

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARK DP INVESTMENTS, INC.,)
d/b/a THE BANK BAR AND LOUNGE,)
)
 Petitioner,)
)
vs.) Case No. 12-3370
)
CITY OF GAINESVILLE,)
)
 Respondent.)

)

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 11, 2012, via video teleconference from sites in Gainesville and Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary S. Edinger, Esquire
Benjamin, Aaronson, Edinger
and Patanzo, P.A.
305 Northeast 1st Street
Gainesville, Florida 32601

For Respondent: Lee C. Libby, Esquire
City of Gainesville
Suite 425
200 East University Avenue
Gainesville, Florida 32601

STATEMENT OF THE ISSUE

The issue is whether the City of Gainesville ("City") properly issued an Underage Prohibition Order to Petitioner, Clark DP Investments, Inc., d/b/a The Bank Bar and Lounge ("The Bank") pursuant to section 4-53, Gainesville Code of Ordinances.

PRELIMINARY STATEMENT

On September 27, 2012, the City served Austin Clark, president of The Bank, with an Underage Prohibition Order, dated September 25, 2012, that ordered The Bank to cease permitting persons under the age of 21 to enter its premises from 9 p.m. to 2 a.m. for a period of 90 days, pursuant to section 4-53, Gainesville Code of Ordinances. On October 3, 2012, The Bank timely requested an administrative hearing to contest the issuance of the Underage Prohibition Order. On October 11, 2012, the City referred the case to the Division of Administrative Hearings ("DOAH").

The case was scheduled for hearing on December 11, 2012, on which date it was convened and completed.

At the hearing, the City presented the testimony of Gainesville Police Department ("GPD") Officers Aaron Steman, Justin Torres, Marquitta Brown, Joseph Crews, Lonnie Scott, Jr., and of GPD Sergeant Orlando Alvarez. The City's Exhibits 1 through 31 were admitted into evidence. The Bank presented the testimony of Lieutenant Dean Pescia of the Division of Alcoholic

Beverages and Tobacco; Tyler Chase Harris, a customer of The Bank; and Austin Clark, president and sole officer of Clark DP Investments, Inc. The Bank's Composite Exhibit 1 was admitted into evidence. This exhibit consisted of the Final Declaratory Judgment issued in Grog House, Inc. v. City of Gainesville, Case No. 01-2009-CA-1691 (Fla. 8th Cir. Ct. Sept. 2, 2009), and the appellate court's decision in Grog House, Inc. v. City of Gainesville, 37 So. 3d 969 (Fla. 1st DCA 2010).

The one-volume transcript of the hearing was filed at DOAH on January 4, 2013. The parties timely filed their Proposed Recommended Orders on January 14, 2013.

FINDINGS OF FACT

1. The City is a municipal corporation organized under the laws of the State of Florida. In 2009, the City adopted Chapter 4, Article III of the Gainesville Code of Ordinances, titled "Underage Prohibition in Alcoholic Beverage Establishments," referenced herein as the "Ordinance."

2. The Bank is an alcoholic beverage establishment as defined in section 4-51 of the Ordinance and is located within the city limits of the City. The Bank's address is 22 West University Avenue, Gainesville, Florida.

3. Section 4-51 of the Ordinance defines "underage drinking incident" as follows:

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

4. Section 4-51 of the Ordinance defines "underage prohibition order" as "an order issued by the city manager or designee which prohibits an alcoholic beverage establishment as herein defined from admitting patrons under the age of 21 into such establishment during specified times."

5. Section 4-53 of the Ordinance provides that an alcoholic beverage establishment will be issued an underage prohibition order if a certain number of underage drinking incidents have occurred at the establishment during a given calendar quarter. For alcoholic beverage establishments with an aggregate occupancy load of fewer than 201 persons, the number of underage drinking incidents triggering a prohibition order is five or more in a quarter. For establishments with an aggregate occupancy load of more than 201, the number is ten or more in a quarter.

6. The Bank has an aggregate occupancy load of 207 persons.

7. On September 27, 2012, the City served The Bank with an Underage Prohibition Order (the "Order"). The Order, dated September 25, 2012, was based on 12 underage drinking incidents that occurred at The Bank during the third quarter of 2012. Subsequent to the issuance of the Order, an additional three underage drinking incidents arose. The Bank was given timely notice of these additional incidents on November 21, 2012, and they became part of this case.

8. At the hearing, the City demonstrated that GPD officers made 15 arrests for underage drinking incidents at The Bank during the third quarter of 2012, and that it secured deferred prosecutions or adjudications in all 15 cases.

9. Five GPD officers and a sergeant testified at the hearing as to the particulars of these arrests and as to GPD's general practices in policing underage drinking in downtown Gainesville.

10. The GPD has a specially assigned unit to patrol a downtown area consisting of the square formed by Northwest 3rd Avenue, Southwest 3rd Avenue, Southeast 3rd Street, and Northeast 3rd Street. Officer Justin Torres estimated that there are between 20 and 30 alcoholic beverage establishments in the roughly one-square-mile downtown area.

11. The downtown unit performs patrols for underage drinking in bars on Thursdays, Fridays and Saturdays from 4 p.m.

until 4 a.m., and every other Wednesday from 7 p.m. until 3 a.m. Between three and four officers from the unit perform these patrols on a given night.

12. The officers are in uniform as they make the rounds of the bars in the downtown area. They are given no particular assignment as to which bars they enter or what time they should go to a particular establishment. They try to cover all of the downtown bars without emphasizing any particular one. Officer Marquitta Brown testified that she would enter The Bank twice a night at most.

13. None of the testifying officers was given any special training by GPD as to spotting underage drinkers or fake identification. They learned to scrutinize IDs through their general experience on the police force and especially by working with officers who were experienced members of the downtown unit.^{1/} Officers volunteer to serve in the downtown unit, and rotate off the unit after serving about one year.

14. The testifying officers all stated that, when looking for underage drinking, they look for suspicious behavior rather than youthful appearance. They do not simply walk into a bar and start checking patrons' IDs. The typical scenario involves the officer walking through the bar. The suspect sees the uniformed officer, and then puts down his drink and walks away from it, or hands the drink to someone standing near him, or simply drops the

drink into a trash can. At this point, the officer requires the suspect to produce identification and makes an arrest if the ID proves insufficient.

15. Of the 15 arrests made in The Bank during the third quarter of 2012, nine were instances in which the underage patron gained entry to the bar by presenting false identification. Upon successfully presenting the false ID to the doorman, the patron would be given an "over 21" wristband that allowed the purchase of alcoholic beverages in The Bank. Persons under 21 were allowed into the bar but were not given a wristband or served alcoholic beverages.

16. Eight of the nine instances of false ID involved the presentation of valid driver's licenses that belonged to other persons who were over the age of 21. In two of the cases, the arresting GPD officer testified that the photo on the driver's license did not look like the suspect. In one case, the officer testified that the false ID did look like the suspect. The record contains no indication as to the resemblance between the suspect and the false identification in the other five instances of the suspect's using another person's valid driver's license.^{2/}

17. The ninth instance of false ID involved the use of a forged Ohio driver's license bearing the actual photo and identifying information of the underage suspect, but with a false date of birth. The arresting officer, Aaron Steman, testified

that he identified the license as a forgery because it was very thick, which indicated to Officer Steman that the card stock used to create the license was thicker than that used by the state of Ohio. Officer Steman testified that he had received no special training in identifying driver's licenses from Ohio, but that his experience had made him familiar with the licenses from approximately 25 states.^{3/}

18. Three of the 15 arrests involved an underage patron who was wearing an "over 21" wristband. The remaining three involved an underage patron who was not wearing a wristband but was in possession of an alcoholic beverage. The hearsay statements of the underage persons to the officers indicated that in each instance they procured either the wristbands or the drinks from persons over 21 who had obtained them lawfully.^{4/}

19. None of the arresting officers observed an underage person obtaining an alcoholic beverage from an employee of The Bank. The testifying officers were unable to state how long any of the underage persons had been in possession of the alcoholic beverages. There was no evidence that any employee of The Bank knew that underage patrons were drinking alcohol and failed to act on that knowledge.

20. The arresting officers testified that they had made arrests for underage drinking at other bars in downtown Gainesville. Officer Brown testified that on the great majority

of nights she makes at least one arrest in a downtown bar.

21. The officers also testified that there were numerous occasions when they walked on patrol through The Bank without making an arrest.

22. At the time of the hearing, there were no administrative actions filed against The Bank's alcoholic beverage license by the Division of Alcoholic Beverages and Tobacco ("DABT"). Lieutenant Dean Plescia of DABT testified that in his experience, Mr. Clark of The Bank "was doing a pretty decent job" in checking IDs and keeping underage persons from obtaining alcoholic beverages in his establishment.

23. Mr. Clark testified as to The Bank's efforts to deter underage drinking on its premises. Mr. Clark testified that he became the owner of The Bank three years ago but has worked there since it opened in 2001. He had extensive history in the bar and restaurant business prior to joining The Bank. Mr. Clark has done "everything that you can do within the industry." He has been a doorman, a bartender, and a bar manager. He is present at The Bank whenever it is open for business.

24. Mr. Clark handpicks and trains every doorman who works at The Bank. Mr. Clark requires his doormen to be at least 21 years of age. He has hired professionals as doormen, including a former state attorney. Mr. Clark requires prospective doormen to provide job histories and references, and he personally checks

the references. New doormen are first put to work roaming the bar looking for underage drinkers, and are only put on the door to check IDs after they are thoroughly oriented.

25. Mr. Clark makes it clear to his doormen and serving staff that they will be fired if they are found to have admitted an underage patron without properly checking for ID or to have served alcoholic beverages to a patron who is underage. Mr. Clark testified that he has fired employees for violating this policy.

26. Mr. Clark trains and instructs his doormen to require photo ID for all patrons. He further instructs the doormen regarding measures to ensure that the ID is valid and belongs to the person who presented it. Mr. Clark's methods are similar to those employed by the GPD officers who testified at the hearing, and are similarly based on years of experience in checking IDs. For example, Mr. Clark has instructed his doormen to check whether the driver's license number matches the patron's birth date. The doorman will match the patron's height and eye color against the information on the driver's license, and examine the photo for features matching those of the patron presenting the card.^{5/}

27. The Bank has cameras that monitor the door staff and patrons seeking admission. Mr. Clark periodically employs "mystery shoppers" to test the doormen. The mystery shopper will

ask the doorman for an "over 21" wristband without checking for ID in exchange for a bribe or as a favor. Mr. Clark testified that to his knowledge the mystery shoppers have never succeeded in gaining entry without proper ID.

28. Mr. Clark testified that even where a patron provides what appears to be a valid ID, his doormen are instructed to inquire further if they have doubts about the patron's age. The doorman will ask the patron to give his birth date and address. If the patron's answer does not match the information on the driver's license, "that's a huge red flag immediately."

29. In these doubtful situations, the doormen will also ask for a second form of ID, preferably one with a photograph. Mr. Clark testified that The Bank has recently stopped admitting international students based on international visas or international passports because of their lack of reliability. GPD officers have informed him that he should require a United States driver's license, military ID, or passport, and he has instituted this practice at The Bank.

30. When a doorman is presented with false ID, he hands it back to the patron and denies him admittance.^{6/} Mr. Clark testified that on rare occasions he has allowed an underage patron to enter without a wristband if he shows legitimate identification after trying to pass with a false ID. However, the standard instruction to the doormen is to deny admittance on

the principle that an underage person who tries to obtain a wristband with a fake ID is likely to try to get alcoholic drinks once he is inside the bar.

31. Mr. Clark assigns as many as seven doormen to roam through the bar and make sure that no patrons without wristbands are in possession of alcoholic beverages. If an underage patron is found with an alcoholic drink, the patron is immediately ejected from the premises.

32. The Bank uses tamper resistant plastic wristbands and changes the color and style of the bands frequently to avoid counterfeits. Mr. Clark purchases the wristbands from a non-local source to decrease the likelihood of duplicating the wristbands of another bar. The wristbands are rotated such that the same one is not used twice in a two-week period. The Bank's staff checks wristbands to make sure that they are not frayed or tampered with, which might indicate that an underage patron obtained the band from a person of lawful age.

33. Mr. Clark reasonably believes that confusion is avoided by The Bank's practice of giving no wristband at all to patrons who are under 21, rather than relying on a system of color-coded wristbands for patrons who are over and under 21. Once a person leaves The Bank, he is not allowed re-entry. Mr. Clark believes that this practice lessens the chances of wristband sharing.

34. The Bank has participated in the responsible hospitality vendor program when it has been offered by GPD. Mr. Clark testified that he and his staff have attended these training sessions on multiple occasions.

35. Mr. Clark testified that he does not believe there are any policies or devices^{7/} which could improve The Bank's efforts to identify and deter underage drinkers. He is aware of the methods employed by The Bank's competitors, and opined that none of them is doing more than The Bank to combat underage drinking and that "there are multiple places that are doing a lot less."

36. Mr. Clark testified that he personally examined each of the false identification cards that had been used to obtain entry into The Bank. Mr. Clark believed that in each case the patron closely resembled the photo on the card. This testimony contradicts the GPD officers' testimony that two of the photo IDs did not bear a strong resemblance to the underage drinker. There is no central filing or tracking system for IDs that are confiscated by the GPD. None of the testifying officers had any idea how to recover the IDs or even who might be their custodian. The actual fake IDs were not introduced into evidence, making it impossible to enter a finding as to the diligence of The Bank's doormen regarding the two IDs in question.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57, 120.65(7), Fla. Stat. (2012).

38. The general rule is that the burden of proof, apart from a statutory directive, is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833-834 (Fla. 1993); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). In this case, the City is the party asserting the affirmative and as such bears the burden of proof by a preponderance of the evidence, pursuant to the general rule and the specific terms of section 4-53(c)(5) of the Ordinance.

39. Pursuant to section 4-53(a) of the Ordinance, an underage prohibition order will be issued to an alcoholic beverage establishment if 10 or more underage drinking incidents occurred at that establishment during any quarter when the establishment has an aggregate occupancy load of greater than 201. The Bank's aggregate occupancy load is 207, and the evidence established that 10 or more underage drinking incidents occurred at The Bank during the third quarter of 2012.

40. Section 4-53(c) provides the standards for the administrative hearing contesting the issuance of an underage

prohibition order as follows, in relevant part:

(3) Upon the timely filing of request for a hearing, the city attorney is authorized to arrange for the services of a hearing officer.

(4) In conducting the hearing, the hearing officer shall have the power to administer oaths, issue subpoenas, compel the production of books, paper, and other documents, and receive evidence. All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the hearing officer's recommended order, and to be represented by counsel. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The lack of actual knowledge of, acquiescence to, participation in, or responsibility for any underage drinking incident for this hearing on the part of the owner or agent shall not be defense by such owner or agent.

(5) If the hearing officer finds, by a preponderance of the evidence, that (a) the requisite number of underage drinking incidents have occurred within a quarter to subject the alcoholic beverage establishment to issuance of the underage prohibition order; (b) the city complied with the procedural requirements of subsection (c)(1); and (c) none of the exceptions of section 4-54 are applicable, then the hearing officer shall prepare a recommended order that upholds the issuance of the underage prohibition order.

(6) If the hearing officer finds that the criteria of paragraph (5) above have not been met, then the hearing officer shall prepare a

recommended order to rescind the underage prohibition order. (emphasis added).

41. The Ordinance was challenged as facially unconstitutional in Grog House, Inc. v. City of Gainesville, No. 01-2009-CA-1691 (Fla. 8th Cir. Ct. Sept. 2, 2009), aff'd per curiam, 37 So. 3d 969 (Fla. 1st DCA 2010). The plaintiff alcoholic beverage establishments contended that the Ordinance was preempted by state law, was directly inconsistent with state law, and violated section 562.45(2)(c), Florida Statutes, because it discriminated against licensees holding a state beverage license. The circuit court held that curbing underage drinking constitutes a valid municipal purpose and that there was a rational basis for the City to believe the Ordinance would serve this purpose. The circuit court also held that the Ordinance was not expressly or impliedly preempted by state law.

42. However, the circuit court found that the last sentence of section 4-53(c)(4), emphasized above, "conflicts with Florida Statutes, the Florida Administrative Code, and the City of Gainesville's very purpose of enacting the ordinance and must be stricken." The court found that the sentence conflicts with section 562.11(1)(c), Florida Statutes and Florida Administrative Code Rule 61A-3.052, as well as section 4-55(b)(2) of the Ordinance itself.^{8/} The circuit court's analysis was as follows:

Both the statute and rule allow an "innocent owner defense," which is premised on an

underage patron falsely evidencing that they are of legal age, that a reasonable person would believe their appearance is of a person of legal age and that the establishment had procedures in place to reasonably check the identification of patrons. The gist of the defense is that the establishment did all things it reasonably could have done to check patrons' age and the patron illegally presented false identification to consume alcohol. The last sentence of Sec. 4-53(c)(4) of the Ordinance also conflicts with the purpose of the Ordinance (preventing underage patrons in establishments that do not reasonably try to prevent underage drinking) by preventing the establishment from presenting evidence as to its reasonable efforts to prevent underage drinking.

43. The First District Court of Appeal's per curiam affirmance did not address the validity of the last sentence of section 4-53(c)(4) because the City failed to timely raise the issue. Thus, the circuit court's order striking the last sentence of section 4-53(c)(4) remains in effect.

44. The City contends that the "innocent owner" defense is inapplicable to this proceeding because section 562.11, Florida Statutes, is not the analogous statute to the Ordinance. Section 562.11 prohibits the sale or delivery of alcoholic beverages to persons less than 21 years of age. The City argues that the Ordinance does not prohibit or punish such sale or delivery; rather, the Ordinance prohibits the unlawful possession of alcoholic beverages by persons under 21 and is therefore more

analogous to section 562.111, Florida Statutes, which contains no "innocent owner defense" provision.

45. The City maintains that the innocent owner defense is not relevant for offenses under the Ordinance because the Ordinance involves the possession and consumption of alcohol by persons under 21 years of age. The innocent owner defense of section 562.11(1)(c) applies only where an establishment or person is charged with selling or delivering alcoholic beverages to persons under 21, and neither The Bank nor any employee of The Bank is charged with any such offense.

46. The City's analogy to section 562.111 is flawed. This statute requires no innocent owner defense because its penalties are directed at the underage person in possession of an alcoholic beverage, not the owner of the bar in which the underage person is arrested. Though the Ordinance is likewise couched in terms of possession of alcoholic beverages by underage persons, its penalties are directed at the alcoholic beverage establishment in which the underage drinker is arrested. In this way, the Ordinance is clearly more analogous to section 562.11 and its express innocent owner defense.

47. Further, there is nothing in the language of the circuit court's decision in Grog House indicating an intent to limit its scope in any way. The court held that the last sentence of section 3-53(c)(4) "must be stricken" as conflicting

with the relevant statute, rule, and another provision of the Ordinance itself. As of the date of this Recommended Order, Grog House constitutes the controlling law of the jurisdiction. The City's argument that section 3-53(c)(4) precludes an innocent owner defense must therefore be rejected.

48. The City has made a prima facie case under section 4-53 of the Ordinance. GPD officers made 15 arrests for underage drinking incidents at The Bank during the third quarter of 2012, and there were deferred prosecutions or adjudications in all 15 cases. The question becomes whether The Bank has established its innocent owner defense.

49. As to the standard to be applied, the undersigned agrees with and adopts the analysis provided by ALJ Barbara J. Staros in Fubar v. City of Gainesville, Case No. 12-3649 (DOAH Mar. 14, 2013):

37. Courts have applied a reasonable diligence standard in alcoholic beverage licensure cases involving the sale of alcohol to underage persons. See Pic N' Save Cent. Fla., Inc. v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245 (Fla. 1st DCA 1992). The undersigned is well aware that the instant case does not involve licensure. However, in light of the language prohibiting the innocent owner defense contained in the Ordinance being stricken by the Grog court, and the restrictions imposed by the Ordinance on the licensee, the reasonable diligence standard discussed in Pic N' Save is, if not controlling, instructive.

50. The undersigned would only add that the "restrictions imposed by the Ordinance on the licensee" can be severe. The Bank is only a first offender, but the Ordinance provides for underage prohibition orders of progressively longer duration for subsequent offenses, and the possibility of civil penalties of \$500 per offense.

51. The preponderance of the evidence established that The Bank carefully hires and trains its doormen to check the photo IDs of persons seeking entrance to the bar. The doormen are trained to ask for more than one ID if they suspect a patron is under 21. The Bank has cameras trained on the door. The Bank tests its doormen by sending "mystery shoppers" to attempt unlawful entry, and has fired doormen for admitting underage patrons without properly checking their IDs. The Bank assigns a group of doormen to roam the bar looking for underage persons in possession of alcoholic beverages. The Bank requires that persons 21 and older wear wristbands, and takes steps to ensure that the wristbands cannot be switched, tampered with, or duplicated. Mr. Clark and his employees have attended responsible hospitality vendor programs offered by GPD.

52. It is concluded that the security steps taken by The Bank establish that it was reasonably diligent in checking the identification of persons seeking to enter its premises, in checking to ensure that only persons of legal age wore wristbands

allowing them to purchase alcoholic beverages, and in inspecting its premises for underage persons in possession of alcoholic beverages.

RECOMMENDATION

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

RECOMMENDED that the Underage Prohibition Order issued to The Bank be vacated.

DONE AND ENTERED this 28th day of March, 2013, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
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 28th day of March, 2013.

ENDNOTES

^{1/} The evidence established that GPD has access to law enforcement databases such as DAVID and FCIC/NCIC that allow them to obtain photos and other identifying information not available to the general public, including The Bank. However, these databases do not provide a distinct advantage to the officer at the time he or she detains a suspected underage drinker in a bar

because the officer does not have access to them while on foot patrol in the downtown district.

^{2/} Out of the total of fifteen cases, there were only two in which the testifying officer had a present memory of the circumstances of the arrest. In all of the other cases, the officers relied on their contemporaneously-filed arrest reports to refresh their memories of the arrests.

^{3/} The Bank correctly notes that there was no evidence to indicate that a layman could or should have been able to spot a fake Ohio driver's license based on its unusual thickness.

^{4/} These hearsay statements are not sufficient in themselves to support a finding of fact under the strictures of section 120.57(1)(c), Florida Statutes.

^{5/} Mr. Clark noted that there can be challenges involved in matching a driver's license photo and information to the person presenting the license because the license may be several years old. Items such as hair color and style may change dramatically even in a younger person over the course of a few years.

^{6/} Mr. Clark testified that The Bank used to confiscate the fakes, but he was informed by GPD that the identification cards belong to the patrons and must be returned.

^{7/} The City emphasized the desirability of using handheld electronic driver's license scanners when an ID is presented to a doorman. However, it failed to explain how the use of such a device would have prevented any of the instances of underage drinking complained of in this proceeding. Testimony at the hearing established that the scanners merely confirm that the information on the magnetic strip of a driver's license is the same as that printed on the front of the license. When an underage patron uses the actual driver's license of another person, the scanner will simply confirm that the license is valid. The scanner cannot tell whether the valid driver's license belongs to the person who is presenting it at the door of the bar.

^{8/} Section 562.11(1)(a) makes it unlawful "for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21

years of age to consume such beverages on the licensed premises." Section 562.11(1)(c) provides:

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

Florida Administrative Code Rule 61A-3.052 provides:

(1) A licensee who has been cited in an administrative action for violations of sections 562.11(1)(a) and 859.06, Florida Statutes, shall have a defense to any administrative action if the underage person falsely evidenced that he was of legal age to purchase the alcoholic beverage, cigarettes, or tobacco products or consume the alcoholic beverage product and the appearance of the

person was such that an ordinarily prudent person would believe the person is of legal age to purchase or consume those products, and if the licensee attempted to verify the person's age by checking one of the following forms of identification with respect to the person:

(a) A driver's license, issued by any government agency, domestic or foreign, provided it includes a photograph;

(b) Identification cards issued by any state, provided it includes a photograph;

(c) Passports;

(d) An identification card issued by any branch of the United States military which shows the customer is currently serving in the United States Armed Services or is a family member of a person currently serving in the United States Armed Services.

(2) It is the responsibility of each licensee/permittee to provide and train their employees so that they will recognize or be able to compare an identification card presented by a customer with a facsimile of the legitimate identification card. The division shall advise any licensee who requests information about identification source materials where they can be purchased to assist in their training programs to determine if an identification card is genuine.

(3) No other type of identification will be recognized as mitigation if a licensee or a licensee's employee sells, gives, or serves alcoholic beverages, cigarettes, or tobacco products to an underage person.

Section 4-55(a) of the Ordinance provides that, in addition to the underage prohibition order, the provisions of the Ordinance may be enforced by civil citation, which could result in a penalty of \$500 per violation and/or 60 days imprisonment. Section 4-55(b) (2) of the Ordinance makes the following legislative finding in support of the penalty provision: "Admission of persons under the age of 21 to an alcoholic beverage establishment that has, by its actions, demonstrated an inability to reasonably prevent underage consumption on its premises presents a serious threat to the public health, safety, or welfare of the youth of our community and the citizenry at large."

COPIES FURNISHED:

Lee C. Libby, Esquire
City of Gainesville
Suite 425
200 East University Avenue
Gainesville, Florida 32601

Gary S. Edinger, Esquire
Gary S. Edinger and Associates, P.A.
305 Northeast 1st Street
Gainesville, Florida 32601

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.