City ordinance prohibiting minors in bars

Number: INFORMAL

Date: September 25, 2002

Mr. James D. Palermo
Tampa City Attorney
315 East Kennedy Boulevard, 5th Floor
Tampa, Florida 33602

Dear Mr. Palermo:

You ask whether the State Beverage Law preempts the City of Tampa from adopting an ordinance that prohibits anyone under the age of twenty-one from entering an establishment which serves alcoholic beverages and which is zoned, licensed or operated primarily as a bar. Attorney General Butterworth has asked me to respond to your letter.

Florida's Beverage Law is contained in Chapters 561 through 568, of the Florida Statutes. The Florida Legislature, however, has specifically empowered local governments to regulate certain specific aspects of the business of alcoholic beverage sales. Municipalities and counties are authorized to regulate the location of liquor establishments, the hours the establishments may stay open, and the sanitary conditions of these establishments. As provided in section 562.45(2), Florida Statutes,

"(a) Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the county or corporate limits of such municipality. . . .

(b) Nothing in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed under the Beverage Law to sell alcoholic beverages for consumption on the premises, or any bottle club licensed under s. 561.14, which is located within such county or municipality."

Thus, the Beverage Law provides that nothing contained within its terms is to be construed to preclude a county or municipality from enacting ordinances regulating the hours and location of places of business, and prescribing sanitary regulations for licensees. In addition, counties and municipalities may enact ordinances regulating the type of entertainment and conduct permitted in a licensed establishment.

The statute further provides, however, that counties and municipalities may not enact ordinances regulating or prohibiting activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law. Section 562.45(2)(c), Florida Statutes, provides:

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

While the enumeration of the areas of local regulation in section 562.45, Florida Statutes, might be considered to prohibit local regulation in areas other than those specified, several courts have indicated that local regulation outside those areas enumerated in the statute are not precluded in the absence of an express preemption in the Beverage Law.[1]

For example, in *Nelson v. State*,[2] the Florida Supreme Court construed similar language as not limiting municipal regulation to these three areas of subject matter. In the face of a preemption argument, the *Nelson* Court upheld an ordinance prohibiting the employment of females to serve liquor, although the ordinance was subsequently voided on other grounds.[3]

Subsequently, in *City of Daytona Beach v. Del Percio*,[4] the Supreme Court stated that the Florida Constitution and the statutes imbue a municipality with the state's full police powers,[5] including those under the twenty-first amendment, except those powers expressly preempted. Thus, the Court upheld the municipal ordinance prohibiting partial female nudity in establishments dealing in alcoholic beverages.

The above cases generally involved ordinances prohibiting behavior concurrent with the sale of beverages for consumption on the premises of the licensees. In addition, the ordinances upheld in those cases were approved because they were construed to be aimed at ensuring "the discipline and good order of persons while in establishments selling alcoholic beverages."[6] However, where the ordinance in question is not aimed at controlling customers' behavior but is clearly an attempt to prevent a state-licensed vendor from selling alcoholic beverages, the courts have been less likely to uphold the validity of the ordinance.[7]

In light of the above cases, this office cannot conclude that the state Beverage Law generally preempts this area of regulation by the city. Moreover, this office has been informed that at least one municipality has adopted a similar ordinance. The City of Fort Lauderdale has adopted an ordinance which prohibits persons under the age of twenty-one from entering or remaining in any alcoholic beverage establishment, as that term is defined in the ordinance, or to be permitted to do so by the owners, managers, employees or independent contractors of alcoholic beverages, except as provided therein. The ordinance contains a number of exceptions for employees of the establishment, persons accompanied by either of their parents, bona fide restaurants, members of the military or armed forces on active duty. In addition, the ordinance contains an exception for those times when the establishment is not serving or selling alcoholic beverages to the public provided that before anyone under the age of twenty-one is admitted, all alcoholic beverages previously served have been consumed and removed from customer access and the

establishment's entire inventory of alcoholic beverages has been secured from public access.

However, as you note, section 562.13(1), Florida Statutes, provides that it is unlawful for any vendor licensed under the Beverage Law to employ a person under the age of eighteen years except as provided therein. In addition, section 562.48, Florida Statutes, prohibits any person operating any dance hall in connection with the operation of any place of business where any alcoholic beverage is sold to knowingly permit or allow any person under the age of eighteen years to patronize, visit, or loiter in any such dance hall or place of business, unless such minor is attended by one or both of his or her parents or by his or her natural guardian. Moreover, as noted above, section 562.45(2)(c), Florida Statutes, requires that a local government, when enacting ordinances designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state.

While these statutory provisions clearly relate, at least in part, to the area of conduct that the city proposes to regulate, they do not expressly preempt the area from regulation by local government.[8] Municipal ordinances, however, are inferior to laws of the state and may not conflict with any controlling provision of a statute. As the Florida Supreme Court stated in *Rinzler v. Carson*,[9] "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." Although a municipality and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law.[10]

The above statutes do not appear to expressly authorize persons eighteen to twenty-one years of age to be employed in an establishment that serves alcoholic beverages or to visit a dance hall operated in connection with an establishment providing alcoholic beverages; rather the statutes are directed toward prohibiting those younger than eighteen from participating in those activities.

In light of the above, however, the city may wish to seek legislative or judicial clarification on this issue. The city may also wish to discuss this matter with those other jurisdictions, such as the City of Fort Lauderdale, which have passed similar ordinances to determine what challenges they may have encountered.

I trust that the above informal advisory comments may be of some assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] *See, e.g.,* s. 563.02(1)(a), Fla. Stat. ("Vendors holding such off-premises sales licenses shall

not be subject to zoning by municipal and county authorities").

[2] 26 So. 2d 60 (Fla. 1946).

[3] *See Brown v. Foley*, 29 So. 2d 870 (Fla. 1947). *Cf., Board of County Commissioners of Lee County v. Dexterhouse,* 348 So. 2d 916 (Fla. 2d DCA 1977), *affirmed sub nom., Martin v. Board of County Commissioners*, 364 So. 2d 449 (Fla. 1978), *appeal dismissed,* 441 U.S. 918 (1979) (ordinance prohibiting display of female breasts in establishment licensed to sell alcoholic beverages for consumption on the premises was directed at discipline and good order of persons while in such establishments and did not interfere or conflict with state's regulation of the sale of alcoholic beverages and was not void on theory that the state had preempted the right to regulate the field); *State v. Redner*, 425 So. 2d 174, 175 (Fla. 2d DCA 1983) (ordinance requiring registration of employees in establishment serving alcoholic beverages did not conflict with state beverage laws in that city was not restricting circumstances under which alcohol could be sold, nor did it purport to regulate who might be employed to sell alcoholic beverages); *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2d DCA 1992) (upholding county ordinance which required all establishments which sold alcoholic beverages to post a sign warning of the health hazards associated with the consumption of alcohol).

[4] 476 So. 2d 197, 201 (Fla. 1985).

[5] *See* Art. VIII, s. 2, Fla. Const., and s. 166.021, Fla. Stat.

[6] *See, e.g., Board of County Commissioners of Lee County v. Dexterhouse,* 348 So. 2d at 919; *Nelson v. State*, 26 So. 2d at 60.

[7] *City of Miami Beach v. Amoco Oil Company*, 510 So. 2d 609 (Fla. 3d DCA 1987).

[8] *Cf. Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2d DCA 1992) (county health warning sign requirement for establishments serving alcohol was not preempted by state law absent definite express preemption provision pertaining to consumer warning signs nor is the legislative scheme relating to sale of alcoholic beverages so pervasive as to impliedly preempt the ordinance).

[9] 262 So. 2d 661, 668 (Fla. 1972).

[10] *See, e.g., Thomas v. State*, 614 So. 2d 468 (Fla. 1993)*; City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066 (Fla. 3d DCA 1981), *review denied*, 408 So. 2d 1092 (Fla. 1981).