CITY OF TAMPA

Pam Iorio, Mayor

Office of the City Attorney

David L. Smith
City Attorney

September 12, 2006

Charlie Crist
Attorney General
Department of Legal Affairs
The Capitol PL-01
Tallahassee, Florida 32399-1050

Re: Request for Legal Opinion

Dear Attorney General Crist:

The City of Tampa respectfully requests an opinion on whether the City of Tampa may enact an ordinance which prohibits special pricing of alcoholic beverages for consumption on premises. Specifically, the City requests an opinion on whether such an ordinance is pre-empted by the State Beverage Law.

The City of Tampa has found that several establishments within the City that are licensed to sell alcoholic beverages for consumption on premises have undertaken promotional practices including special drink pricing. The City is concerned that such special drink pricing is being used to target people of college age, and encourages excessive and dangerous drinking. In order to address this issue, the City is considering adopting an ordinance which prohibits special pricing of alcoholic beverages for consumption on premises.

As explained in the attached memorandum of law, the City does not believe that the State Beverage Law preempts such an ordinance. However, the City respectfully requests the Opinion of the Attorney General on this issue.

Please let me know if I can supply any additional information.

Sincerely,

David L. Smith
City Attorney

K:\RMK\WETZONIN\Ltr to Attorney General re Advisory Opinion on drink specials.doc

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MEMORANDUM OF LAW

A municipal government can lawfully enact an ordinance regulating drink specials because this area is not preempted by state law.[1] A municipal government has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except, *inter alia*, "[a]ny subject expressly preempted to state or county government by the constitution or by general law." Fla. Stat. Sect. 166.021; Florida Constitution, Art. VIII, § 2(b).

The state's Beverage Law is found in Florida Statutes, Chapters 562, 563, 564, 565, 567, and 568. Florida Statutes, Section 562.45(2), provides, in relevant part, that:

> (2)(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** therefore, of any licensee under the Beverage Law within the county or corporate limits of such municipality. . . . . .
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> (2)(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.
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> (2)(c) 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. . . . . (emphasis added).

Although sections (2)(a) and (2)(b) are permissive for local governments, it is the prohibition of (2)(c) that governs according to the case law. That is, the list of permissive local regulations is not exhaustive. It is the area specifically addressed by the state statutory scheme that is dispositive.

In 1946, the Florida Supreme Court rejected the preemption argument and held that, despite the language of Fla. Stat. Sect. 562.45(2)(a), local governments are not limited in their regulation of the sale of alcoholic beverages to the hours of sale, location of the business and

[1] The ordinance must, as an exercise of the police power, be reasonable and bear some substantial relationship to the public health, peace, safety, morals, or welfare. Fla. AGO 83-67.

sanitary requirements. *Nelson v. State*, 26 So.2d 60, 61 (Fla. 1946). In *Nelson*, the City of Miami enacted an ordinance which prohibited females from serving liquor over a bar. *Id.* at 60. The Supreme Court analyzed statutory language similar to Fla. Stat. Sect. 562.45(2)(a). Although the challenged ordinance did not pertain to hours, location or sanitary requirements, the Supreme Court found no preemption. *Id.* at 61. Noting that the State Beverage Law did not regulate the employment of women, and that the manner of their employment did not affect the purpose of the Beverage Law, the Supreme Court held that the ordinance was not preempted by the State Beverage Law. *Id.* Specifically, the Court held that preemption would only **occur if the local regulation conflicted with an express provision** of the State Beverage Law. *Id.* ("[The city's power's to regulate] should not be stricken down, unless they run afoul of some provision of the State Beverage [Law].")

More recently, in *City of Miami Springs v. J.J.T, Inc.*, 437 So.2d 200 (Fla. 3rd DCA 1983), the Third District Court of Appeal upheld a municipal ordinance prohibiting a liquor licensee from serving liquor at the same time sexual performances were occurring on premises. In this case, the Third District held that if the ordinance was "one directed at the discipline and good order of persons while in establishments selling alcoholic beverages," the ordinance did not interfere or conflict with the State's power. The Third District held that the ordinance was not preempted by the State Beverage Law, even though ordinance was not limited to the regulation of hours, location or sanitary conditions. *Id.* at 205 (citing *Board of County Commissioners 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)).

That is, if an ordinance regulates the sale of alcoholic beverages or is directed at the discipline and good order of persons in establishments that sell alcoholic beverages, the ordinance is not pre-empted unless it affects or interferes with an express provision of the Beverage Law. *J.J.T., Inc.*, 437 So.2d at 205 (citing *Nelson*). In *J.J.T., Inc.*, the Third District affirmed that *Nelson* was still applicable, and stated that:

> In *Nelson,* the court held that a municipality's power over establishments selling alcoholic beverages was not limited, despite the language of the statute, to hours of operation, location of the business, and sanitary regulations, but instead extended to any regulation . . . which did not interfere with some provision of, or affect any purpose in, the Beverage Act. *Id.*

In *State v. Redner,* 425 So.2d 174 (Fla. 2d DCA 1983), the Second District Court of Appeal upheld a city ordinance that prohibited an employer from allowing an employee to work where alcoholic beverages are sold longer than forty-eight hours, without registering with the police department. The Second District Court of Appeal noted that, under *Nelson*, local government is not limited in its regulation of the sale of alcoholic beverages to hours, location and sanitary conditions. *Id.* at 175. Instead, the question before the court was **whether the ordinance directly conflicted** with a state law. *Id.* Finding no direct conflict, the Second District upheld the ordinance.

In 1985, the Florida Supreme Court again rejected the preemption argument, and upheld a ban on public nudity where alcoholic beverages are sold. *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985). The Supreme Court found that the Florida Constitution and Florida Statutes invest municipalities with the "state's full police powers, including those under the twenty-first amendment, except those powers *expressly* preempted." *Id.* at 201 (emphasis in original). Although the power to ban sales entirely is preempted to the counties by the local option provision of the Florida Constitution,[2] the Florida Supreme Court found that the "lesser power to ban the sale of liquor on premises where topless dancing occurs" was not preempted. *Id.* That is, municipalities are not preempted from regulating sales of alcoholic beverages, as long as there is not an express conflict with the state Beverage law and the regulation does not prohibit the sale of alcoholic beverages entirely.

More directly on point, in 1987, the Fourth Judicial Circuit Court specifically rejected the argument that the State Beverage Law preempted a municipal ordinance regulating drink specials. In that case, the City of Jacksonville had enacted a comprehensive regulation prohibiting drink specials. The city's bar and restaurant association, as well as a number of affected businesses, challenged the ordinance. The plaintiffs alleged, among other things, that the city was preempted from regulating drink specials. After briefing by both sides, the Circuit Court found that the regulation of drink specials was not preempted by the State Beverage Law.[3]

Even more recently, the Second District Court of Appeal recognized that local governments are not limited in their ability to regulate to only those areas expressly provided for in the Beverage Act. In *Hillsborough County v. Florida Restaurant Assn., Inc.*, 603 So.2d 587 (Fla. 2d DCA 1992), the Second District held that a county ordinance requiring health warning signs in establishments that serve alcohol was not preempted by the State Beverage Law. In that case, the restaurant association argued that the state law regulating alcohol manufacture, packaging, distributing and selling was so pervasive that it "completely occupie[d] the field," and therefore preempted local regulation unless expressly allowed. *Id.* at 591. The Second District stated:

> Under the standard for determining implied preemption in *Tribune Co. v. Cannella,* the legislative scheme must be so pervasive that it completely occupies the field, thereby requiring a finding that an ordinance which attempts to intrude upon that field is null and void. . . . The Association fails to recognize, however, that this scheme itself reserves spheres of regulation to junior legislative bodies. *See, e.g.,* § 561.14 (hours of operation in absence of county or municipal ordinance); § 562.45(2)(a) (local regulation of hours and location of operation. sanitary regulations); § 562.45(2)(b) (type of entertainment or conduct permitted in licensed premises); and, not least of all, *Art. VIII, § 5, Fla. Const.* (local option whether to allow sale of alcohol in the county at all). **Before the legislature in**

[2] Art. VIII, Sec. 5, Fla. Const.

[3] The Fourth Judicial Circuit Court did find that certain provisions were unenforceable because the city had failed to demonstrate a reasonable relationship between the regulation and the public health, safety, or welfare.

> **1987 specifically reserved to counties the right to regulate entertainment and conduct in licensed premises, this court had already held that local government acts are not specifically limited to those referenced by the Beverage Law.** *Id.* (citing to *Dexterhouse*)(emphasis added).

Finding no implied preemption, the Second District Court examined whether there was a "direct conflict with general law." *Id.* at 591. Finding none, the Second District Court upheld the ordinance. *Id.*

The most recent opinion of the Attorney General on the question of preemption of local government regulation of alcoholic beverages is consistent with the view that preemption occurs only when the legislature expressly addresses the subject. In Fla. AGO 2001-44, the city requested an opinion on whether it was preempted from revoking an occupational license for selling alcoholic beverages to underage persons. The State Beverage Law contains a regulation that "the license of a vendor qualified as a responsible vendor under this act may not be suspended or revoked for an employee's illegal sale or service of an alcoholic beverage to a person who is not of lawful drinking age." Fla. Stat. Sect. 561.706. The Attorney General, noting that Fla. Stat. Sect. 562.45(c) prohibits municipalities from enacting ordinances regulating or prohibiting activities or business transactions of licensees regulated by the Division of Alcoholic Beverages and Tobacco, found that such a local ordinance directly conflicted with the express provisions of Florida Statutes Section 561.706. Thus, because a regulation in the State Beverage Law "clearly cover[s] the area of conduct that the city proposed to regulate," the city was preempted from imposing additional penalties. *Id.*

Therefore, the State Beverage Law does not preempt a municipal government from enacting an ordinance regulating drink specials because this area is not addressed in state law. The ordinance must, however, be a valid exercise of the police power, be reasonable and bear some substantial relationship to the public health, peace, safety, morals, or welfare.