

MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Dan Gelber and Members of the City Commission

FROM: Alina T. Hudak, City Manager
Rafael A. Paz, City Attorney



DATE: March 9, 2022

SUBJECT: **SOUTH OF FIFTH ALCOHOLIC BEVERAGE ESTABLISHMENT REGULATIONS**

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 142, "ZONING DISTRICTS AND REGULATIONS," ARTICLE II, "DISTRICT REGULATIONS," DIVISION 18, "PS PERFORMANCE STANDARD DISTRICT," SECTION 142-693, "PERMITTED USES," TO ELIMINATE EXISTING EXCEPTIONS TO THE 2:00 A.M. CLOSING TIME FOR ALCOHOLIC BEVERAGE ESTABLISHMENTS LOCATED SOUTH OF FIFTH STREET; AND PROVIDING FOR REPEALER, CODIFICATION, SEVERABILITY, AND AN EFFECTIVE DATE.

ADMINISTRATION RECOMMENDATION

The Administration recommends that the City Commission approve the subject Ordinance at First Reading, as drafted, and, if the Commission elects to refer the Chapter 118 amendments to the Planning Board, schedule a Second Reading / Public Hearing for May 25, 2022.

HISTORY

On January 20, 2022, the City Commission discussed the proposed ordinance referral and continued it to the February 9, 2022 meeting (Item C4 AH). The City Commission directed the Administration to pre-notice the item for the February 22, 2022 Planning Board meeting. Commissioner Mark Samuelian is the sponsor of the proposed ordinance.

On February 9, 2022, the City Commission referred the ordinance to the Planning Board for review and recommendation (Item R9 F). The City Commission also requested that the Planning Board provide any additional recommendations that the Board may have regarding the subject matter.

BACKGROUND

On November 9, 2016, the City Commission adopted Ordinance No. 2016-4054, amending the hours of operation, locations, and use restrictions for alcoholic beverage establishments located south of Fifth Street. The Ordinance, in pertinent part, provided

that alcoholic beverage establishments shall cease operations no later than 2:00 a.m. each night. The City Commission included an applicability clause, exempting from the 2:00 a.m. termination time any alcoholic beverage establishment with a valid business tax receipt (BTR) or land use board approval issued prior to June 28, 2016.

On November 2, 2021, pursuant to Resolution No. 2021-31824, the following ballot question was submitted to the City's voters:

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?

The ballot question was approved by 56.52% of the voters.

On January 12, 2022, a Special City Commission meeting was held to discuss the results of the straw ballot referendum and consider different options to implement the will of the voters.

On February 9, 2022, and following a lengthy discussion, the City Commission advanced a number of ordinances addressing alcohol hours of sale. This particular Ordinance is limited to alcoholic beverage establishments in the South of Fifth neighborhood.

ANALYSIS

The South of Fifth neighborhood is composed of a mix of multifamily residential buildings of varying scales with commercial districts interspersed throughout. Within this neighborhood, residential uses are often immediately adjacent to commercial districts.

The City Code permits restaurant and bar uses within the PS Performance Standard zoning districts, which, absent mitigation and appropriate regulation, could be incompatible with adjacent residential uses in the South of Fifth neighborhood. Entertainment is prohibited in the South of Fifth neighborhood, though several non-conforming establishments remain in operation. Permitted uses, however, do include large restaurants, stand-alone bars, as well as outdoor food and beverage service, where alcoholic beverages are sold and consumed. The sale and consumption of alcoholic beverages during the early morning hours can be disruptive to residents, as related impacts generate undesirable noise, and results in increased calls for service to the Police and Fire Departments. These impacts particularly burden the residents of the South of Fifth neighborhood that are adjacent to such establishments.

As summarized above, in order to mitigate the impacts of late-night drinking on neighboring residential properties, on November 9, 2016, the City adopted Ordinance No. 2016-4054, which limited the hours of operation of alcoholic beverage establishments in PS Performance Standard Districts located south of 5th Street (See map attached to this

report), with certain exceptions, to 2:00 A.M. Prior to the adoption of Ordinance No. 2016-4054, alcoholic beverage establishments were permitted to remain open until 5:00 A.M.

As part of Ordinance No. 2016-4054, the City Commission, at its discretion, and as a legislative matter, exempted from the 2:00 a.m. termination time any alcoholic beverage establishment with a valid business tax receipt that was in application status or issued prior to June 28, 2016; or an establishment that obtained approval for an alcoholic beverage establishment from a land use board, and which land use board order was active and had not expired, prior to June 28, 2016. Any such exempt alcoholic beverage establishments are, instead, subject to the general rule in Section 6-3(a)(3) of the City Code, which permits the sale and service of alcoholic beverages at alcoholic beverage establishments until 5:00 a.m. each night.

Due to continuing, negative quality-of-life impacts of pre-existing alcoholic beverage establishments, it is now recommended that the exemption be removed so that the sale and service of alcohol for on-premises consumption at all alcoholic beverage establishments in the South of Fifth neighborhood would be required to terminate by 2:00 A.M. Specifically, the proposed Ordinance amends the regulations for PS Districts located south of Fifth Street, in order to repeal the existing exemption from the 2:00 A.M. termination time for alcoholic beverage establishments with a BTR or land use board order issued prior to June 28, 2016. The Ordinance also clarifies that the 2:00 A.M. restriction is for sale and consumption of alcoholic beverages and repeals other exemptions to limitations that were adopted in Ordinance No. 2016-4054.

Florida law grants municipalities broad authority to regulate the sale of alcoholic beverages. Specifically, Section 562.14, Florida Statutes, expressly authorizes municipalities to establish hours of sale for alcoholic beverages by ordinance:

562.14 Regulating the time for sale of alcoholic and intoxicating beverages; prohibiting use of licensed premises.—

(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.¹

¹ 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).

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."
- 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).
- 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).
- Courts have denied injunctive relief 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).
- The vast majority of 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).

Notwithstanding the City's statutory authority to regulate alcohol hours, and the substantial body of case law that businesses are not vested as to hours, the Circuit Court enjoined the City from enforcing two separate alcohol hours ordinances in the case of *Cleveland Ocean LP v. City of Miami Beach* (Fla. 11th Jud. Cir. Ct. Case No. 2021-11642-CA-01).

On June 21, 2021, the Circuit Court enjoined the City from enforcing Ordinance No. 2021-4413 (terminating alcohol sales and consumption at 2:00 a.m. in the MXE district for a defined period of time). The City appealed and, on March 2, 2022, the Third DCA declined

to rule on the part of the appeal relating to the alcohol rollback, finding that the issue was moot, since the ordinance expired on its own terms in December 2021.

On March 2, 2022, the Circuit Court entered an order enjoining the City from enforcing Ordinance No. 2022-4472 (terminating alcohol sales and consumption at 2:00 a.m. in South Beach during the Spring Break 2022 High Impact Period). The City promptly appealed to the Third District Court of Appeal (Third DCA), triggering an automatic stay of the injunction. On March 3rd, the Circuit Court granted Clevelander's emergency motion to vacate the automatic stay pending appeal. Also on March 3rd, the Third DCA denied the City's emergency motion to expedite the appeal. On March 4th, the Third DCA denied the City's request for review of the Circuit Court order vacating the automatic stay. Given these rulings, and the briefing schedule on appeal, the Third DCA will not rule on the merits prior to the end of the two-week period.

However, the fundamental premise of the Circuit Court's rulings—that the Ordinances should have been adopted as amendments to the Land Development Regulations—is not implicated here, because this proposed Ordinance is an amendment to the Land Development Regulations, requiring review by the Planning Board, two readings and a public hearing before the City Commission, and approval on a 5/7ths vote of the City Commission.

In addition, although Florida courts have for decades consistently held that businesses are not vested (or "grandfathered") as to alcohol hours of service, and that municipalities have the authority to adopt legislation changing alcohol hours (including as to existing establishments), we anticipate that adoption of this proposed Ordinance, even on a 5/7ths vote following all of the procedural protections for a Land Development Regulation, will be challenged, and that the issue of vested rights will need to be litigated.

To this end, at least one establishment in the South of Fifth neighborhood has already filed a lawsuit (challenging the Spring Break Ordinance), and that case is before the same Circuit Court judge presiding over the Clevelander litigation. Accordingly, it is possible that any challenge to this Ordinance, and the issue of vested rights as to alcohol hours of service, will also be heard by the same Court that has twice rejected City's efforts to regulate alcohol hours, and has twice expressed an expansive view of property rights, notwithstanding the established case law with respect to alcohol hours of sale.

if the proposed Ordinance is adopted on first reading, based on the litigation risks involved, the Administration and City Attorney's Office recommend as follows:

1. If there is support for eliminating the exceptions to the 2:00 a.m. termination time in the South of Fifth neighborhood, we recommend that the Commission adopt the Ordinance **as drafted, without exceptions**. If the Commission would like to explore a more limited repealer, such as the amendment proposed by the Planning Board (below), we would ask for direction to engage in further study, to determine whether the record would support the amendment.
2. Prior to final adoption of the proposed Ordinance, we recommend that the City Commission refer to the Planning Board and consider adoption of clarifying amendments to Section 118-168 (equitable estoppel) and Ch. 118, Article IX (Nonconformances) of the City's Land Development Regulations, in an abundance

of caution, consistent with existing case law that establishments are not entitled to vesting as to alcohol hours.

3. We also recommend that all legislation with respect to alcohol hours travel together and be considered for final approval at the same time. Adoption of all alcohol legislation in a comprehensive manner will also benefit the City with respect to its future litigation efforts, as it would avoid further piecemeal challenges and the specter of multiple rulings which over time may complicate the City Commission's broader effort to establish a new City-wide framework, consistent with the will of the City's voters, plainly expressed through the results of the November 2, 2021 voter referendum.

PLANNING BOARD REVIEW

The Planning Board held a public hearing on February 22, 2022 and transmitted the Ordinance to the City Commission with a favorable recommendation by a vote of 7-0. The Planning Board also recommended that existing low-impact establishments be permitted to continue to serve alcohol until 5:00 a.m. if they comply with the following criteria:

1. The establishment has an occupant content of less than 100 people.
2. The establishment does not have an entertainment license nor contain a dance hall.
3. The establishment had a valid BTR prior to the date established in the existing regulations.
4. There shall be no outdoor alcohol service or consumption past 2:00 a.m.
5. The establishment shall be subject to any applicable future guidelines and requirements that may be adopted for alcohol consumption beyond 2:00 a.m.

APPLICATION FEE WAIVER

The subject amendment was referred on a comprehensive, citywide basis, and not on behalf of a private applicant or third party. Pursuant to section 118-162(c) of the Land Development Regulations of the City Code, amendments to the City Code require the payment of the applicable fees in section 118-7 and Appendix A. These fees may be waived by a five-sevenths (5/7ths) vote of the City Commission, based upon one or more of the following circumstances:

1. The City Manager determines, in writing, that the proposed amendment is necessary due to a change in federal or state law, and/or to implement best practices in urban planning;
2. Upon written recommendation of the city manager acknowledging a documented financial hardship of a property owner(s) or developer(s); and/or
3. If requested, in writing, by a non-profit organization, neighborhood association, or homeowner's association for property owned by any such organization or association, so long as the request demonstrates that a public purpose is achieved by enacting the applicable amendment.

The City Manager has determined that the proposed amendment is necessary to implement best practices in urban planning.

CONCLUSION

The Administration recommends the following:

1. In accordance with section 118-162(c) of the City Code, the City Commission waive the applicable application fees based upon the legislation implementing best practices in urban planning.
2. The City Commission approve the subject Ordinance at First Reading, as drafted, and, if the Commission elects to refer the Chapter 118 amendments to the Planning Board, schedule a Second Reading / Public Hearing for May 25, 2022.

ATH/ETC/TRM