STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROOKLYN LUNCHEONETTE, LLC, d/b/a DEL TURA PUB AND RESTAURANT,	)	
Petitioner,	)	
vs.	)	Case No. 09-1973RX
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Respondent.	)	

SUMMARY FINAL ORDER

This matter came before the undersigned Administrative Law Judge on Petitioner's Motion for Summary Adjudication and Respondent's response thereto. The parties have filed a Pre-hearing Statement and have waived the requirement for an adjudicatory hearing relating to the companion case (Case No. 09-1218) until this rule challenge case is resolved. Being fully advised in the premises, it is FOUND and DETERMINED, as follows:

APPEARANCES

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

For Respondent: Cecelia D. Jefferson, Esquire
Michael B. Golen, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUES

Whether Florida Administrative Code Rule 61A-3.0141(2)(a)2., and its directive that the square footage making up the licensed premises of a special restaurant (SRX) license be "contiguous," constitutes a valid exercise of delegated legislative authority.

Whether a genuine issue of material fact exists, and, if so, whether Petitioner's Motion for Summary Adjudication should be denied.

PRELIMINARY STATEMENT

Petitioner sought an SRX license from Respondent pursuant to Subsection 561.20(2)(a)4., Florida Statutes (2007),[1] and currently holds a temporary SRX license. Respondent noticed its intent to deny the application for a permanent license on October 30, 2007. Petitioner duly-sought an administrative hearing thereon, pursuant to Subsection 120.57(1), Florida Statutes, which matter is pending in the Division of Administrative Hearings (DOAH) Case No. 09-1218. Respondent has stipulated that the sole basis upon which it seeks to deny the permanent license to Petitioner is the application of the "contiguous" requirement contained in Florida Administrative Code Rule 61A-3.0141(2)(a)2. Petitioner filed a Petition

Challenging Validity of Existing Rule 61A-3.0141(1) and (2), on April 15, 2009, which was assigned DOAH Case No. 09-1973RX. Petitioner alleges that the cited rule constitutes an invalid exercise of delegated legislative authority. By Motion to Cancel Hearing and Initially Resolve the Issue of Rule Validity First, the parties agreed to have the issue of the validity of the "contiguous" requirement of Florida Administrative Code Rule 61A-3.0141(2)(a)2. considered initially by summary adjudication. The parties have submitted a joint Pre-hearing Stipulation and Petitioner filed the depositions of Susan Doherty, chief of the Division's Bureau of Licensing, and Major Carol Owsiany, Respondent's agency representative. Respondent filed its response in opposition to the motion, and both parties filed notices of filing supplemental authority. The entire file has been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

The following findings of facts are determined:

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

2. Under the provisions of Section 561.02, Florida Statutes, the Division of Alcoholic Beverages and Tobacco,

within the Department of Business and Professional Regulation, is charged with the supervision and enforcement of all alcoholic beverages manufactured, packaged, distributed and sold within the state under the Beverage Law. The Division issues both general and special alcoholic beverage licenses.

3. Petitioner, Brooklyn Luncheonette, LLC, d/b/a Del Tura Pub and Restaurant is the owner/operator of a restaurant located in North Fort Myers, Florida. It is seeking issuance of a special restaurant license (SRX) pursuant to Subsection 561.20(2)(a)4., Florida Statutes, from the Division. Therefore, Petitioner is substantially affected by the challenged rule.

4. Petitioner operates a restaurant on a leased parcel of property consisting of two buildings with a dedicated pathway between the two buildings. Petitioner's restaurant premises consist of two buildings which contain a minimum of 2,500 square feet in the aggregate of service area. Petitioner's restaurant facility is equipped to serve 150 patrons full course meals at tables at one time.

5. The sole reason asserted by Respondent for denial of Petitioner's application is the alleged noncompliance with the "contiguous" requirement of Florida Administrative Code Rule 61A-3.0141(2)(a)2.

6. The provision of general law, applicable to Petitioner, which sets forth the specific criteria for an SRX license, is Subsection 561.20(2)(a)4., Florida Statutes.

7. To these statutory criteria, Respondent has, by Florida Administrative Code Rule 61A-3.0141(2)(a)2., added an additional criteria: "The required square footage shall be contiguous and under the management and control of a single establishment." Respondent has interpreted the provision to mean that the buildings containing the square footage must physically touch.

8. Florida Administrative Code Rule 61A-3.0141 reflects that the sole law implemented is Subsection 561.20(2)(a)4., Florida Statutes.

9. Susan Doherty is the chief of Respondent's Bureau of Licensing, whose duties include determining "if a license will be issued based upon the qualifications of the applicant [and] whether the premises meets all requirements based on the type of license applied for."

10. Ms. Doherty, whose deposition was taken on May 12, 2009, testified in pertinent part:

> Q. All right. If I can direct your attention to Subsection (2)(a)(2) of Rule 61A-3.0141, it says, "The required square footage shall be contiguous and under the management and control of a single licensed restaurant establishment." What does "contiguous" mean?
>
> A. Touching, actually connected, touching.

* * *

> Q. Do you see anything in the statute that prohibits a licensee from qualifying if the square footage is in two buildings that the applicant leases and they're connected by a pathway which the applicant leases? Do you see anything in the statute that precludes that?
>
> A. In the statute, no.
>
> Q. Do you see anything in the rule that precludes that?
>
> A. In my opinion, Section (2)(a)(2), the contiguous would.

Deposition of S. Doherty, pp. 15 and 18.

11. Chief Doherty conceded, however, that she could not point to any provision of the relevant statute that imposes a "contiguous" requirement regarding the square footage.

12. Chief Doherty further noted that for special licenses issued for hotels pursuant to Subsection 561.20(2)(a)1., Florida Statutes, she was aware that there were numerous non-contiguous buildings licensed pursuant to such section.

13. The deposition of Respondent's agency representative, Major Carol Owsiany, was taken on May 13, 2009. Major Owsiany testified:

> Q. . . . Isn't it correct that there's 2,500 square feet of service area located in the two buildings that are currently the subject of the [Petitioner's] temporary SRX license?
>
> A. Yes, sir.

> Q. Can you point to me any provision of Section 561.20(2)(1)(4) that precludes the petitioner from having the requisite square footage in two buildings?
>
> A. One second, sir. Not in the statute, but I can in the rule.

Deposition of C. Owsiany, p. 8.

14. For purposes of this rule challenge case, there are no genuine issues of material fact in dispute.

CONCLUSIONS OF LAW

Jurisdiction

15. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Subsections 120.56 (1) and (3), Florida Statutes (2009).

16. Petitioner is a company whose substantial interests are affected by the rule, and it has standing to bring this rule challenge. Petitioner is seeking to challenge an existing rule of Respondent, alleging that Section 561.11 and Subsection 561.20(2)(a), Florida Statutes, do not provide the necessary authorization to promulgate the rule.

Burden of Proof

17. Petitioner "has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(3)(a), Fla. Stat.

18. Florida Administrative Code Rule 61A-3.0141 cites as its rule making authority Section 561.11, Florida Statutes, which grants Respondent the ". . . authority to adopt rules pursuant to Subsection 120.536(1) and Section 120.54, Florida Statutes, to implement the provisions of the Beverage Law.

19. Under the authority granted by the above-noted statutes, Respondent has adopted rules to regulate the sale of alcoholic beverages throughout the state of Florida, specifically the licensing of retail vendors.

20. Florida Administrative Code Rule 61A-3.0141(2)(a)2., which outlines the requirements for receiving an SRX alcoholic beverage license, such as the one Petitioner had applied for, provides that the 2,500 square feet required to make up the licensed premises must be "contiguous and under the management and control of a single establishment."

21. Section 120.56, Florida Statutes, provides for administrative challenges to agency rules on the ground that they are invalid exercises of delegated legislative authority.

22. Subsection 120.52(8), Florida Statutes, provides:

> "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:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (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; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

23. The last paragraph of Subsection 120.52(8), Florida Statutes, includes general standards for challenging a rule and provides:

> The grant of rule making 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 rule making authority or generally describing the powers and functions of an agency rule shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

24. This set of general standards is to be used in determining the validity of a rule in all cases. Lamar Outdoor Advertising – Lakeland v. Florida Department of Transportation, __ So. 3d __, 34 Fla. L. Weekly D1670, 2009 Fla. App. Lexis 11592 (Fla. 1st DCA August 19, 2009); Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-98 (Fla. 1st DCA 2000).

25. Respondent is limited in its rulemaking authority only to implementing or interpreting a specific power or duty conferred by the enabling statute. Neither Subsection 561.11(1), nor 561.20(2)(a)4., Florida Statutes, provides any such authority for the contiguous square footage requirement. Lamar Outdoor Advertising – Lakeland v. Florida Department of Transportation, supra.

26. Subsection 561.20(2)(a)4., Florida Statutes, provides in pertinent part:

> (2)(a) No such limitation on the number of licenses as herein provided shall henceforth prohibit the issuance of a special license to:
>
> * * *

> (4) Any restaurant having 2500 square feet of service area and equipped to serve 150 persons full course meals at tables at one time, and deriving at least 51% of its gross revenue from the sale of food and non-alcoholic beverages . . .[2]

27. An SRX license permits the sale of distilled spirits in addition to beer and wine. The Legislature has limited the categories of licenses that may sell distilled spirits to only quota licenses and certain special licenses, such as the licenses for restaurants and the licenses for hotels. See § 561.20, Fla. Stat. It is readily apparent from the review of Subsection 561.20(2)(a)4., Florida Statutes, that the Legislature limited the grant of this privilege only to restaurants meeting or exceeding a certain minimum size. The restaurants have to meet a minimum of 2,500 square feet of service area, must be equipped to serve at least 150 persons full course meals at tables at one time, and derive at least 51 percent of its gross revenue from the sale of food and non-alcoholic beverages.

28. In imposing these minimum size standards, the Legislature did not delegate to Respondent an explicit power or duty to implement or interpret such criteria. There is nothing in Subsection 561.20(2)(a)4., Florida Statutes, that grants to Respondent the power to add by rule a “contiguous” requirement

to the legislatively mandated minimum “2500 square feet of service area” criteria.

29. Respondent has conceded that the required square footage can be in two separate buildings, but by rule has added the requirement that such buildings containing the square footage must be contiguous, i.e. touch. This is clearly beyond Respondent’s authority. The Legislature knows how to use the word “contiguous” and has done so in other legislation, e.g., Subsection 497.380(1), Florida Statutes, requiring that a funeral establishment must consist “of at least 1,250 contiguous interior square feet.” Lamar Outdoor Advertising – Lakeland, supra.

30. In State, Department of Business Regulation v. Salvation Limited, Inc., 452 So. 2d 65, 66 (Fla. 1st DCA 1984), involving a forerunner of the same special restaurant rule, the court, holding it is “axiomatic” that a rule cannot enlarge, modify or contravene a statute, found invalid a prior division attempt to add additional criteria by rule to the special restaurant license minimum standards:

> Through section 561.20(2)(a)3., the Legislature has enumerated specific criteria for a special restaurant license. The applicant or licensee must: (1) be a restaurant, (2) have 2500 square feet of service area, (3) be equipped to serve 150 persons full course meals at tables at one time, and (4) derive at least 51% of its gross revenue from the sale of food and non-alcoholic beverages. To these fixed and

> definite criteria, DABT added, by rule, a fifth criterion: that meals be prepared and cooked on the licensed premises. In so doing, it enlarged upon the statutory criteria and, thus, exceeded the "yardstick" laid down by the Legislature.
>
> * * *
>
> The serving of food by a restaurant simply does not require that the food be prepared and cooked on the premises. If the Legislature had intended to impose such a requirement, it could easily have done so.

31. In Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 598-599 (Fla. 1st DCA 2000), the court noted that amendments to the APA have made clear "that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority." The court noted that the authority for an administrative rule is not a matter of degree. "Either the enabling statute authorizes a rule at issue or it does not."

32. In Florida Department of Highway Safety and Motor Vehicles v. JM Auto, Inc., 977 So. 2d 733, 734 (Fla. 1st DCA 2008), the court upheld the invalidation of an agency rule which identified only general rulemaking authority as the specific authority for the rule's adoption. The court noted that the general grant of authority was insufficient under Subsections 120.52(a)(d) and 120.536(1), Florida Statutes, which allow an

agency to adopt “only rules that implement or interpret the specific powers and duties granted by the enabling statue.” The court noted that its decisions “have recognized the legislature’s intent to restrict the scope of agency rulemaking and consequently have approved a rule only when there is statutory language authorizing the agency to adopt rules to implement the subject matter of the statute.”

33. Neither the specific authority, Section 561.11, Florida Statutes, nor the law implemented, Subsection 561.20(2)(a)4., Florida Statutes, contains an explicit grant of legislative authority for the “contiguous” rule.

34. Indeed, it is clear that the Legislature did not grant any such specific power or duty since the detailed criteria for the grant of the SRX license are expressly set forth in the statute. State, Department of Business Regulation v. Salvation Limited, Inc., supra.

35. The contiguous square footage requirement of Florida Administrative Code Rule 61A-3.0141(2)(a)2. constitutes an invalid exercise of authority under the aforementioned definitions (b) and (c). The rule provision has exceeded its grant of rule making authority by adopting a rule for which the agency has not conferred any specific power or duty by the enabling statute. The rule improperly adds to the minimum

legislative square footage criteria a “contiguous” requirement not provided by the Legislature.

36. Similarly, Respondent has enlarged, modified or contravened the specific provision of Subsection 561.20(2)(a)4., Florida Statutes, by adding a requirement not provided or authorized by the Legislature. The challenged rule provision vests unbridled discretion in the agency since it usurps the legislative function by adding a requirement not imposed by the Legislature.

37. The rule, however, is not arbitrary and/or capricious and is supported by both logic and the necessary facts.

38. Respondent’s position in regard to the rule, in that somehow the lack of contiguity in the square footage of the restaurant precludes a restaurant from complying with the statutory criteria, is flawed.

ORDER

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

ORDERED that Florida Administrative Code Rule 61A-3.0141(2)(a)2. and its directive that the square footage making up the licensed premises of an SRX license be “contiguous,” constitutes an invalid exercise of delegated legislative authority and cannot be relied upon by Respondent to deny the issuance of an SRX license to Petitioner.

DONE AND ORDERED this 23rd day of October, 2009, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2009.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2007 codification.

[2/] Petitioner was previously audited by Respondent and found to have met the 51 percent requirement, and such is not at issue in this proceeding.

COPIES FURNISHED:

Harold F. X. Purnell, Esquire
Rutledge, Ecenia & Purnell, P.A.
Post Office Box 551
Tallahassee, Florida 32302

Cecelia D. Jefferson, Esquire
Michael B. Golen, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Ned Luczynski, General Counsel
Department of Business and
  Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business and
  Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

F. Scott Boyd, Executive Director
  and General Counsel
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

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.