

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.)
_____)

ADDENDUM TO RECOMMENDED ORDER

On March 29, 2013, a Recommended Order was entered in this case. On April 16, 2013, the City of Gainesville filed an Agency Remand of Recommended Order, pursuant to section 4-53(c)(7), Gainesville Code of Ordinances. Section 4-53(c)(7) provides:

The hearing officer's recommended order shall consist of findings of fact and conclusions of law and recommended action. The hearing officer shall transmit the recommended order to the city manager and the owner or agent of the alcoholic beverage establishment. The owner or agent shall have ten days from the date of the hearing officer's order to submit written exceptions to the hearing officer's recommended order. The city manager shall review such order and any written exceptions by the owner or agent and may set forth any deficiencies he/she finds with respect to the order. Said deficiencies shall be limited to determinations that the findings were not based upon competent, substantial evidence, or that the proceedings on which the findings were based did not comply with the essential requirements of law. In reviewing such recommended order, the city manager shall not

have the power to receive or consider additional evidence and shall not have the power to reject or modify the findings of fact or conclusions of law contained in the recommended order. The city manager may remand the recommended order along with the delineated deficiencies back to the hearing officer for consideration of the deficiencies. The hearing officer shall address the deficiencies in an addendum to the recommended order. The city manager shall then either:

- a. Adopt the recommended order and addendum, if applicable, in its entirety; or
- b. Adopt the findings of fact and conclusions of law in the recommended order and addendum, if applicable, and accept, reject or modify the recommended action.

The action of the city manager shall be the final administrative action.
(Emphasis Added.)

In the Agency Remand, the City Manager accepted the findings of fact in the Recommended Order as based on competent substantial evidence. However, the City Manager went on to find that "the proceedings on which the findings were based did not comply with the essential requirements of law." Specifically, the City Manager found as follows:

The hearing officer made a series of findings of fact as to the efforts of the Petitioner to deter underage drinking in its establishment; however, there is no "innocent owner" or "best efforts" defense in the ordinance. As referenced by the hearing officer, the circuit court's order in Grog House v. City of Gainesville, Case No. 01-2009-CA-1691, directed the City to strike the

last sentence of section 4-53(c)(4) which reads:

(4) 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.

However, the removal of such language from the ordinance did not affirmatively establish "innocent owner" or "best efforts" as criteria for overturning the prohibition order. Absent that language, the ordinance still provides that only "[i]f the hearing officer finds the criteria of paragraph (5) above [§ 4-53(c)(5)] have not been met, then the hearing officer shall prepare a recommended order to rescind the underage prohibition."

The hearing officer has erroneously engrafted a statutory defense to a statutory violation onto the City's ordinance. The City neither provided nor intended for same to apply to the City's ordinance.

The City Manager acknowledges that Grog House, the controlling precedent of this jurisdiction, ordered that the last sentence of section 4-53(c)(4) be stricken. However, the City Manager disagrees that the court's order restored the "innocent owner" defense to the ordinance, despite the Grog House court's statement that one reason for striking the sentence was that it conflicted with section 562.11(1)(c), Florida Statutes, which expressly provides for the innocent owner defense.

The City Manager's disagreement is plainly a rejection of a conclusion of law contained in the Recommended Order. Section 4-

53(c)(7) provides that the City Manager "shall not have the power to reject or modify . . . conclusions of law contained in the Recommended Order." The City Manager attempts to finesse this prohibition by characterizing the disputed conclusion of law as failing to "comply with the essential requirements of law." The City Manager misapprehends the meaning and application of that phrase.

The concept of a failure to comply with the essential requirements of law has its origins in the common law writ of certiorari. See Sylvia H. Walbolt and Leah A. Sevi, The "Essential Requirements of the Law"-- When Are They Violated?, 85 Fla. B.J. No. 3, 21 (Mar. 2011). The decisions make it clear that a grant of certiorari requires "an illegal or irregular act or proceeding," not a mere error in the application of law to fact. Haines City Cmty. Devel. v. Heggs, 658 So. 2d 523, 525 (Fla. 1995). There must be some egregious procedural error, such as the denial of a statutorily guaranteed right to subpoena witnesses, Lee v. Dep't of High. Saf. & Motor Veh., 4 So. 3d 754 (Fla. 1st DCA 2009), or a gross substantive error, such as "the entire absence of essential evidence with resulting material injury," Newman v. State, 174 So. 2d 479, 481 (Fla. 2d DCA 1965). In State v. Smith, 118 So. 2d 792, 795 (Fla. 1st DCA 1960), the court explained the concept as follows:

Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void.

Even if it were accepted that the Recommended Order misstated the law, the instant proceeding would not rise to the level of a failure to observe the essential requirements of law. The City Manager merely disputes the Recommended Order's conclusion of law that Grog House constitutes binding precedent and requires this tribunal to permit an alcoholic beverage establishment served with an Underage Prohibition Order to mount an innocent owner defense.

The ordinance does not allow the City Manager to reject a conclusion of law. Even if it did, the City Manager's reasoning is faulty. He acknowledges that Grog House ordered stricken the last sentence of section 4-53(c)(4), but disregards the court's reason for striking that sentence. To accept the City Manager's position would amount to a nullification of the circuit court's order. The City Manager may believe he has the authority to ignore the clear import of the circuit court's order. The undersigned does not share that belief.

Based on the foregoing consideration of the deficiencies identified by the City Manager in the Agency Remand, the undersigned declines to amend the findings of fact, conclusions

of law, or the recommendation of the Recommended Order entered in this case on March 29, 2013.

DONE AND ENTERED this 25th day of April, 2013, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2013.

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.