

**CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #07-015**

TO: Honorable Marc D. Santoff, Commissioner District 2
FROM: Jorge L. Fernandez, City Attorney
DATE: October 25, 2007
RE: Hours of Operation for Bars and Nightclubs with a 4COP License.
Legal Opinion - Matter No.: 07-2049

You have requested a Legal Opinion on the following question:

**WHETHER THE CITY CAN REGULATE THE HOURS OF
SALE OF ALCOHOLIC BEVERAGES WHERE THE
ESTABLISHMENT HOLDS A STATE LICENSE;
WHETHER THE CITY MAY CHANGE THE CLOSING
TIME FOR ESTABLISHMENTS THAT DISPENSE
ALCOHOLIC BEVERAGES; AND WHETHER THE CITY
MAY REGULATE THE HOURS OF A BUSINESS IN
ADDITION TO THE HOURS OF SALES OF ALCOHOLIC
BEVERAGES.**

For the reasons set forth below, your questions are answered in the affirmative.

ANALYSIS

In the first part of your question, you have asked whether the City of Miami may set a time [for establishments possessing a 4COP license from the State of Florida] to close that is more restrictive than the time provided by State.¹ An earlier version of the question indicated that "[s]tate statute sets forth the rules for a 4 COP liquor license, and it is our understanding that by state statute that a 4 COP license holder is able to sell liquor until 5:00 a.m." The earlier question was whether the City can "locally impose a time earlier than 5:00 a.m. to stop the sale of liquor by a 4 COP license holder (for example 3:00 a.m.)."

¹ The term "4COP" signifies a type of license that is issued by the State of Florida for the sale and dispensing of alcoholic beverages. "COP" refers to "consumption of the premises" and means that patrons may imbibe or consume the alcoholic beverage at the establishment that dispensed it. The number signifies the type of alcoholic beverage that may be dispensed and means that the establishment. The number "4" indicates that beer, wine, malt and vinous and liquor may be dispensed. This is the highest (and most difficult to obtain) level of license for consumption on the premises.

The Florida Legislature has in fact set a time when the sale and dispensing of alcoholic beverages must cease, but it is not 5:00 a.m. Section 562.14 Florida Statutes provides, "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."² *Emphasis added.* In actuality, the Florida Legislature has granted the authority to counties and municipalities to set the hours of sales of alcoholic beverages beyond their minimum standard. What that means is if the City of Miami did not provide a later closing time by ordinance, a bar would have been able to dispense alcoholic beverages only until midnight.

Thus the City may indeed set a time for establishments possessing a 4COP license from the State of Florida to close that is more restrictive than the time provided by State. In practice the City has not made the time for sales more restrictive, but has gone the other way. The City has provided less restrictive hours of operation by ordinance. For example, §4-3(4) of the City Code provides that:

"The hours of sale for alcoholic beverages by the following establishments are weekdays, including Saturday, from 7:00 a.m. to 3:00 a.m. on the following day; Sunday, from 12:00 noon to 3:00 a.m. on the following day:

- a. Bars;
- b. Bottle clubs;
- c. Restaurants;
- d. Hotel, motel and apartments, with fewer than 100 guestrooms;
- e. Private clubs;
- f. Any of the establishments (above) in a retail or waterfront specialty center."

Thus, a bar or establishment holding a 4COP may continue to dispense alcoholic beverages until 3:00 a.m. in the City of Miami. Certain bars, however, may dispense alcohol beyond the 3:00 a.m. time limit. Bars that are considered to be "nightclubs;" "supper clubs" or are located in motels and apartments with 100 or more guestrooms or

² It appears that this statute would also prevent an establishment from giving away its alcoholic beverages to patrons for free in an effort to avoid the closing hours. The legislature could have merely proscribed the sale of alcoholic beverages during the enumerated times but instead chose to proscribe the sale, consumption, service and the permitting of the service or consumption of alcoholic beverages on the premises. The City Code seems to say the same thing but not as clearly. The City Code provides the definition for sale as follows: "*Sale and sell:* Any transfer of an alcoholic beverage for a consideration, any gift of an alcoholic beverage in connection with, or as a part of, a transfer of property other than an alcoholic beverage for a consideration, or the serving of an alcoholic beverage by a club licensed under the Florida statutes." *Section 4-2(a) Code of the City of Miami, Florida.*

located in a retail or waterfront specialty center (Cocowalk or Bayside) may dispense alcoholic beverages until 5:00 a.m.

Some districts in the City have no restrictions on hours of operation. Section 4-11 (i)(4) of the City Code provides as follows:

“(4) Hours of operation. The hours of operation for the sale of liquor shall be restricted for each Entertainment District as follows:

- a. Brickell Village district: liquor sales shall cease at 5:00 a.m.*
- b. Brickell Riverside district: liquor sales shall cease at 5:00 a.m.*
- c. Park West district shall have no restrictions on hours of operation.*
- d. Media Entertainment district: liquor sales shall cease at 5:00 a.m.*
- e. Overtown district: liquor sales shall cease at 5:00 a.m.”*

In the second part of your question you have asked whether the established hours of operation is a property right. It appears that the Florida courts have not considered the hours of operation to be a property right. Rather, the courts have treated the hours of operation as merely part of a regulatory scheme which may be changed pursuant to the legislative discretion of the municipality or county. While not exactly on point, the case *Playpen South, Inc. v. the City of Oakland Park*, 396 So.2d 830 (Fla. 4th DCA 1981) is very instructive. In *Playpen South* the City of Oakland Park enacted an ordinance which changed the closing time for all-night or show club establishments from 4:00 a.m. to 2:00 a.m. Playpen South filed for temporary injunctive relief from the ordinance alleging that the implementation of the ordinance would interrupt prime business time and would, therefore, significantly reduce the gross income of its business and cause irreparable injury. Playpen South sought to have the ordinance declared unconstitutional. They also sought an order prohibiting the City of Oakland Park from enforcing the ordinance. And in the alternative, Playpen South asked the court to compensate them for the inverse condemnation of their property (the loss of two extra hours of alcohol sales).

The Fourth District Court of Appeal upheld the trial court’s finding that Playpen South was unable to prove a clear legal right to the injunction and that the public interest would be best served by temporarily enjoining Oakland Park’s ordinance. It further found that “the Legislature has delegated to the City of Oakland Park the power to designate closing hours for night clubs selling liquor.” *Ibid* at 831.

Although the Fourth District did not hold that Playpen South had a property right in the two hours of business that it lost, it did hold that Playpen South failed to demonstrate a substantial likelihood of success on the merits.³

³ (See also *The Other Place of Miami, Inc. v. City of Hialeah Gardens* (Fla. 3d DCA 1977) where the Third District Court of Appeal found that an ordinance changing the closing hours of sale of alcoholic beverages from 3:00 a.m. to 1:00 a.m. was within the authority granted to Hialeah Gardens pursuant to §562.14, Fla.

A local government's ability to regulate the hours of sale for alcoholic beverages was also affirmed in *Silver Rose Entertainment, Inc. v. Clay County*, 646 So.2d 246 (Fla. 1st DCA 1994). In *Silver Rose*, Clay County enacted an ordinance that outlawed the sale of alcoholic beverages on "Christmas day and Christmas night." While the challenge was mainly on establishment of religion grounds, the Court firmly upheld the authority of Clay County to regulate the hours of sale. The Court held that "Clay County is authorized to: Establish and enforce regulations for the sake of alcoholic beverages in the unincorporated areas of the county pursuant to general law." The Court cited the provision of § 562.45(2)(a), Fla. Stat. which provides:

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...of any licensee under the Beverage Law within the county or corporate limits of such municipality.

Therefore, unless legislatively or judicially determined otherwise, it does not appear that the hours of operation are to be considered a property right. The hours of operation are merely regulations relating to the privilege to sell and dispense liquor. That power to regulate has been conferred to the counties and municipalities by the Florida Legislature pursuant to general law.

Finally, you have asked whether the City may force a closure of business and not just the termination of serving alcohol. There are many cases relating to the regulation of the hours of sales of alcoholic beverages. There are not, however, many cases that deal with the regulation of business hours for general businesses. A 1999 Law Review article succinctly outlines the regulation of business hours.

Regulation of the times during which businesses may remain open occurs frequently at the local level as a result of municipal governments' exercise of the police power widely delegated to them by the state. Thus, as a general rule, the validity of the regulation depends on the existence on some police-power purpose, or as one court noted, "the nature of the business must be such that the public health, morals, safety, or general welfare is, or might be, affected by such business being permitted to remain open or continue after certain hours." In the absence of such a purpose, courts will likely strike down an attempted restriction as "a

Stat. (1975).) (See also, *City of Pompano Beach v. Big Daddy's, Inc.*, 375 So.2d 281, Fla., 1979. We find nothing per se unreasonable about reducing the closing hours from 4 a. m. to 2 a. m., particularly when the legislature in section 562.14(1) [Fla. Stat.] has established a closing hour of midnight in the absence of a local ordinance. The reduction of closing hours not being per se unreasonable, the allegations are insufficient." (See also, *South Daytona Restaurants, Inc. v. City of South Daytona*, 186 So.2d 78, (Fla. 1st DCA 1966), Ordinance that changed final hour for sale of alcoholic beverages from 5 a.m. to 2 a.m. was a valid exercise of city's police power and city was acting within its legislative discretion in adopting the ordinance so that plaintiff was not entitled to injunction to restrain city from enforcing the ordinance.)

tyrannical interference" with the right of business operators to earn a living in the manner they choose. On the other hand, where a police-power purpose does exist, it can sometimes even justify exclusion of a business from certain areas of the city, or from the city altogether. Therefore a valid purpose can surely justify limiting the hours of the business's operation. 55 *WAUJUL* 41, *Washington University Journal of Urban and Contemporary Law, A TIME TO OPEN AND A TIME TO CLOSE--MUNICIPAL REGULATION OF BUSINESS HOURS*, Winter 1999.

The same Law Review article continues:

"The dangers of liquor may even justify a closing requirement for establishments selling soft drinks or other bottled goods, because the legislative body may reasonably fear that these goods are 'not as 'soft' as the unsophisticated may believe them to be.' An ordinance may thus validly require night-time closing of restaurants, and even of catering services, in order to prevent *sub rosa* sale of intoxicating drinks. Legislative bodies typically have very broad power over the regulation of liquor, and an exercise of such power through enactment of a closing restriction will generally be upheld unless there is a clear abuse of legislative discretion." *Ibid* at 56.

The Florida courts have issued a scant few opinions relating to the regulation of business hours. An old case on point is *Cowan v. City of St. Petersburg*, 149 Fla. 470, 6 So.2d 269, (Fla. 1942). In *Cowan*, the Florida Supreme Court held that "[w]e must hold that it is not beyond the power of a municipality to compel by ordinance the closing of places of business where the retail sales of intoxicating liquors, wines or beers are licensed and permitted during certain reasonable hours. The hours during which such places are required to be closed under the provisions of the ordinance here under consideration can not in the light of our opinions cited, supra, be held to be unreasonable."

Another old Florida case deals with the regulation of slot machines. The court first analogized the selling of alcohol to the running of a slot machine business. In *Curtis v. Hutchinson*, 125 Fla. 435, 170 So. 134, (Fla. 1936) the Florida Supreme Court held that "it follows that the power inherent in municipal corporations may be exercised to reasonably regulate the operation of slot machines within the municipality and in the exercise of this power it may prohibit the operation of such machines within certain hours or within certain zones, provided there is a reasonable basis for the adoption of the hours within which the operation is prohibited or the zones in which the machines may be operated; and provided further that the ordinance does not conflict with lawfully established state policies in this regard." *Id.* at 436. *Emphasis added.*

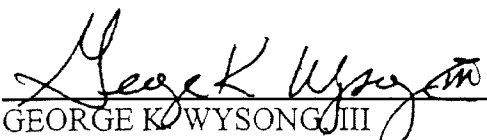
In *Levy v. Stone*, 97 Fla. 458, 121 So. 565 (Fla. 1929) the Florida Supreme Court held that a Deland ordinance prohibiting auction sales of certain goods after 6 p.m. was valid and not unreasonable interference with personal rights. However the Court indicated

that it was limiting its decision to the auction of jewelry and other expensive items. Later the Supreme Court struck down a City of Tallahassee regulation relating to all auctions generally. In *Perry Trading Co. v. City of Tallahassee*, 128 Fla. 424, 174 So. 854, (Fla. 1937), the Florida Supreme Court considered a case regarding the City of Tallahassee's regulations relating to the times that auctioneers could hold auctions. In striking down the regulations the Supreme Court held that "[t]hese requirements, we likewise consider to be unreasonable and in excess of the legitimate exercise of police power in that they make neither for the health, peace, morals, or convenience of the public, but on the other hand arbitrarily limit the right of the auctioneer..."

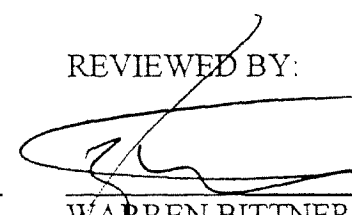
CONCLUSION

The City may indeed set a closing time for establishments, possessing a 4 COP License from the State of Florida, to close that is more restrictive than the time provided by the State. The power to regulate the hours of operation has been conferred to the counties and municipalities by the Florida Legislature pursuant to general law. Unless legislatively or judicially determined otherwise it does not appear that the hours of operation are to be considered a property right. Finally, the City may, upon a showing of a reasonable basis, require an establishment to close its business operations completely when the time for sales of alcoholic beverages has ended.

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cc: Honorable Mayor and Members of the City Commission
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