FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-375

LA GALERE MARKETS, INC.,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, BEER INDUSTRY OF FLORIDA, FLORIDA BEER WHOLESALERS ASSOCIATION, INC., and FLORIDA INDEPENDENT SPIRITS ASSOCIATION,

Appellees.

On appeal from a Final Order of the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco.
Thomas R. Philpot, Director.

January 31, 2020

ROWE, J.

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco issued a statement declaring that La Galere Markets' (LGM) plan to sell alcoholic

beverages through automated dispensing machines (ADMs) violated Florida's Beverage Law. LGM appeals that ruling and the Division's order allowing the Beer Industry of Florida, Florida Beer Wholesalers Association, Inc., and Florida Independent Spirits Association to intervene. We affirm the intervention order without further comment. But we reverse the Division's declaration that Florida's Beverage Law bars the sale of alcoholic beverages through ADMs because nothing in the plain language of the statutes cited by the Division prohibits the sale of alcoholic beverages through ADMs.

Background

LGM operates gourmet mini-market stores that use self-checkout technology. The stores are in large residential buildings and only building residents can access the stores. Because the stores use self-checkout, employees are rarely present. LGM uses surveillance equipment to monitor store activity. It sells food items, non-alcoholic beverages, personal care items, and household goods. LGM would like to expand its offerings to include beer and wine.

LGM developed a plan to sell beer and wine through ADMs that it contends complies with Florida's Beverage Law and preventing sales to underaged persons. LGM included three layers of security in its plan. First, the stores with ADMs would be in residential buildings and could be accessed only by building residents. Second, residents would need a key fob to enter the store. Third, residents would have to qualify to make purchases from the ADMs by registering, verifying their age and identity, and providing biometric data. Valid government-issued identification would be required to prove that the resident was at least twenty-one years old. Once LGM verified age and identity, LGM would add the resident to a list of persons authorized to make purchases from the ADMs. Residents would need to use biometric data, such as a fingerprint, to complete a purchase from the ADM. LGM would monitor and digitally record purchases through twenty-four-hour surveillance. Payments for purchases from the ADMs would be electronic, and LGM would maintain records of all transactions.

Procedural History

LGM sought guidance from the Division concerning whether its plan would qualify for licensure and requested a declaratory statement. LGM asked the Division:

> Whether the proposed business model outlined herein generally conforms to the Florida Beverage Law and relevant sections of the Florida Administrative Code and specifically conforms to Sections 561.01(9), 561.01(11), 561.17, 562.06, 562.14[,] Florida Statutes and Rule 61A-3.017, Florida Administrative Code.

In support of its plan, LGM pointed out that the Division allows hotels to sell alcoholic beverages through "mini bars" inside hotel rooms. Hotel employees do not supervise mini-bar sales, and age verification occurs only at check-in. LGM asserted that the Division should license its plan because it was superior to both hotel minibars and convenience stores in deterring the sale of alcoholic beverages to underaged persons. LGM argued that its three layers of security would effectively eliminate the risk of sales to underaged persons. LGM asked the Division to declare that its plan complied with Florida's Beverage Law.

The Florida Independent Spirits Association, the Beer Industry of Florida, and the Florida Beer Wholesalers Association, Inc. opposed LGM's petition and moved to intervene in the proceedings. The Division allowed the associations to intervene, and after a public hearing, issued a final order on LGM's petition. The Division framed LGM's petition as seeking two separate declarations: Does LGM's plan comply with sections 561.01(9), 561.01(11), and 561.17, Florida Statutes? And does LGM's plan comply with the Beverage Law?

First, the Division considered whether LGM's plan complied with sections 561.01(9), 561.01(11), and 561.17, Florida Statutes (2017). Section 561.01(9) defines what constitutes the sale of alcoholic beverages under the Beverage Law. The Division found that LGM's plan contemplated the sale of alcoholic beverages and

would require licensure. The Division then considered the definition of "licensed premises" in section 561.01(11). Because LGM did not provide specific information about the location, layout, or property rights for any potential store it sought to license, the Division declined to issue a declaratory statement on whether LGM's plan qualified for licensure. The Division next considered section 561.17, which provides the requirements to apply for a license to sell alcoholic beverages. Because the statute does not address the requirements for approval of a license, the Division declined to declare whether it would approve LGM's plan for licensure. The Division found that LGM's failure to identify a specific location, failure to describe the contents of its potential license application or corporate structure, and its silence on where it intended to file its application did not allow the Division to determine whether LGM's plan conformed to the requirements of the applicable statutes.

Second, the Division determined that LGM's plan did not comply with ten provisions of the Beverage Law. The Division found that the Beverage Law was a comprehensive regulatory framework designed to prevent the sale of alcoholic beverages to underaged persons. The Division noted that the Legislature had not authorized alcohol sales through ADMs. The Division viewed the lack of express statutory authority as the Legislature's prohibition of ADMs for alcohol sales. LGM appeals the final order.

Standard of Review

Before the passage of Article V, section 21 of the Florida Constitution, reviewing courts had to defer to "an agency's interpretation of statutes it implemented unless such interpretation was clearly erroneous." *S. Baptist Hosp. of Fla. v. Agency for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019). After the amendment passed, judicial deference to an agency's interpretation was no longer required. *Id*. Instead, the de novo standard applies. *Id*. Though the order appealed here was rendered before the effective date of the amendment, we need not decide whether the amendment applies. When the agency's view conflicts with the plain meaning of the statute, judicial deference is not required. *Id*. Our review is de novo. *Id*.

Analysis

In the first part of the final order, the Division determined that it did not have enough information to issue a declaratory statement about whether LGM's plan complied with sections 561.01(9), 561.01(11), and 561.17. The Division did not err in making this determination, and we affirm this portion of the final order without elaboration. *See Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n & Utilities, Inc.*, 164 So. 3d 58, 63 (Fla. 1st DCA 2015) (holding that a declaratory statement was authorized where petitioner "alleged a particular set of circumstances in its petition giving rise to an actual, present need for a declaratory statement"); *see also Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015) ("[I]t is well settled that, Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.") (quoting *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995)).

Even so, we reverse the Division's conclusion in the second part of the final order—declaring that LGM's plan did not comply with the comprehensive regulatory framework set forth in the Beverage Law.

We begin by addressing the Division's conclusion that the Legislature did not intend to authorize alcoholic beverage sales through ADMs because it has not expressly authorized such sales. The Division noted that the Legislature expressly authorized the sale of other age-restricted products from automated machines. *See* § 569.007(1)(b), Fla. Stat. (authorizing the sale of tobacco products from vending machines in limited circumstances);[1] § 24.112(15), Fla. Stat. (authorizing the sale of lottery tickets from vending machines if the machine is in the direct line of sight of an

[1] The Legislature authorized such sales as an exception to the line-of-sight requirement for the sale of tobacco. § 569.007(1)(a), Fla. Stat. (2017).

employee).[2] Examination of statutes relating to the sale of other age-restricted products would be relevant to our analysis of the Beverage Law only if we concluded that the statutes cited by the Division were ambiguous. "Established rules of statutory construction demand that when interpreting a statute, courts should give terms their plain meaning. When the plain meaning of a statute is clear, a court should look no further than the language of the statute." *Srygley v. Capital Plaza, Inc.*, 82 So. 3d 1211, 1212 (Fla. 1st DCA 2012) (internal citations omitted). Because the statutes cited by the Division are not ambiguous, we confine our analysis to their plain language. *See Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 301 (Fla. 2017) ("'When the statute is clear and unambiguous,' we use the plain language of the statute and avoid rules of statutory construction to determine the Legislature's intent.") (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

The Division declared that LGM's plan would not comply with the Beverage Law. The Beverage Law is defined as "this chapter [chapter 561] and chapters 562, 563, 564, 565, 567, and 568." § 561.01(6), Fla. Stat. (2017). These seven chapters span seventy-five pages of the Florida Statutes. The Division cited just ten provisions in concluding that the Beverage Law bars LGM's plan to sell alcohol through ADMs. As explained below, the statutes cited by the Division do not support the Division's declaration.

First, the Division cited section 561.02, Florida Statutes (2017), which authorizes the Division to "supervise the conduct, management, and operation of the manufacturing, packing, distribution, and sale within the state of all alcoholic beverages." But nothing in the statute prevents the Division from supervising LGM's distribution or sale of alcohol from ADMs. *Anderson Columbia v. Brewer*, 994 So. 2d 419, 421 (Fla. 1st DCA 2008) (holding "courts are not to 'add, subtract, [or] distort the words' the

[2] Sales of lottery tickets from automated machines were once expressly prohibited. § 24.105(10)(a)3., Fla. Stat. (1987). The current statute authorizing vending machine sales of lottery tickets was enacted in response to the prior statutory prohibition.

Legislature has written") (quoting *State v. Byars*, 804 So. 2d 336, 338 (Fla. 4th DCA 2001)).

The next two statutory provisions cited by the Division concern the prohibition against and the criminalization of alcohol sales to underaged persons. §§ 561.702(1); 562.11(1)(a)1., Fla. Stat. (2017). Section 561.702(1) expresses the Legislature's intent to eliminate alcohol sales to and alcohol consumption by underaged persons. Section 562.11(1)(a)1. makes the sale or service of alcohol to underaged persons a second-degree misdemeanor. But nothing in either statute addresses whether sales of alcohol require face-to-face transactions or prohibit sales through ADMs. *State v. Jett*, 626 So. 2d 691, 693 (Fla. 1993) ("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.") Thus, the Division erred in relying on these two provisions to conclude that LGM's plan violates the Beverage Law.

Third, the Division concluded that LGM's plan conflicted with portions of Florida's Responsible Vendor Act (RVA). §§ 561.701-561.706, Fla. Stat. (2017). To qualify as a responsible vendor, a vendor must train its employees how to recognize and deal with underaged customers. § 561.705(1)(d), Fla. Stat. (2017). The RVA requires vendors to train managers of alcohol servers and to develop standards for dealing with underaged customers. § 561.705(2)(b), Fla. Stat. (2017). It also requires vendors to post signs informing customers of the vendor's policy against the sale or service of alcoholic beverages to underaged persons. § 561.705(9), Fla. Stat. (2017). Voluntary compliance with the RVA protects vendors from administrative penalties when the vendor's employee makes an unlawful sale to an underaged person. § 561.706(2), Fla. Stat. (2017). But even though the Division instructs vendors to comply with the requirements of the RVA, compliance with the Act is not mandatory. *Okeechobee Aeire 4137, Fraternal Order of Eagles, Inc. v. Wilde*, 199 So. 3d 333, 338 (Fla. 4th DCA 2016) ("The RVA is a voluntary statute that imposes no duties on any vendor. Instead, the RVA serves to protect a vendor from certain administrative penalties resulting from serving an underage person."). Because vendors need not comply with the RVA, it means that "it is impossible to 'violate' or 'not comply' with the RVA." *Id.* Likewise, because vendors need not comply with the

RVA, the Division erred in concluding the LGM's plan would violate the RVA.

Fourth, the Division cited sections 562.11(1)(c) and 562.11(1)(d), Florida Statutes (2017), which provide a complete defense to a licensee charged with selling alcohol to an underaged person when the licensee carefully checked a particular form of identification at the time of sale. Both statutes offer protection for licensees engaging in in-person sales. Because LGM's sales would be unmanned, the defense provided under these statutes would not be available to LGM against a charge of sale of alcohol to a minor. Even though LGM would not be entitled to the protection offered by these statutes, nothing in these statutes prohibits the sale of alcoholic beverages through ADMs. *See Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005) ("When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."). Thus, the Division erred in concluding that LGM's plan violated these provisions of law.

Next, the Division cited section 562.12(1), Florida Statutes (2017), which prohibits the unlicensed sale of alcoholic beverages. LGM never expressed an intent to sell alcohol without a license. Rather, the very purpose of LGM's petition for a declaratory statement was to determine whether its plan for selling alcoholic beverages through ADMs would qualify for licensure. Because LGM has not applied for a license or made unlicensed sales, the Division erred in finding that section 562.12(1) restricted or prohibited the sale of alcoholic beverages through ADMs. *See Steinbrecher v. Better Const. Co.*, 587 So. 2d 492, 493 (Fla. 1st DCA 1991) (holding that courts cannot "construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications").

Finally, the Division cited its right to inspect the premises of a licensee when open for business as another reason that the sale of alcoholic beverages through ADMs violated the Beverage Law. § 562.41(5), Fla. Stat. (2017). LGM assured the Division that its personnel would be granted access to LGM's stores by the personnel in the residential buildings where the stores were located. And nothing in LGM's proposed plan interferes with the

Division's right to inspect licensed premises. Thus, the Division erred in concluding that section 562.41(5), Florida Statutes, bars alcoholic beverage sales through ADMs. *McCloud v. State*, 260 So. 3d 911, 914 (Fla. 2018) ("If the statute is 'clear and unambiguous,' then this Court does not look beyond the plain language or employ the rules of construction to determine legislative intent—it simply applies the law.").

In sum, nothing in the plain language of the statutes cited by the Division prohibits the sale of alcoholic beverages through ADMs. We, therefore, reverse the portion of the final order declaring that LGM's plan violates these specific provisions of the Beverage Law.[3]

AFFIRMED in part; REVERSED in part; and REMANDED.

RAY, C.J., and ROBERTS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Louis J. Terminello and Michael Martinez of Greenspoon Marder, LLP, Miami, for Appellant.

Raymond Treadwell, General Counsel; Beth Miller, Chief Attorney; and Daniel J. McGinn, Deputy Chief Attorney, Florida Department of Business and Professional Regulation, Tallahassee, for Appellee.

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[3] Although we reverse the Division's declaration that LGM's plan violates the ten cited statutes, we do not suggest that other provisions of the Beverage Law would not prohibit or restrict the sale of alcoholic beverages in the manner described by LGM.

Donna E. Blanton of Radey Law Firm, Tallahassee, for Florida Beer Wholesalers Association, Inc. and Florida Independent Spirits Association, Appellees.

No appearance for the Beer Industry of Florida.