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

Havana Club Enterprises, LLC.

Petitioner,

v.

DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC
BEVERAGES & TOBACCO,
Respondent.

Case No.: 2006-003361

Final Order No. BPR-2006-02834 Date: 4-27-06
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brandon. M. Nielson

ORDER OF DISMISSAL

This matter comes before me for final Agency Action

Based on the fact that the Petitioner has withdrawn their Petition for Declaratory
Statement, the Respondent has requested that the above mentioned case be dismissed.

In accordance with the Respondent’s request, it is hereby ORDERED that the above
mentioned case is dismissed.

DONE and ORDERED with regard to Case Number 2006-003361, this 21 day of
April, 2006.

[Signature]
Steven M. Houglan, Ph.D. Director
Division of Alcoholic Beverages and Tobacco
Executed copies furnished to:

Michael J. Wheeler, Esq.
Assistant General Counsel
Division of Alcoholic Beverages and Tobacco

Marshall R. Pasternack, Esq.,
Fax No.: (305) 374-7593
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION DIVISION OF
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DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC
BEVERAGES & TOBACCO,

Respondent.

/ 

MOTION TO DISMISS

COMES NOW the Respondent, Department of Business and Professional Regulation,
Division of Alcoholic Beverages and Tobacco, by and through the undersigned counsel, pursuant
to 120.569 and 120.57(1), Florida Statutes, moves for the entry of an Order dismissing the above
mentioned case, and would show as follows:

1. The Department received a Petition for Declaratory Statement. in Re Havana

2. The Petitioner, Havana Club Enterprises, LLC., submitted a letter withdrawing
their Petition for Declaratory Statement on April 11, 2006.

WHEREFORE, the Respondent prays for the entry of an Order dismissing the above
mentioned case.
Respectfully submitted this 21st day of April, 2006

MICHAEL J. WHEELER
Assistant General Counsel
1940 North Monroe Street
Tallahassee, FL 32399-2202
Voice: (850) 922-3050
Facsimile: (850) 488-5074
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile to Marshall R. Pasternack, Esq., at (305) 374-7593, this 21 day of April, 2006.

Michael J. Wheeler
April 11, 2006

VIA FACSIMILE AND REGULAR MAIL

Debbie Pender, Deputy Director
1941 North Monroe Street, Suite 26
Tallahassee, Florida 32399

Re: Havana Club Enterprises, LLC: Petition for Declaratory Statement filed with the State of Florida Department of Business and Professional Regulation on January 18, 2006 (the "Petition")

Dear ________:

Reference is made to the Petition. I write on behalf of my client, Havana Club Enterprises, LLC, the Petitioner under the Petition, to inform you that we hereby withdraw the Petition.

Please acknowledge receipt of this letter in the space provided below and return an executed copy to the undersigned.

Very truly yours,

Marshall R. Pasternack

Acknowledge receipt this 11th day of April, 2006.
Department of Business and Professional Regulation

By: ____________________________
Name: Marshall R. Pasternack
Title: Chief Attorney

cc: Mr. Robert Katz
    Mr. Gregory Massimi
    Mr. Richard Katz
IN RE: HAVANA CLUB ENTERPRISES, LLC

PETITION FOR DECLARATORY STATEMENT BEFORE THE STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

The Petitioner, Havana Club Enterprises, LLC, a Florida limited liability company ("Petitioner"), hereby petitions the Florida Department of Business and Professional Regulation (the "Department" or "DBPR"), pursuant to Section 120.565, Florida Statutes, for a Declaratory Statement on the following issue:

WHETHER PETITIONERS' BUSINESS IS EXEMPT FROM THE REQUIREMENTS OF "THE FLORIDA CLEAN INDOOR AIR ACT," CH. 386, Florida Statutes ("the Act").

FACTS

Petitioner's address and telephone number are: 616 Clearwater Park Rd., Penthouse #7, West Palm Beach, Florida 33401, (561)667-5556.

Petitioner plans to enter into a Management Agreement pursuant to which it will commence significant capital improvements to, and manage the operations of, a certain social club’s facilities in Miami, Florida (the "Facility"). The social club (the "Club") is owned by a tax exempt Section 501(c)(7) entity that operates a dining hall in conjunction with its broader function as a social membership organization. The Facility is located in a high rise office/commercial building and is a separate "Facility" within the building as that term is used in the Florida Building Code (incorporating the definition of "facility"
contained in Section 11-3.5 of the Florida Accessibility Code for Building Construction)("all of any portion of buildings, structures..."), and the Florida Americans with Disabilities Act, Section 553.501, et seq., Florida Statues.

As part of the operations, Petitioner will develop a sophisticated cigar room, in conjunction with the dining operation of the Club. The Petitioner intends that the facility will be non-smoking for purposes of breakfast and lunch but will be available for smoking after the lunch hour on each day of operation. State of the art air purifiers will be installed in the Facility as part of the extensive renovations of the existing Facility. These purifiers will be constantly running as part of the operation of the Facility.

The Club will have two types of member — those that are compensated and those that are not.

All persons performing services at the Club, including any janitorial or maintenance services, will also be members of the Club. The Club’s compensated members prepare and serve food in the dining hall and provide janitorial and other necessary health related services. These services are necessary to the Club’s overall purpose as a social and recreational association with dining facilities. All activities within the Club will be focused on benefits for the members and will be conducted by other members. These members will be compensated.

**LAW**

Section 386.204, Florida Statutes (as part of the “Florida Clean Indoor Air Act”) provides: “a person may not smoke in an enclosed indoor workplace...” However, in Section 386.203(5)(c), Florida Statutes, the Act excludes from the definition of “enclosed indoor workspace”: 
Any facility owned or leased by and used exclusively for noncommercial activities performed by the members and guests of a membership association, including social gatherings, meetings, dining, and dances, if no person or persons are engaged in work as defined in subsection (12)

Additionally, Section 386.203(12), Florida Statutes, defines “Work” as:

Any person’s providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part time, whether legally or not. “Work” includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like. The term does not include noncommercial activities performed by members of a membership association.

Finally, Section 386.203(13), Florida Statutes, states:

“Membership association” means a charitable, nonprofit, or veterans’ organization that holds a current exemption under s. 501(c)(3), (4), (7), (8), (10), or (19) or s. 501(d) of the Internal Revenue Code.

DISCUSSION

Based on the facts and applicable law, Petitioner believes that it meets the qualifications to operate as a smoking facility under the Act. Specifically:

1. The Club qualifies as a facility under the Florida Building Code. See also: Diagnostic Services of South Florida v. State Farm Mutual Automobile Insurance Co., 877 So.2d 1 (3 DCA Fla. 2004), wherein the Court stated:

The statute does not contain a definition of “facility.” A dictionary definition is “something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve
or facility some particular end.” Webster’s Third New International Dictionary 812-13 (1986).

and Metropolitan Dade County v. Miami-Dade County Community College Foundation, Inc., 545 So.2d 324 (3 DCA Fla. 1989) where the Court spoke of the remodeling of a portion of a building as a “facility.”

2. The Club, recognized as a Section 501(c)(7) organization by the IRS, is clearly a “membership organization” under the Act and may only be accessed by members and their guests.

3. The only activities of the Club will be “noncommercial activities” such as “social gatherings, meetings, dining, and dances.”

4. Because the compensated members of the Club are members thereof and will only facilitate the “noncommercial activities” set forth above, there will be no “work” performed at the Club within the purview of the Statute.

REQUEST

We therefore request DBPR issue a Declaratory Statement that the Petitioner’s Club is not an “enclosed indoor workplace” where smoking is prohibited under the Act.

Respectfully submitted this 17th day of January, 2006.

[Signature]

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