

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SPANNK,

Petitioner,

vs.

Case No. 13-0822

CITY OF GAINESVILLE,

Respondent.

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RECOMMENDED ORDER

This case is before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings, on the parties' Joint Motion for Summary Final Order, filed on May 20, 2013, and granted by order dated May 21, 2013, in which the parties requested that a recommended order be entered based on their stipulations of fact and evidentiary submissions, in lieu of a final hearing.

APPEARANCES

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For Respondent: Lee C. Libby, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether the City of Gainesville ("City") properly issued an Underage Prohibition Order to Petitioner, Spannk, pursuant to Section 4-53, Gainesville Code of Ordinances.

PRELIMINARY STATEMENT

On February 21, 2013, the City served Daniel J. Robinson, owner and operator of Spannk, with an Underage Prohibition Order, dated February 12, 2013, that ordered Spannk 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 March 4, 2013, Spannk timely requested an administrative hearing to contest the issuance of the Underage Prohibition Order. On March 8, 2013, 2012, the City referred the case to the Division of Administrative Hearings ("DOAH").

The case was scheduled for hearing on May 30, 2013. On May 20, 2013, the parties filed a Joint Motion for Summary Final Order, which was granted on May 21, 2013. The parties made certain factual stipulations and each party submitted a set of stipulated exhibits.

Spannk's Exhibits 1 through 5 are hereby admitted into evidence. These exhibits include the sworn witness statements of Mr. Robinson, Spannk doorman Sean O'Brien, and Spannk

security manager Paul John Zurich, as well as a copy of Spannk's door policy and the originals of 13 false or fraudulent identification cards that had been confiscated by Spannk employees from underage patrons who had attempted to use them to gain admittance to Spannk.

The City's Exhibit 1 and composite Exhibit 2 are hereby admitted into evidence. These include a copy of the executed and served Underage Prohibition Order and copies of the redacted notices to appear and deferred prosecution/disposition forms for 18 underage individuals found in possession of alcoholic beverages in Spannk by officers of the Gainesville Police Department ("GPD").

The parties filed their Proposed Recommended Orders on June 3, 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. Spannk is an alcoholic beverage establishment as defined in section 4-51 of the Ordinance and is located within the city limits of the City. Spannk's address is 15 Southwest 2nd Street, 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 parties have made the following stipulations of fact, which are hereby accepted:

1. The parties stipulate that the Occupancy Load for Spannk is greater than 201 persons, thereby requiring a showing of ten (10) or more underage drinking incidents.

2. Spannk stipulates that based upon the certified copies of the Notices to Appear and individual court dispositions, including Deferred Prosecution Agreements and/or Judgments and Sentence to be offered by the Respondent, that twelve (12) "underage drinking incidents" as defined in section 4-51, Code of Ordinances, did occur in Spannk during the 4th quarter of 2012.

3. Spannk was served with an Underage Prohibition Order on February 21, 2013, which was entered by Russ Blackburn, City Manager, on February 12, 2013, in accordance with the procedures set forth in section 4-53, Gainesville Code of Ordinances.

4. The City followed all of the procedural requirements set forth in section 4-53, Gainesville Code of Ordinances.

5. Danny Robinson has been the owner and operator of Spannk since it opened in 2008.

6. In order to eliminate the occurrence of underage drinking incidents, Spannk has instituted the following policies and procedures:

a. Maintains a strict identification policy, which includes:

i. Requesting identification from every customer entering Spannk, in the form of a driver's license, ID card from the DMV, passport, or military ID.

- ii. Requesting a second form of identification when an out-of-state license is presented.
  - iii. Questioning patrons who appear younger than 21 or who raise suspicion about their birthdays, addresses, and Zodiac signs.
- b. Maintains a strict wristband policy, which includes:
- i. Using blue wristbands from Domino's pizza to indicate that patrons are at least 21 years old.
  - ii. Using yellow wristbands to indicate that patrons are under the age of 21, or alternatively not giving wristbands to underage patrons and ensuring that the staff knows "No band = no drink."
  - iii. Ensuring that, when door staff places wristbands on entering patrons, such bands are tight enough so that they cannot be easily removed.
- c. Maintains a strict entry/re-entry policy, which includes:
- i. Questioning patrons entering Spannk who already possess wristbands, and ensuring that they are the wristbands used by Spannk.
  - ii. Prohibiting any patron from bringing into Spannk any type of cup, bottle, or can and requiring all outside drinks to be consumed prior to entering Spannk.
  - iii. Prohibiting under-age patrons who have left Spannk from re-entering the premises.
  - iv. Checking any large purse brought into Spannk by any patron, and prohibiting backpacks from being brought inside Spannk.
- d. Provides comprehensive training to all Spannk staff, which includes:

- i. Gainesville Police Department Responsible Vender Programs.
- ii. On-the-job training of new employees by older, more experienced staff.
- e. Consistently monitors Spannk premises to prevent underage drinking by:
  - i. Requiring staff to "roam" the indoor premises to ensure that patrons with alcoholic beverages are wearing wristbands.
  - ii. Requiring staff to check for signs of patrons tampering with or removing wristbands.
  - iii. Requiring staff to periodically check Spannk bathrooms to ensure that underage patrons are not consuming alcohol.
- f. Maintains a strict removal policy in the rare event that a patron fails to comply with Spannk policies or engages in underage drinking by:
  - i. Removing any person of age who gives a drink to an underage patron, and removing the underage patron.
  - ii. Removing any patron who has snuck an outside beverage into Spannk.
- g. Ensures diligence and effective communication among staff members while patrons are on the premises by:
  - i. Requiring front and back-door staff to communicate with each other to ensure that they are aware of the occupancy number.
  - ii. Requiring a staff member who leaves his assigned position to use the restroom during his/her shift to communicate this to the rest of the staff.

iii. Prohibiting staff from visiting with friends during work hours.

iv. Asking staff to communicate to police if any problems with patrons arise during work hours.

7. On February 21, 2013, the City served Spannk with an Underage Prohibition Order (the "Order"). The Order, dated February 12, 2013, was based on 11 underage drinking incidents that occurred at Spannk during the fourth quarter of 2012. Subsequent to the issuance of the Order, an additional underage drinking incident arose. Spannk was given timely notice of this additional incident on May 7, 2013, and it became part of this case.

8. In its exhibits, the City included documentation for six underage drinking incidents at Spannk other than those to which the parties stipulated. Five of those six incidents occurred outside of the fourth quarter of 2012 and are therefore irrelevant to establishing a violation of section 4-53 of the Ordinance. The sixth additional incident has not been considered because the City did not establish that Spannk was given sufficient notice of the City's intended reliance on it.

9. The stipulated exhibits demonstrated that the City secured deferred prosecutions in 10 of the 12 arrests that GPD officers made for underage drinking incidents at Spannk during the fourth quarter of 2012. One of the arrests resulted in a



pre-trial intervention agreement because a post-arrest search of the defendant's purse revealed that she was in possession of a controlled substance. The twelfth arrest resulted in a plea of nolo contendere and the court's withholding adjudication and placing the defendant on six months' probation.

10. Of the 12 arrests made in Spannk during the fourth quarter of 2012, five 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 a blue "over 21" wristband that allowed the purchase of alcoholic beverages in Spannk. Persons under 21 were allowed into the bar, given a yellow "under 21" wristband, and not served alcoholic beverages.

11. Three of the five instances of false ID involved the presentation of valid IDs that belonged to other persons who were over the age of 21. In one of those three instances, the suspect presented the doorman with his older brother's ID. None of the arrest reports indicates whether or not the arresting GPD officer believed the photo on the ID resembled the suspect. No other evidence was presented as to whether the suspects resembled the photos on the IDs they presented to the Spannk doorman.

12. In two of the five instances of false ID, the underage patrons presented the doorman with forged IDs that indicated

they were over 21 and obtained blue wristbands. Neither of the arrest reports expressly states that the suspect appeared to be under 21, but the fact that the officer saw cause to investigate allows for the inference that the suspects did not appear to be of legal drinking age.

13. In each of these five instances, the suspect had been given a blue wristband by the doorman. The arresting officer observed each of the five in possession of an alcoholic beverage. Three of the five told the arresting officer that they had bought drinks from the bar. One of the suspects gave the arresting officer no indication of how she got the alcoholic beverage she was holding. One of the forged ID suspects told the arresting officer that someone else bought the drink he was holding, but that he had earlier bought drinks for his friends because he was wearing a blue wristband and they were not.

14. One of the 12 arrests made in Spannk during the fourth quarter of 2012 involved a patron who told the arresting officer that she had shown the doorman her real ID, which indicated she had just turned 20, but was given a blue wristband anyway. This patron told the arresting officer that she had bought her drink at the bar, and that she had smuggled a bottle of vodka into the bar.

15. Two of the 12 arrests involved underage patrons who were wearing yellow wristbands but were seen holding alcoholic

beverages. One of these patrons told the arresting officer that he entered the bar using his real ID, and that his underage friend had handed him the drink when he saw the officer approaching. The second patron who was wearing a yellow wristband and holding a beer told the arresting officer that she had entered the bar using her own ID and had smuggled the beer into the bar in her purse.

16. The remaining four arrests involved idiosyncratic details. One patron told the arresting officer that she worked at Beef O'Brady's, which used wristbands similar to those used by Spannk, and that she brought a blue wristband into the bar with her and put it on after obtaining admission to Spannk using her own ID and receiving a yellow wristband. She purchased an alcoholic beverage at the bar in Spannk.

17. Another patron told the arresting officer that she used her own ID to get into the bar and received a yellow wristband. She went into the bathroom and found a green wristband. She put it on and was able to purchase a drink at the bar despite the fact that Spannk does not use green wristbands.

18. One of the patrons told the arresting officer she didn't know how the blue band made it to her wrist and did not know whether the beverage she was holding had alcohol in it. The arrest report does not expressly state the officer's

findings as to the alcoholic content of the beverage.

19. Finally, a GPD officer saw a patron who was wearing a blue wristband and holding a drink but appeared to be under 21. The patron refused to provide identification to the officer, who arrested her. At the police station, the patron was found to be in possession of a controlled substance (Adderall). This was the arrest that resulted in a pre-trial intervention agreement. This was also the only arrest in which the arresting officer expressly stated that the suspect appeared to be younger than 21; however, as stated above, the officers' investigations of the various patrons permit the inference that the officers did not believe that the patrons looked to be of drinking age.

20. The arrest reports indicate a variety of suspicious behaviors cited by the arresting officers as grounds for suspicion. In some cases, the patron placed the drink on the bar or on a table when he or she saw the GPD officer approaching. In two cases, the patron handed the drink to a friend. Three patrons simply dropped their drinks when they saw the officer. Two of the patrons attempted to conceal their drinks from the officers.

21. None of the arrest reports states that the GPD officer observed an underage person obtaining an alcoholic beverage from an employee of Spannk. There was no indication of how long any of the underage persons had been in possession of the alcoholic

beverages. There was no evidence that any employee of Spannk knew that underage patrons were drinking alcohol and failed to act on that knowledge.

22. According to the arrest reports, six of the twelve patrons who were arrested told the arresting officers that they had purchased drinks at the bar. This number included four persons who had obtained blue wristbands under false pretenses, one who brought her own blue wristband into the bar, and one who somehow purchased a drink while wearing a green wristband.

23. The owner of Spannk, Danny Robinson, filed a witness affidavit that stated as follows:

I have been in the bar business for 16 years in Gainesville and before that I have worked in the industry in Washington, D.C., Portland, Oregon and St. Thomas for a total of 27 years. It's pretty safe to say I have extensive experience. A partner and I started Speakeasy in 1997. I worked as the bartender and trained staff. We would attend GPD training classes provided to spot fake IDs and deal with intoxicated people. We would also attend the Fire Safety courses put on by the Fire Marshall. These are the years of training we would pass on to our employees in the capacity of the Door Staff. The responsible vendor class for bartending. Teaching everyone the rules and correct procedures for working in the bar business and what we expected of them representing our establishment. I only hire door staff with experience and a positive attitude with people-- generally older. I do not allow students to work the door. I feel like there is too much temptation to let fellow students in to drink underage. My staff consists of ex-military, firefighters,

professionals with day jobs. For example, two hold jobs with the government. One works for TSA and the second one for the VA. These men are all responsible, mature people that I feel very good about having at the front checking ID's and roaming throughout the establishment looking for infractions. We employ a strict door policy at both Spannk and Speakeasy to avoid any trouble. Only accepting valid driver's licenses, DMV ID card, military ID and passports. We do not accept foreign ID's and foreign passports. We don't know enough about them to spot a fake. I have trained my employees to question people if the picture doesn't look right and thoroughly examine the ID presented to them. If any questions pop up about it they quiz the person and ask for a second form of ID. We have collected quite a few fake ID's and real ones not belonging to the person using it. In the past Lt. John Parrish from ABT has stopped by and collected many of them.

Create a safer environment for people. We had that open communication with the downtown unit for years. The last year or longer the faces have changed and the communication has been very limited. If someone has been arrested with fake ID or passing a drink back and forth between an underage and a person of age, we do not know what the offense is and without this communication we can't educate our staff to be on the lookout even more than they already are for these actions. We patrol inside of the club checking for correct bands and are always on the lookout for kids trying to share a drink. If underage drinkers are caught doing so they are removed immediately from the premises and if the person of age provides someone with a drink they are both removed. We show that offender to the front door people so they can't come back in and wristbands removed. Fake ID's are becoming increasingly more complex with the age of computers these

days. But we still manage to catch them. I honestly feel we do a very good job at keeping the underage people from drinking.

I am at the bars working every night and pass my years of experience on to all my employees on what to look for. We have caught kids sneaking by getting their friends drinks. We, just like the police on the street, have an obligation to look out for people committing crimes inside the bar. But people will break these laws even knowing the consequences. We cannot [be] everywhere at all times, but we do cover the space and roam throughout all night looking out for people drinking underage.

24. Paul John Zurich, Spannk's security manager, does the hiring and firing of all security personnel and has attended multiple GPD responsible vendor educational programs. In his affidavit, Mr. Zurich testified that in doubtful situations, Spannk requires patrons to produce two forms of ID. The doormen check the IDs for marks indicating they are fakes: the ID has no hologram; the ID bends and shows wrinkles; or the dates on the ID "don't add up." If a patron's age seems questionable, the security person will ask the patron to state his Zodiac sign, or his address, or the height given on the ID. The doorman will also ask the patron to provide a signature to compare to the one on the ID card. Mr. Zurich testified that he employs a spotter inside the bar to check for illegal activity, and he requires all staff persons to take turns roaming the premises to observe the activity of the patrons.

25. Sean O'Brien works as a doorman at Spannk on Saturday nights. Mr. O'Brien's full-time job is with the Transportation Security Administration ("TSA") at Gainesville Regional Airport. In his witness affidavit, Mr. O'Brien testified that the TSA has specifically trained him in methods of checking for false or fraudulent IDs. Mr. O'Brien stated that he denies entry to persons when he concludes they are presenting false identification, and he denies entry to any person who does not present identification regardless of that person's apparent age. He removes underage persons who are caught in the bar with alcoholic beverages. Mr. O'Brien affirmed that employees are constantly scanning the bar looking for underage persons who are sneaking drinks.

#### CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57, and 120.65(7), Fla. Stat. (2013).

27. 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.

28. 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. Spannk's aggregate occupancy load exceeds 201, and the evidence established that 10 or more underage drinking incidents occurred at Spannk during the fourth quarter of 2012.

29. 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).

30. The Ordinance was challenged as facially unconstitutional in Grog House, Inc. v. City of Gainesville, Florida, 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.

31. 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.<sup>1/</sup> 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 section 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.

32. 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.

33. 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.

34. 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 Spannk nor any employee of Spannk is charged with any such offense.

35. 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 apprehended by the police. In this way, the Ordinance is clearly more analogous to section 562.11 and its express innocent owner defense.

36. 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.

37. The City has made a prima facie case under section 4-53 of the Ordinance. GPD officers made 12 arrests for underage

drinking incidents at Spannk during the fourth quarter of 2012, and there were deferred prosecutions, adjudications, or pre-trial intervention agreements in all 12 cases. The question becomes whether Spannk has established its innocent owner defense.

38. 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.

39. The undersigned would only add that the "restrictions imposed by the Ordinance on the licensee" can be severe. Spannk 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.

40. Because the City takes the position that the innocent owner defense is unavailable under the Ordinance, it did not mount a vigorous attack on Spannk's presentation of the steps it takes to ensure compliance with underage drinking laws. Without speculating on the success such an attack might have had, the undersigned does note that Spannk's procedures seem less stringent and its defenses slightly more porous than those described by the alcoholic beverage establishment in Clark DP Investments Inc., d/b/a The Bank v. City of Gainesville, Case No. 12-3370 (DOAH Dec. 11, 2012), a case previously heard by the undersigned involving the Ordinance. For example, rather than use specially purchased plastic wristbands that are rotated every few weeks to ensure that patrons cannot duplicate them, Spannk obtains its blue wristbands from Domino's pizza. This raises the obvious question whether any and all Domino's employees are able to sneak blue wristbands into Spannk and purchase liquor whether or not they are 21. One Spannk patron who worked at Beef O'Brady's told police that she used a wristband from her place of work to buy drinks in Spannk. There were also the odd situations in which one patron claimed that she showed the doorman her actual ID, which indicated she was only 20 years old, and was given a blue wristband, and another patron told police that she managed to buy beer in Spannk with a green wristband she found in the bathroom. Despite Spannk's

policy of checking large purses, one underage female patron told police that she managed to sneak a bottle of vodka into the bar, and another told police that she had smuggled in the can of beer she was holding.

41. Nonetheless, the preponderance of the stipulated evidence established that Spannk has developed and followed a comprehensive door policy in which it hires and trains its doormen to check the photo IDs of persons seeking entrance to the bar and directs its personnel to roam the bar looking for underage persons in possession of alcoholic beverages. The doormen are trained to ask for more than one ID if they suspect a patron is under 21, and they will inquire even further if they remain in doubt as to the patron's age. Spannk employs older professionals to work as doormen and specifically excludes students from that position. Spannk's employees have attended multiple responsible vendor programs offered by GPD.

42. It is concluded that the security steps taken by Spannk establish that it was reasonably diligent, if not perfect, in checking the identification of persons seeking to enter its premises, in checking to ensure that only persons of legal age wore the color-coded 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 Spannk be vacated.

DONE AND ENTERED this 27th day of August, 2013, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of August, 2013.

ENDNOTE

<sup>1/</sup> 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 therefor, 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 section 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:

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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.