Specific Authority 386.2125, 561.695(9) FS. Law Implemented 386.203(11), 561.695(1)(9) FS. History--New

11. Article X, Section 20, Florida Constitution, was adopted by the electorate in 2002, and generally prohibits smoking in enclosed indoor workplaces. This constitutional provision includes certain exceptions from this general prohibition including the "stand-alone bar" exception. Section 20(d) instructs the Florida Legislature to adopt legislation to implement its provisions and specifies that the Legislature is not precluded from enacting any law constituting or allowing a more restrictive regulation of tobacco smoking than is provided in Section 20.

12. The legislature implemented the constitutional amendment by amending Part II, Chapter 386, Florida Statutes. Section 386.204 prohibits smoking in enclosed indoor workplaces, except as provided in Section 386.2045. Section 386.2045 enumerates exceptions to the general prohibition, including the exception of a stand-alone bar. Section 386.2045(4), Florida Statutes, reads as follows:

> (4) STAND-ALONE BAR- A business that meets the definition of a stand-alone bar as defined in s. 386.203(11) and that otherwise complies with all applicable provisions of the Beverage Law and this part.

13. A stand-alone bar is defined in Section 386.203(11) as follows:

> (11) 'Stand-alone bar' means any licensed premises devoted during any time of operation predominately or totally to serving alcoholic beverages, intoxicating beverages, or

> intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace, including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. A place of business constitutes a stand-alone bar in which the service of food is merely incidental in accordance with this subsection if the licensed premises derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

14. Deborah Pender is the chief of licensing for the Division. According to Ms. Pender, the Division included the SBX or special bowling license in the list of special licenses that cannot qualify for stand alone bar status in proposed Rule 61A-7.003 because its predominant business is a bowling alley. Similarly, the 12RT license was included because its predominant business is a racetrack: "Because that's a specialty license that is issued at race tracks, and if it wasn't a race track business, the caterer . . . couldn't have a license anywhere else."

15. Marie Carpenter is the chief of the Bureau of Auditing of the Division. According to Ms. Carpenter, the provision regarding the six consecutive months in proposed rules 61A-7.007 and 61A-7.008 was intended to give the Division enough of a period of time to get a good picture of whether the business met the criteria for compliance and to give licensees an opportunity

to build up business records that were not previously required to be kept.[2/] The licensee would be required to keep daily records.

16. Ms. Carpenter acknowledged that in using the six month auditing period in the proposed rule, a licensee could exceed the 10 percent requirement on one or more occasions during the audit period.

17. Sandy Finkelstein is President of Petitioner and is the operating partner of Shore Lanes Bowling Center in Merritt Island, Florida. According to Mr. Finkelstein, there is at least one bowling facility in Florida that was issued a 4COP license.

18. A bowling facility with a 4COP license is not automatically excluded from the stand-alone bar designation, whereas a bowling facility with an SBX license is automatically excluded from the stand-alone bar designation by virtue of proposed rule 61A-7.003.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56(1) and (2), Florida Statutes.

20. Petitioner and Intervenor have standing to challenge the proposed rules which is the subject of this dispute.

21. The Division of Alcoholic Beverages and Tobacco is vested with general regulatory authority over the alcoholic beverage industry in Florida. Chapter 561, Fla. Stat.

22. In a challenge to a proposed rule, the party attacking the proposed rule has the burden of going forward. The agency

then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(a) and (c), Fla. Stat.

23. The Petition challenging the proposed rules alleges that the proposed rules constitute an invalid exercise of delegated authority. Petitioner asserts that the proposed rules violate subsections (b), (c), (d), and (e) of Section 120.52(8) in that they exceed the Department's rulemaking authority; enlarge, modify, or contravene the specific provisions of law implemented; vest unbridled discretion in the agency; and are arbitrary and capricious.[3/]

24. Section 120.52(8), Florida Statutes, reads in pertinent part as follows:

> (8) 'Invalid exercise of delegated legislative authority' means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational . . . .

25. "The authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute . . . [T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." (Emphasis in original) Florida Board of Medicine v. Fla. Academy of Cosmetic Surgery, 808 So. 2d 243, 253, quoting Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

26. In this instance, the publication of the proposed rules references the Department's grant of rulemaking authority found in Sections 386.2125, and 561.695(9), Florida Statutes. Section 386.2125, Florida Statutes, reads as follows:

> The [Department of Health] and the Department of Business and Professional Regulation, shall, in consultation with the State Fire Marshall, have the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this part within each agency's specific areas of regulatory authority. Whenever assessing a smoking cessation program for approval, the department shall consider whether the smoking cessation program limits to the extent possible the potential for exposure to second-hand tobacco smoke, if any, to nonparticipants in the enclosed indoor workplace.

27. Section 561.695(9) reads as follows:

> 561.695 Stand-alone bar enforcement; qualification; penalties.--
>
> (9) The division shall adopt rules governing the designation process, criteria for qualification, required recordkeeping, auditing, and all other rules necessary for the effective enforcement and administration of this section and part II of chapter 386. The division is authorized to adopt emergency rules pursuant to s.120.54(4) to implement the provisions of this section.

28. Petitioner argues that proposed Rules 61A-7.007, 7.008, and 7.009 exceed the grant of rulemaking authority in violation of Section 120.52(8)(b), Florida Statutes.

29. Sections 386.2125 and 561.695, as well as Section 386.203(11), Florida Statutes, gave the Department sufficiently specific rulemaking authority regarding the designation process, criteria for qualification, required record keeping, auditing, and all other rules necessary for the effective enforcement of Chapter 561 and Part II of Chapter 386, but that authority was exceeded.

30. Petitioner argues that proposed Rule 61A-7.003 violates Section 120.52(8)(c) and (d) in that it enlarges, modifies, or contravenes the specific provisions of law implemented and vests unbridled discretion in the agency by impermissibly excluding SBX and 12RT licenses from the definition of stand-alone bar. Petitioner argues that the appropriate premise for the rule should be a question of law and not fact, i.e., do the statutory requirements for holding the special license enumerated in the

rule absolutely preclude the licensee from complying with the stand-alone bar exception.

31. Petitioner asserts that there is nothing in the statutory provisions creating the SBX and 12RT special licenses that preclude as a matter of law compliance with the statutory requirements of a stand-alone bar. Petitioner further argues that Section 386.203(11) does not contain any express disqualification for any category of alcoholic beverage license.

32. The undersigned is unpersuaded that the inclusion of SBX or 12RT licenses in a list of types of licenses that are not eligible for stand-alone bar designation in proposed rule 61A-7.003 enlarges, modifies, or contravenes Section 386.203(11), Florida Statutes. While the Department presented extremely limited facts, Ms. Pender's testimony in this regard, as well as the statutory language authorizing the issuance of the specialty licenses at issue herein, is persuasive. That is, the license is issued based upon the nature of the business. The special alcoholic beverage license could not have been issued but for the nature of the underlying business, i.e., a bowling center or a racetrack. Moreover, the inclusion of SBX and 12RT in the list of special licenses does not vest unbridled discretion in the agency. In administering the proposed rule, the agency will have no discretion regarding licensees with the designations enumerated in the rule.

33. Regarding proposed Rules 61A-7.007 and 7.008, Petitioner argues that the provision of a six-month averaging process contravenes the requirement of Section 386.203(11),

Florida Statutes, that the licensed premises be devoted "during any time of operation" to the sale of alcoholic beverages for consumption on the premises with the further limitation that only incidental sales of food of 10 percent or less for consumption on the premises occur.

34. Petitioner further asserts that proposed Rules 61A-7.007, 7.008, and 7.009 contravene Section 386.203(11), by permitting the receipt of gross revenues from sources other than the sale of food and alcoholic beverages for consumption on the premises. Petitioner argues this renders the “predominately or totally devoted” language of Section 386.203(11) to be meaningless.

35. Petitioner’s arguments in this regard are well founded. In proposed Rule 61A-7.007, which would be used to determine the percentage of gross revenues from food sales, and proposed Rule 61A-7.008, which would be used to determine the percentage of total gross revenues from alcoholic beverage sales, the total gross revenues in each rule includes revenues received by the licensee from any source. Proposed Rule 61A-7.009 then compares the resulting percentage of alcoholic beverage sales to the percentage of food sales. This comparison then results in a determination that a licensed premises whose alcoholic beverage sales exceed food sales to be predominately dedicated to the sale of alcoholic beverages.

36. This end result is in direct conflict with the definition of stand-alone bar which the Legislature provided in Section 386.203(11), Florida Statutes. That definition has three

components. The first sentence of Section 386.203(11) states that a stand-alone bar means any licensed premises devoted during any time of operation "predominately or totally" to serving alcoholic beverages. The middle portion of the statutory definition requires that the licensed premises is not located within, and does not share any common entryway or common indoor area with any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenues. The last sentence states that a place of business constitutes a stand-alone bar if the licensed premises derives no more than 10 percent of its gross revenues from the sale of food consumed on the premises.

37. While the Department acknowledges the predominant business aspect of licensees in proposed Rule 61A-7.003, it ignores that same component in proposed Rules 61A-7.007, 7.008, and 7.009. These proposed rules focus on the last sentence of the statutory definition of "stand-alone bar" thereby allowing businesses which are not necessarily predominately or totally serving alcoholic beverages for consumption on the premises to qualify for the stand-alone bar exception. An exemption from a statute enacted to protect the public welfare is strictly construed against the person claiming the exemption. Heburn v. Department of Children and Families, 772 So. 2d 561, 563 (Fla. 1st DCA 2000), rev.den. 790 So. 2d 1104 (Fla. 2001).

38. Finally, Petitioner asserts that all four of the proposed rules are arbitrary and capricious in violation of

Section 120.52(8)(e), Florida Statutes, in that a bowling facility which obtains a quota license is capable of meeting the stand-alone bar designation, whereas a bowling facility with an SBX license cannot. Both parties acknowledge that a bowling center could obtain a general alcoholic beverage license for its facility.

39. Proposed Rules 61A-7.007, 7.008, and 7.009 are arbitrary by failing to take into consideration a licensee's predominate business in fact and, therefore, are not supported by the necessary facts. Proposed Rule 61A-7.003 standing alone is not arbitrary or capricious.

40. Based upon the evidence presented and the statutory authority outlined above, the Department has exceeded its grant of rulemaking authority in that proposed Rules 61A-7.007, 7.008, and 7.009 enlarge, modify, or contravene the specific provisions of law implemented and are arbitrary.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. The Petition challenging proposed Rules is granted as to proposed Rules 61A-7.007, 7.008, and 7.009 and is dismissed as to proposed Rule 61A-7.003.

2. Jurisdiction of the Division of Administrative Hearings is retained for consideration of Petitioner's request for reasonable costs and attorney's fees pursuant to Section 120.595(2), Florida Statutes.

DONE AND ORDERED this 26th day of March, 2004, in Tallahassee, Leon County, Florida.

S

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of March, 2004.

ENDNOTES

[1/] All references to Fla. Stat. will be to Florida Statutes (2003), unless otherwise indicated.

[2/] The parties stipulated that proposed Rule 61A-7.007 will be amended to reflect that sales of food to go and not for consumption on the premises will be included in gross total sales revenue but not in gross food sales revenue. The parties further stipulated that proposed Rule 61A-7.008 will be amended to reflect package sales for consumption off the premises will be included in gross total sales revenue but not in gross alcohol sales. Notwithstanding the parties' stipulations, these future amendments cannot support or invalidate the rules under consideration in this case.

[3/] The Petition also asserts that the proposed rule is not supported by competent substantial evidence. This ground was apparently abandoned in Petitioner’s Proposed Final Order. In any event, this language, which was found in Section 120.52(8)(f), Florida Statutes (2002), was repealed by Section 1, Chapter 2003-94, Laws of Florida, and became effective June 4, 2003. Accordingly, that argument will not be addressed in this Final Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.