STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOWLING CENTERS ASSOCIATION OF FLORIDA, INC.; SHORE LANES, INC.; AND SANFORD FINKLESTEIN,	)	
Petitioners,	)	
vs.	)	Case No. 05-1882RP
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, an administrative hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on August 30, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Harold F. X. Purnell, Esquire
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For Respondent: Renee Alsobrook, Esquire
John Lockwood, Qualified Representative
Department of Business and
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STATEMENT OF THE ISSUES

Whether the proposed Rules 61A-7.006, 61A-7.007, 61A-7.008, and 61A-7.009, constitute a valid exercise of delegated legislative authority, as such term is defined in Subsection 120.52(8), Florida Statutes (2004).

PRELIMINARY STATEMENT

This matter was initiated on May 20, 2005, when Petitioners filed a Petition Challenging the Validity of Proposed Rules Noticed for Adoption ("Petition"). The Petition alleges that Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco's (Division), proposed Rules 61A-7.006, 61A-7.007, 61A-7.008, and 61A-7.009 constitute an invalid exercise of delegated legislative authority as defined in Subsection 120.52(8), Florida Statutes (2004).

A Notice of Hearing was issued on May 25, 2005, scheduling a formal hearing for June 16, 2005. On June 6, 2005, the hearing was placed in abeyance for a period of 30 days. A final Notice of Hearing was issued on July 18, 2005, scheduling a formal hearing for August 30, 2005. On August 18, 2005, John Lockwood was deemed a qualified representative of Respondent. The parties filed a Pre-Hearing Stipulation on August 26, 2005.

At hearing, the parties agreed to the voluntary dismissal of Sarah Lynch as a Petitioner. Respondent went forward with

the evidence and presented the testimony of Marie Carpenter, Debbie Pender, Michael Martinez, and Richard Law, certified public accountant. Petitioners presented the testimony of Brenda Olsen and Sanford Finkelstein as rebuttal witnesses. Petitioner's Exhibits numbered 1 through 8 were admitted into evidence, which consisted of: 1) a copy of the Final Order of Administrative Law Judge (ALJ) Barbara J. Staros in Bowling Centers Association of Florida, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Case No. 03-4776RP (DOAH March 26, 2004); 2) a copy of Article X, Section 20 of the Florida Constitution; 3) a copy of Chapter 386, Part II, Florida Statutes (2005); 4) a copy of Section 561.695, Florida Statutes (2005); 5) a copy of proposed Rules 61A-7.006, 61A-7.007, 61A-7.008, and 61A-7.009; 6) a copy of the Division's Form ABT-6039 and instruction sheet; 7) a copy of the Division's publication entitled "Frequently Asked Questions"; and 8) a copy of Marie Carpenter's deposition taken on January 26, 2004. Respondent's Exhibits numbered 1 through 3 were admitted into evidence, which consist of: 1) a copy of the notice of rule development, notice of rulemaking, and the proposed rules as submitted to the Florida Administrative Weekly; 2) a copy of a Transcript from the rulemaking workshop held on July 29, 2005; 3) a copy of the Transcript of the rule development workshop held on May 13, 2005, with attachments.

The Division filed a Motion to Take Official Recognition and orally supplemented with Sections 561.1105, 561.20, 565.02, and 565.045, Florida Statutes (2005), in addition to Florida Administrative Code Rules 61A-3.0141 and 61A-3.054. Official recognition was taken without objection.

A Transcript consisting of one volume was filed on September 9, 2005. The parties requested until October 10, 2005, in which to submit proposed final orders. The request was granted, and each party timely filed their proposals.

FINDINGS OF FACT

Based on the evidence, the following findings of fact are determined:

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

2. The Division is vested with general regulatory authority over the alcoholic beverage industry within the state.

3. The Division issues both general and special alcoholic beverage licenses. The general licenses which permit consumption of alcoholic beverages on the premises of a business are: 1-COP licenses which permit consumption of beer and certain wine and distilled spirit products; 2-COP licenses which permit consumption of beer, wine, and certain distilled spirit

products; and 4-COP licenses which permit the consumption of beer, wine, and all distilled spirits.

4. Quota licenses are issued based on the population of the county and are limited in number. In addition, a quota license allows consumption on the premises of beer, wine, and distilled spirits.

Standing and/or Identification of the Parties

5. The parties stipulated in the Joint Pre-Hearing Stipulation to the standing of Bowling Centers Association of Florida, Inc. (BCAF), Shore Lanes, Inc., and Sanford Finklestein. The parties agreed at hearing that Sarah Lynch would be voluntarily dismissed as a Petitioner.

6. BCAF is a non-profit Florida corporation with its principle place of business in Orlando, Florida. It is composed of owners of bowling centers throughout the State of Florida. Its purpose is representing the interests of its member bowling centers. This purpose includes matters of rule adoptions that would affect or concern bowling centers.

7. All members of BCAF are bowling centers that may hold either a special bowling license (SBX) or a general alcoholic beverage license.

8. Shore Lanes, Inc., is the owner/operator of a bowling center located in Merritt Island, Florida. Shore Lanes, Inc.,

currently holds an SBX license, but is eligible to hold a general alcoholic beverage license.

9. Sanford Finklestein is the general manager and part-owner of Shore Lanes, Inc., as well as the current president of BCAF. Finklestein is substantially affected because establishments holding general alcoholic beverage licenses are classified as enclosed indoor workplaces.

Florida Clean Indoor Air Act

10. Article X, Section 20 of the Florida Constitution, "the Florida Clear Indoor Act," was adopted by the electorate in May 2002, as "a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke." It contains a far-reaching prohibition against smoking in enclosed indoor workplaces. A very limited exception from this general prohibition was provided for "stand-alone bars," as such term was defined in subsection (c)(8) of the amendment.

> (8) "Stand-alone bar" means any place of business 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 that 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.

The amendment further provided in subsection (d) for legislative implementation of this amendment in a manner which could be more, but not less, restrictive than the provisions of the amendment.

11. On June 23, 2003, the Governor of Florida signed House Bill 63-A into law to implement Article X, Section 20 of the Florida Constitution. It was denominated as Chapter 2003-398, Laws of Florida, and this statute substantially revises Chapter 386, Florida Statutes (2002), which is commonly referred to as the Florida Clean Indoor Air Act.

12. Section 386.2125, Florida Statutes (2003), requires the Department of Health and Respondent, in consultation with the state fire marshal, to adopt rules pursuant to Subsection 120.536(1) and Section 120.54, Florida Statutes (2003), to implement the provisions of Chapter 386, Part II, Florida Statutes (2003), within each agency's specific areas of regulatory authority.

13. The Legislature, in implementing Article X, Section 20 of the Florida Constitution, enacted Section 386.204, Florida Statutes (2003), which prohibits smoking in enclosed indoor workplaces, except as provided in Section 386.2045, Florida Statutes (2003). Section 386.2045, Florida Statutes (2003), provides that smoking may be permitted in a:

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

14. A stand-alone bar is defined in Subsection 386.203(11), Florida Statutes (2003), as follows:

> (11) "Stand-alone bar" means any licensed premises devoted during any time of operation predominantly 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 derive no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

Prior Litigation

15. The Division previously was involved in rule challenge proceedings concerning the stand-alone bar exemption. Bowling Centers Association of Florida, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Case No. 03-4776RP (DOAH March 26, 2004). In that case, ALJ Staros concluded that the Division exceeded its grant

of rulemaking authority in three of the four rules proposed at the prior hearing. ALJ Staros found three of the proposed rules to be arbitrary by failing to take into consideration a licensee's predominate business and, also, by permitting the use of gross revenue from sources other than the sale of food and alcoholic beverages to render the provision "predominately or totally devoted" to serving alcoholic beverages.

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

> 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 as 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(6), FS.
History-New

29 Fla. Admin. W. 4021-4022 (October 10, 2003).

The Proposed Rules

17. The revised proposed Rules 61A-7.006, 61A-7.007, 61A-7.008, and 61A-7.009 were drafted in response to legislation that implemented Article X, Section 20 of the Florida Constitution.

18. The basis for the proposed rules is information derived from telephone calls, committee hearings, legislative staff interaction, town hall meetings, rule workshops, rule hearings, senators, and representatives.

19. The text of the proposed rules as published in their final form in the Florida Administrative Weekly on March 11, 2005, is a follows:

61A-7.006 Records Required to Maintain the Designation

(1) Stand-alone bars holding an "ss" or "ssf" designation shall maintain records to substantiate reports, affidavits and designation qualifications. Records of all purchases of food, all gross retail sales of alcohol for consumption on the licensed premises, all gross retail sales of alcohol for consumption off the licensed premises, all gross retail sales of food sold for consumption on the premises, all gross retail sales of food sold for consumption off the premises, and gross revenue from all other sales shall be separately documented.

(2) Stand-alone bars holding an "ss" or "ssf" designation shall maintain complete and accurate records of all sales and purchases. Records shall include, but are not limited to, purchase invoices, sales tickets, inventory records, receiving records, cash register journal tapes, on premises food sales records, computer records generated from automatic dispensing devices, Department of Revenue Sales Tax Returns, and any other record documenting sales. Sales records shall be sequentially organized by month and year and include a monthly statement summarizing the total sales revenue, food revenue and percentage of food revenue for each month.

Specific Authority 386.2125, 561.695(9), FS.
Law Implemented 386.203(11), 561.695(6), 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 from the sale of food the licensee sells for consumption on premises, including but not limited to non-alcoholic beverages, divided by gross total sales revenue, in any consecutive two month period. The results of the formula will represent the percentage of food sales revenues as defined herein and in Section 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 for Consumption on the Licensed Premises Revenue Formula

In order to determine compliance, the division shall use the formula of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption on premises, divided by gross total sales revenue, in any consecutive two-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 Predominately 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 predominately dedicated to the serving of alcoholic beverages for consumption on the licensed premises, the division shall compare the percentage of gross alcohol revenue from the sale of alcohol the licensee sells for consumption on the premises with the following categories of revenue:

(1) For stand-alone bars holding the "ss" designation:

(a) the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is required to enter,

(b) the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is not required to enter the premises, and

(c) the percentage of gross revenue from any source not included in the alcohol categories above.

If the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption on premises is greater than that of the gross sales revenue from each individual category of gross sales in 61A-7.009(1)(a)-(c), an establishment is deemed predominately dedicated to the serving of alcoholic beverages.

(2) For stand-alone bars holding the "ssf" designation:

(a) the percentage of gross food sales revenue from the sale of food the licensee sells for consumption on premises,

(b) the percentage of gross food sales revenue from the sale of food the licensee sales for consumption off premises,

(c) the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises, and

(d) the percentage of gross revenue from any source not included in the food and alcohol categories above.

If the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption on premises is greater than that of the gross sales revenue from each individual category of gross sales in 61A-7.009(2)(a)-(d), an establishment is deemed predominately dedicated to the serving of alcoholic beverages.

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

31 Fla. Admin. W. 964-965 (March 11, 2005).

Applicable Statutes

20. The provision within the Florida Statutes that outlines the "12-month affidavit" reads as follows:

(5) After the initial designation, to continue to qualify as a stand-alone bar the licensee must provide to the division annually, on or before the licensee's annual renewal date, an affidavit that certifies, with respect to the preceding 12-month period, the following:

(a) No more than 10 percent of the gross revenue of the business is from the sale of food consumed on the licensed premises as defined in s. 386.203(11).

(b) Other than customary bar snacks as defined by rule of the division, the licensed vendor does not provide or serve food to a person on the licensed premises without requiring the person to pay a separately stated charge for food that reasonably approximates the retail value of the food.

> (c) The licensed vendor conspicuously posts signs at each entrance to the establishment stating that smoking is permitted in the establishment.
>
> The division shall establish by rule the format of the affidavit required by this subsection.

§ 561.695(5), Fla. Stat. (2005).

21. The provision within the Florida Statutes that outlines the "36-month certified public accountant evaluation" reads as follows:

> (6) Every third year after the initial designation, on or before the licensee's annual license renewal, the licensed vendor must additionally provide to the division an agreed upon procedures report in a format established by rule of the department from a Florida certified public accountant that attests to the licensee's compliance with the percentage requirement of s. 386.203(11) for the preceding 36-month period. Such report shall be admissible in any proceeding pursuant to s. 120.57. This subsection does not apply to a stand-alone bar if the only food provided by the business, or in any other way present or brought onto the premises for consumption by patrons, is limited to nonperishable snack food items commercially prepackaged off the premises of the stand-alone bar and served without additions or preparation; except that a stand-alone bar may pop popcorn for consumption on its premises, provided that the equipment used to pop the popcorn is not used to prepare any other food for patrons.

§ 561.695(6), Fla. Stat. (2005).

22. The provision within the Florida Statutes that authorizes the Division to promulgate rules regarding the

enforcement and administration of Section 561.695, Florida Statutes (2005), and Chapter 386, Part II, Florida Statutes (2005), reads as follows:

> (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.

§ 561.695(9), Fla. Stat. (2005).

23. The provision within the Florida Statutes that defines an "invalid exercise of delegated legislative authority" 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:
>
> * * *
>
> (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.;
>
> * * *
>
> (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; . . . .

§ 120.52(8), Fla. Stat. (2005).

Objections of Petitioner

24. Petitioners challenge the proposed rules in the present case as constituting an invalid exercise of delegated legislative authority. Petitioners argue that Subsection 386.203(11), Florida Statutes (2005), limits a stand-alone bar to selling only alcoholic beverages and food for consumption on the premises. Petitioners assert that proposed Rule 61A-7.006 constitutes an invalid exercise of delegated legislative authority by authorizing the receipt of gross revenues from and the consideration of records regarding sales by a stand-alone bar received from other than the sale of food or alcoholic beverages for consumption on the premises.

25. Petitioners also assert that proposed Rules 61A-7.007 and 61A-7.008 are invalid exercises of delegated legislative authority for the reason that the two-month period for determining compliance with the stand-alone bar requirement of Subsection 386.203(11), Florida Statutes (2005), is contrary to such statute's directive that compliance must be maintained "at any time"; would permit a stand-alone bar to violate on repeated occasions during the audit period, the "incidentals sales" requirement that no more than 10 percent of gross revenues be

from the sale of food for consumption on the premises; and is contrary to the prior Final Order in DOAH Case No. 03-4776RP, which found that a substantially identical proposed rule, in which the audit period was six months, constituted an invalid exercise of delegated legislative authority.

26. Petitioners further assert that proposed Rule 61A-7.009 is an invalid exercise of delegated legislative authority in that it violates the statutory requirements of Subsection 386.203(11), Florida Statutes (2005), that a stand-alone bar sell only alcoholic beverages and food for consumption on the premises; permits a stand-alone bar to derive approximately 25 percent or less of its gross revenue from the sale of alcoholic beverages for consumption on the premises and be deemed by the Division to be "predominantly devoted" to the sale of alcoholic beverages for consumption on the premises, and is only a non-substantive, cosmetic change from the previous proposed Rule 61A-7.009 held invalid in DOAH Case No. 03-4776RP.

27. Based on the testimony of Brenda Olsen, assistant CEO for the American Lung Association of Florida and director of Governmental Affairs, during the 2003 legislative session in which House Bill 63-A was passed, the Florida House of Representatives and Senate had conflicting views of the legislation at first. The House version contemplated

eliminating the stand-alone bar exemption while the Senate version would allow 25 percent food sales.

28. Tampa Lanes is a bowling alley in the Tampa area that has purchased a quota liquor license in order to operate as a stand-alone bar, and is a 50-lane bowling center that consists of around 175 game machines, which is one of the larger machine set-ups in the bowling industry.

The Division's Position

29. The Division's proposed two-month auditing period is analogous to the method in which the Division currently audits SRX licensed premises.

30. There are statutory restrictions on what may be sold in some establishments licensed to sell alcoholic beverages, but no statutory limits exist specifically for stand-alone bars.

31. Richard Law has been a CPA in Florida since 1977 and has been qualified as an expert in accountancy in state administrative hearings, federal administrative hearings, federal district court, and the circuit court. Law was recognized as an expert. Based on his testimony, the typical audit period is a year. A yearly audit is a true and accurate representation of a business's practice. A daily audit would be susceptible to skewed results. For example, a tour bus may stop alongside a bar resulting in that particular days' food sales being abnormally high. Those particular days' sales would not

be representative of the true nature of the bar's business practices.

32. Michael Martinez, special counsel to the Department of Business and Professional Regulation, was involved with the legislative process in drafting legislation that implemented Article X, Section 20 of the Florida Constitution. In addition to the input received from the Legislature, there was input from public workshops, public hearings, and numerous telephone calls from concerned business owners.

CONCLUSIONS OF LAW

Jurisdiction

33. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.56, Florida Statutes (2005).

34. Petitioners consist of an association, a company, and an individual whose substantial interests will be affected by the proposed rules, and they have standing to bring this rule challenge.

Burden of Proof

35. Initially, Petitioners "shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority." § 120.56(2)(a), Fla. Stat (2005). Then, the Division "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." Id.; see also Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 908 (Fla. 2nd DCA 2001)("Nothing in section 120.56(2) requires the agency to carry the burden of presenting evidence to disprove an objection alleged in a petition challenging a proposed rule. Instead a party challenging a proposed rule has the burden of establishing a factual basis for the objections to the rule, and then the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority."), citing St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1998). The court in Consolidated-Tomoka Land Co., declined to require the agency to go forward with evidence to disprove every objection made in the petition. Consolidated-Tomoka Land Co., 717 So. 2d at 76. Instead, the court adopted a practical approach that requires the party challenging the proposed rule to establish a factual basis for the objections put forth in the petition. Id. at 77.

36. A rule may not be declared invalid on any other ground without impermissibly extending the authority of the Administrative Law Judge. See Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375,

1379 (Fla. 1st DCA 1991)("An administrative agency has only the authority that the legislature has conferred it by statute.") Thus, a proposed rule may not be invalidated simply because the ALJ believes it is not the wisest or best choice. See Bd. of Trustees of Internal Improvement Fund v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995)("The issue before the hearing officer in this [rule challenge] case was not whether the Trustees made the best choice . . . or whether their choice is one that the appellee finds desirable . . . ."); Dravo Basic Materials Co., Inc. v. Department of Transportation, 602 So. 2d 632, 634 (Fla. 2nd DCA 1992)("It is not our task, however, to write the best rule for DOT. That was not the task of the hearing officer.").

Statutory Construction

37. Legislative intent is the polestar that guides a court's statutory construction analysis. Reynolds v. State, 842 So. 2d 46, 49 (Fla. 2002). In determining the Legislature's intent in using a particular word in a statute, the courts may examine other uses of the word in similar contexts. Hankey v. Yarian, 755 So. 2d 93, 96 (Fla. 2000).

38. Statutory phrases are not to be read in isolation, but rather within the context of the entire section. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 915 (Fla. 2001). The legislative use of different terms in different sections is strong evidence that different meanings were intended.

Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515, 518 (Fla. 1st DCA 1984).

39. When the Legislature enacts a statute, it is presumed to know existing statutes and the case law construing them. Williams v. Christian, 335 So. 2d 358, 360 (Fla. 1st DCA 1976).

40. The statutory construction principle in pari materia requires two statutes relating to the same thing or subject to be construed together "so as to harmonize both statutes and give effect to the Legislature's intent." Maggio v. Florida Department of Labor and Employment, 899 So. 2d 1074, 1078 (Fla. 2005.

Agency Interpretation

41. It is widely recognized that "[a]gencies are to be accorded wide discretion in the exercise of their lawful rulemaking-authority, clearly conferred or fairly implied and consistent with the agency's general statutory duties." Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991).

42. The Division is to be "accord[ed] great deference to administrative interpretations of statutes which the . . . agency is required to enforce." Department of Environmental Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985).

43. "[T]he agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable

one; it need only be within the range of possible interpretations." Department of Professional Regulation, Board of Medicine Examiners v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984). See Board of Podiatric Medicine v. Florida Medical Association, 779 So. 2d 658, 660 (Fla. 1st DCA 2001) (upholding agency's definition "[i]n light of the broad discretion and deference which is accorded an agency in the interpretation of a statute which it administers, and because such an interpretation should be upheld when it is within the range of permissible interpretations[.]").

44. The ALJ has the discretion to declare the proposed rule wholly or partly invalid. § 120.56(2)(b), Fla. Stat. (2005).

Statutory Exemptions

45. Statutory exceptions to general statutory provisions are to be strictly construed against one attempting to take advantage of the exception. See Heburn v. Department of Children and Families, 772 So. 2d 561 (Fla. 1st DCA 2000). In Heburn, the appellant had been disqualified from a "position of trust" because of two offenses involving possession of marijuana on school property and armed robbery. Heburn, 772 So. 2d at 562. Appellant sought relief under a statutory provision that would allow an exemption if it was proven by clear and convincing evidence that a disqualification was not required.

Id. The Department of Children and Families issued a final order denying Appellant the exemption. Id. The District Court of Appeal, upholding the denial, found that "[a]n exemption from a statute, enacted to protect the public welfare, is strictly construed against the person claiming the exemption, and the Department was not required to grant Heburn any benefits under the exemption." Id. at 563, citing State v. Nourse, 340 So. 2d 966, 969 (Fla. 3d DCA 1976).

46. In Nourse, 340 So. 2d at 968-969, the appellee sought an exception to a broad prohibition against possession of under-sized crawfish. The appellee attempted to take advantage of an exception that related to the right to bait traps ten days before crawfish season. Id. at 969. The court ruled against the appellee finding that an exception to a general prohibition is strictly construed against an individual seeking to take advantage of the exception. Id.

47. Petitioners have failed to establish how this widely-accepted rule of statutory construction alters the Division's discretion in promulgating rules. Furthermore, Petitioners have cited no legal authority that has applied this rule to a scenario in which neither party is seeking an exemption.

Invalid Exercise of Delegated Legislative Authority

48. The ultimate question in a proposed rule challenge is whether the rule is "an invalid exercise of delegated

legislative authority." § 120.56(1), Fla. Stat. (2005). Subsection 120.52(8), Florida Statutes (2005), defines the term as an "action which goes beyond the powers, functions, and duties delegated by the Legislature."

49. In 1999, the Legislature revised the closing paragraph of Subsection 120.52(8), Florida Statutes, after the decision in Consolidated-Tomoka Land Co., which held that "[a] rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented." Consolidated-Tomoka Land Co., 717 So. 2d at 80. The language of Subsection 120.52(8), Florida Statutes, was amended to read:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute. (Emphasis supplied.)

§ 120.52(8), Fla. Stat. (2005). See Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001); See also Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

50. The test for invalid delegation of legislative authority is whether a rule gives effect to a "specific law to be implemented" and whether the rule implements or interprets "specific powers and duties." Day Cruise, 794 So. 2d at 704.

51. The court in Day Cruise discussed the importance of the 1999 Administrative Procedure Act (the "Act") amendments as follows:

> Under the 1996 and 1999 amendments to the APA, it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the proposed rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

Day Cruise, 794 So. 2d at 700. See generally Save the Manatee Club, Inc., 773 So. 2d at 598-599 (interpreting Subsection 120.52(8), Florida Statutes (1999), as removing an agency of the authority to adopt a rule merely because it is with the agency's class of powers and duties).

Applicability of Res Judicata

52. It is well settled that the doctrine of res judicata may be implied in administrative proceedings. See Thomson v. Department of Environmental Regulation, 511 So. 2d 989 (Fla. 1987); Wager v. City of Green Cove Springs, 261 So. 2d 827 (Fla. 1972); Metropolitan Dade Co. Board of County Commissioners v. Rockmatt Corporation, 231 So. 2d 41 (Fla. 3d DCA 1970).

53. However, the principles upon which res judicata applies do not always fit neatly within the scope of administrative proceedings. Thomson, 511 So. 2d at 991. The doctrine of res judicata is to be applied with "great caution" in proceedings before administrative bodies. Id., citing Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 648 (Fla. 3d DCA 1982).

54. Furthermore, the doctrine is inapplicable where there has been a change in circumstances or facts relating to the subject matter. Metropolitan Dade Co. Board of County Commissioners v. Rockmatt Corp., 231 So. 2d at 44.

55. There is a significant difference between the prior rules and the proposed rules. For example, the prior rules only required the alcohol sales to be greater than the food sales in order to be deemed predominately dedicated to the serving of alcoholic beverages. The difference results in a substantial

change in circumstances that renders the doctrine of res judicata inapplicable to the present proceeding.

Merits

56. Sections 386.2125 and 561.695 and Subsection 386.203(11), Florida Statutes (2005), give the Division sufficient 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, Florida Statutes (2005).

57. Petitioners raised the objection that the Division has arbitrarily interpreted the statutory language of Subsection 386.203(11), Florida Statutes (2005). Specifically, Petitioners allege that the statute only allows for the sale of alcoholic beverages and food in a stand-alone bar. Not only do Petitioners mistake the language of the statute as an express limitation on what a stand-alone bar may sell, but Petitioners failed to support this objection with factual evidence presented at hearing. Petitioners cited no law and presented no testimony to establish that the Legislature intended to limit what could be sold in a stand-alone bar.

58. Proposed Rule 61A-7.006 requires a licensee to maintain records in a separate manner that will allow computation by the use of proposed Rule 61A-7.009. This is a

reasonable and consistent interpretation of the statutory language and does not modify, enlarge, or contravene the implementing statute.

59. Petitioners raised the objection that the Division has arbitrarily interpreted the phrase "during any time of operation." Specifically, Petitioners allege that the Legislature clearly intended this phrase to mean a daily basis. However, Petitioners fail to note that Section 561.695, Florida Statutes (2005), requires the licensee to submit a "12-month affidavit" and a "36-month certified public accountant evaluation." See § 561.695, Fla. Stat. (2005). Neither the affidavit, nor the evaluation, contemplates a daily review of sales. See Id. Interpreting the statute in a manner that would require daily compliance contravenes the language of the specific statutes and, thus, the legislative intent. See § 561.695(5), Fla. Stat. (2005)(requiring the licensee to certify that the stand-alone bar criteria was met for the preceding 12-month period); § 561.695(6), Fla. Stat. (2005)(requiring the licensee to submit a report from a Florida CPA that attests to the licensee's compliance with the ten-percent requirement for the preceding 36-month period). Petitioners' objection is lacking a factual basis as none of the statutes pertaining to this exemption contains the language "daily." Petitioners put forth neither statutory cites, nor

evidence that would support such an interpretation. Further, a daily review of sales by the Division would be practically impossible to achieve.

60. Proposed Rules 61A-7.007 and 61A-7.008 properly implement Subsection 386.203(11), Florida Statutes (2005), by utilizing a two-month averaging period that will obtain a reasonable representation of the business in question. These rules would be used as an enforcement tool to verify the business's compliance with the "12-month affidavit" and "36-month certified public account evaluation" requirements of Section 561.695, Florida Statutes (2005). Neither provision requires the audit period to be examined on a daily basis. See § 561.695(5) and (6), Fla. Stat. (2005). If the Legislature had contemplated the stand-alone bar exception to be met on a daily basis, they would have so stated in the "12-month affidavit" or the "36-month certified public accountant evaluation" requirements of the statute. "Daily" was not used in the definition of a stand-alone bar or in any other provision of the statute related thereto.

61. Petitioners presented no evidence that would support its contention that the Legislature intended the phrase "during any time of operation" to mean on a daily basis. Martinez testified that the phrase "during any time of operation" could be interpreted to mean "every single sale." Both

interpretations lead to an absurd result which is to be disfavored when discerning legislative intent. State v. Webb, 398 So. 2d 820 (Fla. 1981). The Division stresses that proposed Rules 61A-7.007 and 61A-7.008 are enforcement tools that will ensure the provisions of Section 561.695, Florida Statutes (2005), are being met. These rules in no way serve as a method of obtaining qualification as a stand-alone bar.

62. Petitioners raise a final objection pertaining to the Division's authority to create categories in order to determine whether the premises are dedicated predominately or totally to the serving of alcoholic beverages. Petitioners argue that the Legislature placed an express limitation on what a stand-alone bar may sell. If the Legislature had envisioned such a limitation on what a stand-alone bar may sell, then the final sentence in the "stand-alone bar" exemption would have required the ten percent requirement to be compared to alcoholic beverage sales, rather than total gross revenue. See § 386.203(11), Fla. Stat. (2005)("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 ten percent of its gross revenue from the sale of food consumed on the licensed premises"). (Emphasis supplied.) At hearing, Petitioners failed to present any factual evidence

or point to the express limitation in the statute that would support such a contention.

63. Proposed Rule 61A-7.009 takes into consideration a licensee's predominate business by requiring the sale of alcohol for consumption on the premises to be the highest grossing category of revenue. The implementing statute does not prohibit the licensee from selling items other than alcoholic beverages and food. Petitioners failed to offer testimony to establish otherwise. The Division's interpretation is consistent with the dictionary definition and within the range of reasonable interpretations. Therefore, it follows that the interpretation is not an invalid exercise of delegated legislative authority.

64. Petitioner's evidence presented at trial falls short of that required to shift the burden to the Division. Petitioners' opening statement and subsequent witnesses fail to support the objections raised in the petition. Petitioners' opening statement cannot be considered as factual basis for objections put forth in the petition. The purpose of the attorney's opening statement is to outline what is expected to be established by the evidence. See Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990) ("Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence."), citing Whitted v. State, 362 So. 2d 668 (Fla. 1978).

65. Subsection 386.203(11), Florida Statutes (2005), does not require a licensee to meet the ten percent threshold on a daily basis. Such an interpretation is neither reasonable, nor supported by the evidence presented at trial. Proposed Rules 61A-7.007 and 61A-7.008 are rules setting forth the requirements to obtain a designation as a stand-alone bar. These rules will be used for enforcement purposes to ensure that the establishment is meeting the requirements imposed by Section 561.695, Florida Statutes (2005).

66. Subsection 386.203(11), Florida Statutes (2005), does not prohibit the licensee from selling items other than alcoholic beverages and food. Such interpretation would require words to be read into the statute and impermissibly modify the legislative intent. Petitioners are correct in pointing out that the Legislature made an express limitation on what a "retail tobacco shop" could sell; however, there is no such express limitation for the "stand-alone bar" statute.

67. The Division's proposed Rule 61A-7.009 takes into consideration a licensee's predominate business by requiring the sale of alcohol for consumption on the premises (the service of alcoholic beverages) to be the highest grossing category of revenue. This is a reasonable interpretation that does not modify, contravene, or expand the specific provisions of the implementing law. Furthermore, this categorical scheme cures

the deficiency found by ALJ Staros in the prior rule challenge. See Bowling Centers Association of Florida, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Case No. 03-4776RP (DOAH March 26, 2004).

68. Petitioners have failed to meet the burden of establishing a factual basis for the objections to the rule. While the Petition raised objections, the testimony and evidence presented at trial did not establish a factual basis for the objections raised.

69. Additionally, there was no evidence presented by Petitioners to show that either the rules were not supported by logic or that they were adopted without thought or reason. To the contrary, the Division has shown that numerous workshops, hearings, and thousands of telephone calls from concerned citizens were taken into account when drafting the proposed rules.

70. In conclusion, the Division has shown by a preponderance of the evidence that the proposed rules challenged by Petitioners are not invalid exercises of the authority delegated to the Division by the Legislature. The proposed rules do not enlarge, modify, or contravene the specific statute to be implemented. The rules are consistent with the statute, they lawfully implement the specific statute, and they serve a

reasonable interpretation of the specific powers and duties outlined within the applicable statutes. The designation as a stand-alone bar requires, for renewal of the annual license, the submission of an affidavit that for the proceeding year the business met the criteria for the designation. The two-month audit set forth in the proposed rule is used for other license types with percent of sales restrictions. The two-month audit accomplishes the intent of the legislation without imposing arbitrary requirements on a business. The proposed rule does not contravene the requirements for the designation "any time," it merely gives notice as to the Division's enforcement procedures as required and authorized by the specific authority granted in Subsection 561.569(9), Florida Statutes (2005). The rule provides that the business be, if not totally, predominately devoted to serving alcoholic beverages. Predominate, or to be, or have a greater quantity than other sales is required by the proposed rule. Sales of other than alcoholic beverages are not prohibited by statute.

ORDER

Based on the foregoing Findings of Facts and Conclusions of Law, it is

ORDERED that proposed Rules 61A-7.006, 61A-7.007, 61A-7.008, and 61A-7.009 are not an invalid exercises of delegated legislative authority and the Petition is denied.

DONE AND ORDERED this 7th day of December, 2005, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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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 agency 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.