

**STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**

**IN RE: Request for Variance from  
Florida Administrative Code Rule 61A-3.055**

**Petitioner: National Deli Corp.  
Counsel for Petitioner: Terminello & Terminello, P.A.  
2700 S.W. 37<sup>th</sup> Avenue  
Miami, Florida 33133**

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**ORDER DENYING PETITION FOR PERMISSION TO SELL PRODUCTS OTHER  
THAN THOSE LISTED IN FLA. ADMIN. CODE RULE 61A-3.055**

This matter came before the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division"), for consideration of a Petition for Permission to Sell Products Other Than Those Listed in Fla. Admin. Code Rule 61A-3.055, filed September 15, 2008. Although Petitioner filed its Petition for Permission to Sell Products Other Than Those Listed in Fla. Admin. Code Rule 61A-3.055 pursuant to Fla. Admin. Code Rule 61A-3.055, the Division is treating it as a Petition for Variance pursuant to Section 120.542, Florida Statutes, as there is no other authorized procedure found in Chapter 120, Florida Statutes, for such a request. Petitioner requests a variance from the following pertinent portion of the rule:

**Florida Administrative Code Rule 61A-3.055:**

(1) As used in s. 565.045, Florida Statutes, items customarily sold in a restaurant shall only include the following:

- (a) Ready to eat appetizer items; or
- (b) Ready to eat salad items; or
- (c) Ready to eat entrée items; or
- (d) Ready to eat vegetable items; or
- (e) Ready to eat dessert items; or
- (f) Ready to eat fruit items; or
- (g) Hot or cold beverages.

(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant.

Specifically, Petitioner requests a variance from the requirement that the products offered for sale be "ready to eat" or be items normally sold in a restaurant. After a complete review of the record, the Division makes the following findings and conclusions:

#### FINDINGS OF FACT

1. The menu provided by Petitioner which lists items offered for sale includes raw produce and other assorted groceries.
2. The Petition failed to state facts demonstrating that application of Florida Administrative Code Rule 61A-3.055 in Petitioner's case would create a substantial hardship or would violate principles of fairness.
3. The Petition failed to state facts demonstrating that if application of Florida Administrative Code Rule 61A-3.055 is waived, the purpose of the underlying statute will be achieved by some other means.

#### CONCLUSIONS OF LAW

1. Section 120.542(2), Florida Statutes, provides as follows:  
  
Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of the section, "substantial hardship" means a demonstrated economic, technological, legal or other type hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.
2. Section 120.542(2), Florida Statutes places the burden upon the petitioner requesting a variance to demonstrate that the purpose of the underlying statute would be or has

been achieved by some other means in the petitioner's case, and that application of the rule would create a substantial hardship or violate principles of fairness.

3. Rule 28-104.002(2)(g), Florida Administrative Code, provides that a Petition for Waiver or variance must include "the specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver or variance for the petitioner".

4. Petitioner's Petition contained no facts pled to demonstrate that application of Florida Administrative Code Rule 61A-3.055 would result in substantial hardship or would violate principles of fairness. As such, the petition is deficient on its face.

5. Section 565.045, Florida Statutes, the law implemented by Florida Administrative Code Rule 61A-3.055, provides as follows:

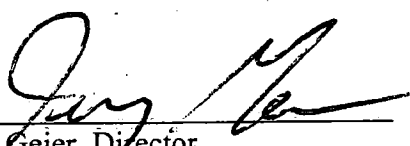
... (2)(a) There shall not be sold at such places of business anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and what is customarily sold in a restaurant. ...

6. The items offered for sale for which Petitioner requests a variance are not items customarily sold in a restaurant. As such, the purpose of the underlying statute has not been met.

7. As the items offered for sale for which Petitioner requests a variance are not items customarily sold in a restaurant, which is a requirement of Section 565.045, Florida Statutes, the Division is unable to grant a variance because the Division lacks the authority to grant variances from statutory provisions.

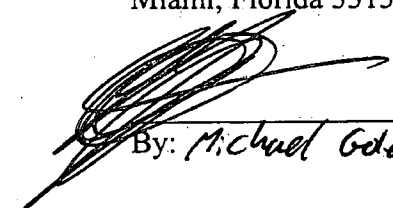
WHEREFORE, for the foregoing reasons, Petitioner's Amended Petition to Sell Products Other Than Those Listed in Fla. Admin. Code Rule 61A-3.055 is DENIED.

DONE AND ORDERED this 2 day of April, 2009.

  
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Jerry Geier, Director  
Division of Alcoholic Beverages and Tobacco  
Dept. of Business and Professional Regulation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by  
U.S. Mail to National Deli Corp., c/o Terminello & Terminello, P.A. 2700 S.W. 37<sup>th</sup> Avenue,  
Miami, Florida 33133.

  
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By: Michael Getson

4/10/09  
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Date: