

## **Alcoholic Beverage Permitting in Florida: Focus on the City of Tampa**

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This article is to provide the reader with an overview of the general processes that local governments in Florida utilize to regulate the sale of alcohol under a state of Florida alcoholic beverage license. Although each jurisdiction has their own unique requirements, the majority adhere to the fundamental framework outlined in this brief article. This article will also examine the City of Tampa's unique, lengthy, and very expensive approval process to demonstrate the extreme measures that local governments will take to regulate the sale of alcohol, which in Tampa is more highly regulated than the sale of medical marijuana.

### Background

The Standard State Zoning Enabling Act of 1926, which was ultimately enacted in nearly every municipality in the nation, was developed by the U.S. Department of Commerce in the 1920's to assist in the delegation and creation of zoning powers from state to local governments, and it included promotion of "health and general welfare" as one goal of zoning. In 1926, in the famous Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) decision, the U.S. Supreme Court confirmed that cities and counties possessed the police power to regulate public and private land uses in furtherance of protecting the "health, safety, welfare, and morals" of the people of those jurisdictions.

Then fast forward to the 1980's, when community-based opposition surfaced with the goal of limiting the proliferation of retail alcohol outlets and to address the secondary effects of alcohol sales, such as public and domestic violence, group violence, drunk driving, loitering, prostitution, illegal drug sales, and the like, based on the public health research. Consequently, over the past 50 years, local governments have created a number of local ordinances using a variety of approaches to the regulation of alcohol and have had them battle tested in the courts. Such ordinances placed restrictions on new alcohol establishments, including, for example, limits on the number and concentration of such businesses in an area, limits on placement of outlets in proximity to each other and to schools or playgrounds, and restrictions on hours of service and the amount and nature of signage visible from the street.

### Alcoholic Beverage Approval Process

Florida local governments have actually been on the forefront of regulating alcoholic beverage sales and consumption through their land development or zoning codes. In order to sell alcohol in Florida, there are generally three requirements that must be met:

1. Permission from the local government – county, city or town
2. Permission to sell during certain specified hours unique to each jurisdiction (unless defaulting to state statute hours of operation)
3. A license from the State of Florida Division of Alcoholic Beverages and Tobacco

In Florida, the primary control of the sale of alcoholic beverages is exercised through a local governments' zoning code. Approval to sell is typically granted if the property is zoned commercial and meets certain distance separation requirements that are established to presumably ensure compatibility between uses and that no adverse impacts occur on surrounding areas resulting from the sale of alcohol. These separation requirements are typically in the range of 150 feet to 1,000 feet from residentially zoned or

institutional uses (such as schools, parks, day cares, and governmentally owned property), and the property is also a certain specified distance (often as far as 1,000 feet) from other establishments authorized by the local government to sell alcohol.

The public policies behind these separation requirements are twofold:

1. The greater distance provides more compatibility between alcoholic beverage sales and these community uses; and
2. That distance separation between alcoholic beverage businesses will prevent an overconcentration of businesses selling alcohol, which will minimize secondary effects on the community such as public drunkenness, violence, impacts to public safety, prostitution and illicit drug sales and other inappropriate conduct.

Although some local governments allow the sale of alcohol through an “over the counter” administrative approval process, the vast majority require an approval from the governing council, commission, planning board or hearing officer delegated authority to approve the sale of alcoholic beverages. These various processes used for review and approval generally require commercial zoning of the property, and a zoning special use permit, which is also known in some jurisdictions as a “conditional use” or “special exception.” Under Florida caselaw, a special use is presumed to be a lawfully permitted use and must be issued by the local government if the applicant meets all requirements set forth in the applicable codes. However, many codes have established processes that provide broad discretion to local governments to impose certain limitations on the permit to ensure that the sale is compatible with the surrounding area, such as regulating hours of operation for sale of alcohol, limiting lighting, outdoor music, identifying the location of parking areas and the like.

These special use permits are generally approved through an oftentimes tedious, lengthy and costly public hearing process. For example, the City of Tampa, Florida’s alcoholic beverage approval process, which was converted from a “wet zoning” to a special use permit in 2008, requires a \$2,163.50 application fee, along with the preparation of costly surveys, site plans, traffic studies, architectural elevations, identification of other alcoholic beverage establishments, institutional uses, and residential uses and their respective owners.

#### Florida Statutes

Florida’s Division of Alcoholic Beverages, through Section 562.14, Florida Statutes, limits the sale of alcoholic beverages to between 7:00 a.m. and midnight. However, Section 562.45(2)(a), Florida Statutes, delegates authority to local governments to control the hours of operation through enactment of a local ordinance, and they typically allow sales to occur until 3:00 a.m. The government may also regulate the type of entertainment and conduct that may occur at any business that is licensed by the Division. Consequently, local governments have significant authority to dictate where sales may occur, and for what period of time. Accordingly, you may see in the City of Tampa two bars in close proximity where one may sell to 3 a.m., while the other must cease sales at midnight because of a condition imposed by the local government in response to neighborhood concerns.

Furthermore, Section 562.45(2)(a), Florida Statutes, that applies to all local governments through state preemption, prohibits the sale of alcohol for a business (such as a bar) that allows for “on premises consumption” if the business is located within 500 feet of the real property of a private or public school. This separation requirement may, however, be waived by a local government if it is demonstrated that the sale of alcohol promotes the public health, safety, and welfare of the community. The state’s distance

waiver process must be approved through a public hearing process that allows neighbors, parent-teacher organizations, and other interested parties to participate and voice their objections.

#### City of Tampa “Wet Zoning” Process

The City of Tampa first enacted its wet zoning ordinance in 1945 which included distance waivers for institutional, community, and residential uses. It also required that the lawful sale of alcohol be consummated on the property every 30 days and if not, the City’s approval would “dry up” by operation of law, causing a new business to repeat the City’s approval process. Around that period, Tampa was obviously not an urbanized city, thus the concept of a convenience store or drive through were non-existent, so its distance separation requirements were not generally an impediment to establishing a business that sold alcohol. This process delegated significant authority to the Tampa City Council to determine compatibility.

Prior to 2008, the ability to sell alcohol was approved through what was called “wet zoning.” From a legal standpoint, it was more in the nature of a permit or license as a property for example, must first have commercial land zoning that allowed the sale of alcohol, and then receive another approval called “wet zoning.” The wet zoning application simply required a property survey or legal description and a \$350.00 filing fee. The entire process required about 3 months. This required two public hearings before the City Council, and the law did not allow Council to impose conditions on the sale of alcohol that could minimize or eliminate any impacts to adjacent properties. The City’s code prohibited the imposition of any conditions unless the applicant requested them on the record at the public hearing.

#### Post-2008 City of Tampa Special Use Process

The 2008 conversion changed the City of Tampa’s process from a wet zoning to a special use process, that provided City Council with the discretion to impose conditions on business operations and allowed for an administrative revocation process for either failing to sell a drink every 60 days or failing to adhere to conditions imposed on the special use approval, or violating other standards set forth in the code (i.e. allowing revocation if noise ordinance is violated or sale of alcohol to minors.) During discussions between Council and City staff, prior to adoption, the process was sold to the Tampa City Council by its staff as providing a defensible legal mechanism for revoking the right to sell alcohol. It was also described as being a much quicker, more efficient, and less costly process. However, after utilizing this process for seventeen years at this point, staff’s representations turned out to be incorrect.

Because the City of Tampa has now opted to characterize the sale of alcohol as a special use permit, the Florida Supreme Court’s decision in Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986) is controlling. In Irvine, a business owner petitioned for a zoning special exception (a/k/a special use, conditional use) to allow for the sale of beer and wine for consumption on the business premises. The application met all of the County’s zoning code requirements and staff recommended approval to the Planning Commission. The Commission denied the request because the applicant had failed to sustain the burden of proof showing that the granting of the exception would promote the public health, safety and welfare and it would not be compatible with the surrounding area. The applicant then filed suit, and the Court noted that the burden is on the applicant to demonstrate by competent substantial evidence that it meets all special use conditions in the ordinance and that a special exception or special use is a permitted use to which the applicant is entitled unless the zoning authority determines that the use would adversely affect the public interest. Once that burden is met, the burden then shifts to the local government to demonstrate with substantial competent evidence and made part of the record, that the exception did not meet the code’s standards and was in fact adverse to the public interest. Because there is a

presumption that a special use is a permitted use subject to meeting express conditions of the code, the burden on the applicant is much lighter than it would be if he sought a rezoning.

Accordingly, once the City of Tampa adopted the special use approach to allow the sale of alcohol, it was subject to Irvine's deferential treatment for special uses that they are clothed with a legal presumption of a permitted use, subject to meeting code standards. Notably, there are certain uses that may be approved administratively for alcoholic beverage sales, such as hotels, bowling alleys, and special restaurants. However, the majority of situations in the City of Tampa are processed as a Special Use Class 2. These uses are subject to distance separation requirements that are arguably impractical in an urban setting, such as 1,000 feet from residential uses and other approved alcoholic beverage permits. There are a few locations where the 1,000 foot requirement is reduced to 250 feet in high intensity urban areas called urban villages, business centers, or mixed use corridors.

In Tampa, if the alcoholic beverage special use permit should cause a change of use (i.e., conversion of an office building to a bar/restaurant), the new development must comply with all of the City's existing codes. This is a deterrent to redevelopment in certain areas of the City as many older buildings did not meet ADA requirements, landscaping, parking, access, retention, and other new requirements. The process also requires that two public hearings be held before the Tampa City Council and typically takes from 4 to 5 months. This estimated timeframe does not include the "ramp up" time to prepare the special use package, which requires surveys, site plans, attorneys, and the like, which can also require 2 to 3 months for preparation.

Not only must an alcoholic beverage application meet the code's special use standards pertaining to alcoholic beverages but must also meet the below required General Standards for special uses which pose a major roadblock to obtaining approval. These general special use standards are part of the applicant's burden, and are as follows:

Section 27-129. General Standards

- (a) Except as otherwise provided herein, the following general standards shall be met by all applicants for alcoholic beverage special use permits:
  - (1) The use will ensure the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted.
  - (2) The use, which is listed as a special use in the district in which it is proposed to be located, complies with all required regulations and standards unless greater or different regulations are contained in the individual standards for that special use.
  - (3) The use is compatible with contiguous and surrounding property or the use is a public necessity.
  - (4) The use is in conformity with the Tampa Comprehensive Plan.
  - (5) The use will not establish a precedent of or encourage more intensive or incompatible uses in the surrounding area.

It shall be the responsibility of the applicant to present evidence in the form of testimony, exhibits, documents, models, plans and the like to support the application for approval of a special use permit.

- (b) As appropriate to the nature of the special use permit involved and the particular circumstances of the case, the following considerations and standards shall apply generally, in addition to any other standards and requirements set forth concerning the class or kind of permit being considered.
- (1) *Ingress and egress.* Due consideration shall be given to adequacy of ingress and egress to the property and structure and uses thereon, with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or other emergency.
  - (2) *Off-street parking and loading.* Due consideration shall be given to off-street parking and loading facilities as related to adjacent streets, with particular reference to automotive and pedestrian safety and convenience, internal traffic flow and control, arrangement in relation to access in case of fire or other emergency, and screening and landscaping.
  - (3) *Refuse and service areas.* Due consideration shall be given to the location, scale, design and screening of refuse and service areas; to the manner in which refuse is to be stored; to the manner of refuse collection, deliveries, shipments or other service activities, in relation to the location and nature of uses on adjoining properties; and the location and character of adjoining public ways.
  - (4) *Lighting.* Due consideration shall be given to the number, size, character, location and orientation of proposed lighting for premises, with particular reference to traffic safety, glare, and compatibility and harmony with adjoining and nearby property and the character of the area.
  - (5) *Utilities.* Due consideration shall be given to utilities required, with particular reference to availability and capacity of systems, location of connections, and potentially adverse appearance on other adjoining and nearby property and the character of the area.
  - (6) *Drainage.* Due consideration shall be given to provision for drainage, with particular reference to effect on adjoining and nearby properties and on general drainage systems in the area.
  - (7) *Control of potentially adverse effects generally.* In addition to consideration of detailed elements indicated above, as appropriate to the particular class or kind of special use permit and the circumstances of the particular case, due consideration shall be given to potentially adverse effects generally on adjoining and nearby properties, the area, the neighborhood or the city, of the use or occupancy as proposed, or its location, construction, design, character, scale or manner of operation. Where such potentially adverse effects are found, consideration shall be given to special remedial measures appropriate in the particular circumstances of the case, including screening or buffering, landscaping, control of manner or hours of operation, alteration of proposed design or construction of buildings, relocation of proposed open space or alteration of use of such space, or such other measures as are required to assure that such potential adverse effects will be compatible and harmonious with other development in the area.

The business operator should also be aware of is that the City of Tampa's code states that the project subject to special use approval must be built out within 2 years, and that once the permit is activated by the initiating of sales of alcohol, the permit shall expire if the business associated with the permit has not made a sale for 120 days (to avoid this, administrative waivers can be sought). The permit will also expire if the special use ceases operation for 180 days.

### Conclusion

Maneuvering through the City of Tampa's or any local government's alcoholic beverage approval process can be a complicated, expensive, and lengthy process that requires the assistance of land surveyors, land planners, architects, fire code expert analysis, and an expert attorney to be the quarterback for the team.

We have handled hundreds of these cases across Florida and if you are about to venture into the process, we will gladly discuss your situation. Our firm has substantial experience in dealing with alcoholic beverages and can assist our clients in:

- Obtaining proper approvals from local government.
- Obtaining a license from the Division.
- Purchasing and selling 4-COP licenses.
- Representation in any appeals or enforcement actions relating to zoning or licensure matters.

Our next bulletin will discuss the alcohol beverage approval process in Hillsborough County, Florida.

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