

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOOTERS OF LAKE UNDERHILL, LLC,)
d/b/a HOOTERS OF WATERFORD)
LAKES,)
)
Petitioner,)
)
vs.) Case No. 07-5214
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 25, 2008, via video teleconference with sites in Tallahassee and Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Joshua B. Moyer, Esquire
Department of Business &
Professional Regulation
1940 North Monroe Street, Suite 42
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application for a special restaurant license (4COP-SRX) can be deemed incomplete for failure to obtain zoning approval from the local government.

PRELIMINARY STATEMENT

On or about February 5, 2007, Petitioner filed a Change in Location/Increase in Series Application (the "Application") with Respondent. Respondent issued a notice of intent to deny the Application, and Petitioner availed itself of its right to a formal administrative hearing, which was held at the date, time, and place set forth above.

At final hearing, Petitioner called two witnesses: Tim Baum, regional manager for Hooters of Lake Underhill, and Lois Williams, senior management analyst II for Respondent. Petitioner offered 12 exhibits into evidence; Exhibits 1 through 4, 8 through 11, and 16 were admitted. Official recognition was taken of Exhibits 5, 6, and 7. Respondent did not call any witnesses or introduce any independent exhibits into evidence. Rather, Respondent made an argument on the record as to how it believes the law should be applied in this case.

FINDINGS OF FACT

1. Petitioner is a restaurant duly-licensed by the State of Florida to serve food and certain alcoholic beverages. It

currently holds a 2COP restaurant license, which allows it to sell beer and wine along with its food products. Petitioner has held the 2COP license since opening in calendar year 2002.

2. Petitioner derives 51 percent of its revenue from the sale of food and nonalcoholic beverages. It is in an area of Orange County which is zoned for commercial property and has the appropriate land use code for a restaurant chain.

3. Petitioner's facility is presently located within 500 feet of a local school. The school was built a year or two after Petitioner began operation of its restaurant.

4. In order for Petitioner to obtain an upgraded license so that it can serve other alcoholic beverages (i.e., liquor) it must submit an application to Respondent. Petitioner duly-submitted such an application on February 5, 2007. The application sought to upgrade Petitioner's license to a 4COP-SRX license. The 4COP license would allow for sale of all alcoholic beverages.

5. Section 5 of the Application addresses zoning for the restaurant. Section 5 includes the following:

Are there outside areas which are contiguous to the premises which are to be part of the premises sought to be licensed? [Petitioner answered, Yes.]

If this application is for issuance of an alcoholic beverage license where zoning approval is required, the zoning authority must complete "A" and "B". If zoning is not

required, the applicant must complete section "B".

A. The location complies with zoning requirements for the sale of alcoholic beverages or wholesale tobacco products pursuant to this application for a Series 4COP SRX license.

Signed _____ Date _____
Title _____

B. Is the location within limits of an "Incorporated City or Town"? ___Yes ___No

If yes, enter the name of the city or town:

6. Petitioner filled in the address portion of Section 5, but did not have a zoning authority complete Section A, nor did Petitioner complete Section B.

7. Respondent deemed the Application incomplete due to Petitioner's failure to complete Section 5. On July 25, 2007, a Final Warning Notice was sent to Petitioner, allowing Petitioner ten additional days to submit zoning approval for the Application. When no zoning approval was returned within the prescribed period, Respondent issued its Intent to Deny License.

8. Petitioner did make an inquiry to the local zoning authority concerning its application to increase the level of its license. However, by letter dated February 22, 2007, the Orange County Zoning Division notified Petitioner as follows:

We have received your request for an increase in series to the alcoholic beverage

license at Hooters Lake Underhill,
11425 Underhill Road, Orlando.

On February 22, 2007 we conducted a distance check to see if the proposed location satisfied the separation requirements contained in the Orange County Code. The results of our inspection reveal that the proposed location is 407 ft. from Legacy Middle School at 11398 Lake Underhill Road.

Since this location cannot satisfy the 1000 ft. separation requirement from the nearest school, this office cannot issue zoning approval for the increase in series.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).¹

10. Authority to review and approve requests for licenses under the Florida Beverage Law (Chapters 561 through 568, Florida Statutes) rests with Respondent.

11. Subsection 562.45(2)(a), Florida Statutes, states as follows:

Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of places of business, and prescribing sanitary regulations therefore, of any licensee under the Beverage Law within the county or corporate limits of such municipality. However, except for premises licensed on or before July 1, 1999,

and except for locations that are licensed as restaurants, which derive at least 51 percent of their gross revenues from the sale of food and nonalcoholic beverages, pursuant to Chapter 509, a location for on-premises consumption of alcoholic beverages may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school unless the county or municipality approves the location as promoting the public health, safety, and general welfare for the community under proceedings as provided in s. 125.66(4), for counties, and s. 166.041(3)(c), for municipalities. This restriction shall not, however, be construed to prohibit the issuance of temporary permits to certain nonprofit organizations as provided for in s 561.422. **The division may not issue a change in the series of a license** or approve a change of a licensee's location **unless the licensee provides documentation of proper zoning from the appropriate county or municipal zoning authorities.** (Emphasis added)

12. Clearly, Petitioner derives at least 51 percent of its gross revenues from the sale of food and nonalcoholic beverages. Thus, it would be allowed to exist within 500 feet of a school under the exception in the above language without a showing by the county that such location promotes the health, safety, and welfare of the community.²

13. Likewise, Orange County's right to enact ordinances regulating the location of a place of business for a licensee under the Beverage Law cannot be impaired. Thus, Orange County

may legally enact a 1,000-foot separation requirement between schools and restaurants that serve alcohol.³

14. The last phrase in the statutory subsection above, however, establishes limits where there is to be a change in series of a license. Any applicant seeking to obtain such a change must obtain documentation of proper zoning from the appropriate county or municipality. It is clear that in the instant case, Petitioner failed to obtain that documentation.

15. Subsection 562.45(2)(c), Florida Statutes, goes on to say:

A county or municipality may not enact any ordinance that regulates or prohibits those activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law. Except as otherwise provided in the Beverage Law, a local government, when enacting ordinances designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state. Nothing in this section shall be construed to affect or impair the enactment or enforcement by a county or municipality of any zoning, land development or comprehensive plan regulation or other ordinance authorized under ss. 1, 2, and 5, Art. VIII of the State Constitution.

Again, Orange County is authorized to enact zoning requirements within its authority under the Florida Constitution. It is only prohibited from enacting ordinances which are discriminatory or

inconsistent with the manner other businesses are treated. In the instant action, the Orange County ordinance concerning a 1,000-foot separation between schools and businesses selling alcohol is well within the purview of the county government.

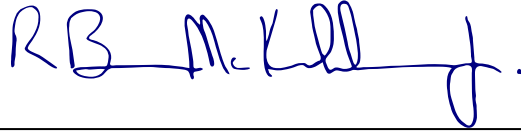
16. Petitioner bears the burden of proof in this matter as to whether a change in license is warranted. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1966). Based upon the facts presented, Petitioner has not met its burden.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, denying the application filed by Petitioner.

DONE AND ENTERED this 5th day of May, 2008, in Tallahassee,
Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2008.

ENDNOTES

^{1/} Unless otherwise stated, all references to Florida Statutes herein shall be to the 2007 version.

^{2/} In this case, the restaurant would be grandfathered in at its present location anyway because it existed prior to the school being built on its present site.

^{3/} Orange County Code 38-1415(a) states:

Places of business for the sale of alcoholic beverages containing more than three and two-tenths (3.2) percent of alcohol by weight for consumption on or off the premises may be located in the unincorporated areas of the county in accordance with and subject to this chapter and specifically those zoning regulation regulating the location of places of business selling alcoholic beverages containing fourteen (14) percent or more alcohol by weight. No such place of business shall be established within one

thousand (1,000) feet of an established
church or school. . . .

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within
15 days from the date of this Recommended Order. Any exceptions
to this Recommended Order should be filed with the agency that
will issue the Final Order in this case.