



OFFICE OF THE CITY ATTORNEY
RAFAEL A. PAZ, CITY ATTORNEY

COMMISSION MEMORANDUM

To: Mayor Dan Gelber
Members of the City Commission
Alina T. Hudak, City Manager

cc: Rafael Granado, City Clerk

From: Rafael A. Paz, City Attorney

A handwritten signature in blue ink, appearing to be "Rafael A. Paz", written over the "From:" line.

Date: February 23, 2022

Subject: AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 6 OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, ENTITLED "ALCOHOLIC BEVERAGES," BY AMENDING ARTICLE I, ENTITLED "IN GENERAL," BY AMENDING SECTION 6-3 THEREOF, ENTITLED "HOURS OF SALE/VIOLATIONS," TO PROHIBIT THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES FOR ON-PREMISES CONSUMPTION BETWEEN THE HOURS OF 2:00 A.M. AND 8:00 A.M. EACH NIGHT AT ALCOHOLIC BEVERAGE ESTABLISHMENTS LOCATED SOUTH OF 16TH STREET, ON SPECIFIED DATES DURING THE SPRING BREAK HIGH IMPACT PERIOD IN MARCH OF 2022; AND PROVIDING FOR A SUNSET AND AUTOMATIC REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

Pursuant to the request of Commissioner Alex J. Fernandez, the attached Ordinance has been placed on the February 23, 2022 City Commission agenda for Second Reading/Public Hearing.

I. Summary of the Proposed Ordinance

The Ordinance amends Section 6-3 of the City Code, entitled "Hours of sale/violations," to provide that, on specified dates during the Spring Break High Impact Period in March of 2022, the sale and service of alcoholic beverages for on-premises consumption at certain alcoholic beverage establishments shall terminate at 2:00 a.m. each night.

At First Reading on February 9, 2022, the City Commission made two amendments: (1) limit the geographic area to alcoholic beverage establishments located south of 16th Street, and (2) reduce the duration of the rollback to the period of time between March 7, 2022 and March 21, 2022. The Commission adopted the Ordinance, as amended, and scheduled Second Reading/Public Hearing on February 23, 2022.

II. Background

In recent years, the City has seen an increasingly large number of visitors during the period when high schools, colleges, and universities across the country recess for Spring Break, which occurs primarily during the month of March. In response, the City has implemented legislative and police measures in order to address the public safety and quality of life issues that arise from late-night drinking, particularly during the Spring Break period. The high volume of visitors who patronize alcoholic beverage establishments during Spring Break generates increased calls for service, and places demands on the City's police, fire, code compliance, and sanitation resources. A summary of recent legislation is as follows:

- On February 26, 2020, the City Commission adopted Ordinance No. 2020-4333, prohibiting the sale/service of alcoholic beverages after 3:00 a.m. each night, between March 13, 2020, and March 19, 2020. The Ordinance, which sunsetted automatically on March 19, 2020, applied to the Washington Avenue, Collins Avenue, and Ocean Drive corridors, as well as Española Way.
- On May 12, 2021, the City Commission adopted Ordinance No. 2021-4413, which modified the hours for the sale and on-premises consumption of alcoholic beverages in the MXE district south of 16th Street. Specifically, the Ordinance changed the termination time for the sale and on-premises consumption of alcohol from 5:00 a.m. to 2:00 a.m. each night. The provisions of Ordinance No. 2021-4413 automatically sunsetted on December 8, 2021.¹

In addition to the above legislative measures, on March 20, 2021, the City Manager issued a Declaration of a State of Emergency (E.O. 2021-01-SB), in response to larger-than-expected Spring Break crowds. Pursuant to the State of Emergency, the City Manager imposed a number of emergency measures, including an 8:00 p.m. curfew in the area bounded by 5th Street on the south, 16th Street on the north, Pennsylvania Avenue on the west, and Ocean Drive on the east.

Following Spring Break 2021, and pursuant to Resolution No. 2021-31824, the City Commission approved the following non-binding, straw ballot question, in order to consult the City's voters on whether further restrictions on alcohol hours of sale should be adopted:

Non-Binding, Straw Ballot Question: Citywide - Changing Alcoholic Beverage Establishments Sales/Consumption Termination Time

City law allows, subject to exceptions, the sale and consumption of alcoholic beverages at Alcoholic Beverage Establishments throughout the City, from 8:00 a.m. until 5:00 a.m. the following day.

Would you support changing this 5:00 a.m. termination time to 2:00 a.m. throughout the City, with specific locations and related restrictions and exceptions, to be determined by City Commission by Ordinance?

¹ On May 17, 2021, Clevelander Ocean, LP (the "Clevelander") filed a complaint in Circuit Court which, among other things, challenged the alcohol rollback set forth in Ordinance No. 2021-4413. On June 21, 2021, the Circuit Court granted, in part, Clevelander's Motion for Temporary Injunction, and enjoined the City from enforcing the Ordinance. The City promptly appealed, and the case remains pending before the Third District Court of Appeal.

On November 2, 2021, the straw ballot measure was approved by 56.52% (7,302) of the City's voters.

III. City's Legal Authority to Establish Alcohol Hours of Sale

The City Commission has express statutory authority to establish alcohol hours of sale by Ordinance.

Section 562.14, Florida Statutes, provides as follows:

(1) Except as otherwise provided by county or municipal ordinance, no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place holding a license under the division between the hours of midnight and 7 a.m. of the following day. . . .

Under State Law, the termination time for the sale and service of alcoholic beverages for on-premises consumption is 12:00 midnight, **except as otherwise provided by local Ordinance**. The City has, within its express authority to set alcohol hours of sale that are different from State Law, adopted a 5:00 a.m. termination time for the sale of alcoholic beverages for on-premises consumption. This 5:00 a.m. termination time is set forth in Chapter 6 of the City Code.²

Commissioner Fernandez's proposed regulation has been drafted as a narrow exception to the 5:00 a.m. termination time in Section 6-3(a), which governs the sale and service of alcoholic beverages for on-premises consumption.

In addition to the City's express statutory authority, relevant case law supports the City Commission's legislative discretion to modify alcohol hours of sale:

- Florida courts have determined that it is within the police power for a municipality to change the hours of sale of alcoholic beverages, because municipalities have the statutory authority under Section 562.14, Florida Statutes, to restrict the sale of alcohol. *Village of North Palm Beach v. S & H Foster's, Inc.*, 80 So. 3d 433 (Fla. 4th DCA 2012).
- In *State ex rel. Floyd v. Noel*, 124 Fla. 852 (Fla. 1936), the Florida Supreme Court recognized that "[i]t is so well settled that no citation of authority is required to support the statement that a municipality exercising the powers inherent in municipal corporations may reasonably regulate the sale of intoxicating liquors and in providing such reasonable regulations may prohibit the sale of such liquors within certain hours, and also may prohibit the sale of liquors within certain zones."

² The City Commission has also, by Ordinance, adopted exceptions to the 5:00 termination time, for sidewalk cafes (sale must terminate at 1:30 a.m. and consumption by 2:00 a.m.), during major event weekends and holidays (sale and service at eligible establishments may continue until 7:00 a.m., subject to conditions), and in specified geographic areas (2:00 a.m. in the South of Fifth neighborhood, and along Alton Road, West Avenue, and 41st Street).

- The Florida Attorney General has opined that a municipality may regulate (1) the hours of sale, (2) locations in which alcoholic beverages may be sold, and (3) the sanitary conditions under which alcoholic beverages may be dispensed or served to the public. Op. Att’y Gen. Fla. 59-73 (1959).
- In fact, the Florida Attorney General has opined that different hours may be provided for different areas in a local ordinance, provided there is reasonable relation to the health, safety, and morals of the community. Op. Att’y Gen. Fla. 50-288 (1950).
- In *Funtana Village, Inc. v. City of Panama Beach*, 2016 WL 375102 (N.D. Fla. January 28, 2016), the U.S. District Court for the Northern District of Florida denied a motion for injunctive relief, on First Amendment grounds, against enforcement of a Panama City Beach ordinance restricting alcohol hours of sale during the month of March.
- Florida courts have consistently held that alcoholic beverage establishments are not entitled to grandfather status as to hours of sale for alcoholic beverages. See *S & H Foster’s, Inc.; Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861 (Fla. 3d DCA 1978).
- Injunctive relief is not available against the enforcement of a municipal ordinance regulating the time at which alcoholic beverages may be sold, because municipalities have the statutory authority to set times for sale of alcoholic beverages. *Id.*; *Playpen S., Inc. v. City of Oakland Park*, 396 So. 2d 830 (Fla. 4th DCA 1981).
- Florida courts have also ruled that hours of operation are not a property right. *S. Daytona Rests., Inc. v. City of S. Daytona*, 186 So. 2d 78 (Fla. 1st DCA 1966).

This Ordinance is also not a “land development regulation” within the meaning of Chapter 163, Florida Statutes (the Community Planning Act). Unlike LDR amendments, this Ordinance **does not** regulate the development of land, and **does not** regulate where alcoholic beverage establishments may be located. Rather, consistent with the City’s express authority under Sec. 562.14, Florida Statutes, the Ordinance merely changes the hours when alcohol may be sold or consumed. Accordingly, the Ordinance has been drafted as an amendment to Chapter 6.

Because zoning case law does not apply to hours of sale for alcoholic beverages, courts have held that businesses are not vested (or “grandfathered”) as to hours. “Grandfather” status, or “vesting,” is a creation of the zoning ordinance. See *S & H Foster’s, Inc.*; see also *Other Place of Miami, Inc.*

This Ordinance applies uniformly to alcoholic beverage establishments located south of 16th Street, roughly overlapping with the area of the City known as South Beach, without regard to a property’s zoning designation. In fact, the affected area would include properties in at least 17 zoning districts.

IV. Conclusion

The attached Ordinance has been drafted narrowly, and within the City’s express authority to regulate alcohol hours, to address a period of time and geographic area of the City that have, in recent years, generated the most calls for service. If the Ordinance is adopted at Second Reading,

the sale and service of alcoholic beverages for on-premises consumption will terminate at 2:00 a.m. at alcoholic beverage establishments located south of 16th Street, between March 7 and March 21, 2022. The Ordinance further provides that the City Commission shall, prior to May 31, 2022, review the effectiveness of the Ordinance, and determine whether to extend the duration of the Ordinance for another year, or for such other period of time as determined by the City Commission.