IN RE:

PETITION FOR DECLARATORY STATEMENT
BEFORE THE DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

On behalf of REGENCY CENTERS, L.P.,

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (hereinafter "Division") issues this Order Denying Petition for Declaratory Statement pursuant to section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On March 9, 2011, the Division received a Petition for Declaratory Statement on behalf of REGENCY CENTERS, L.P., who currently owns and operates shopping centers throughout the State of Florida. Petitioner seeks an opinion on whether it must be disclosed as a party of interest on its tenants' applications for alcoholic beverage licenses.

Notice of receipt of the petition was published in Florida Administrative Weekly on June 9, 2011. The petitioner did not request a hearing.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.
1. Regency Centers, L.P., ('Regency') is currently a developer, owner and operator of grocery-anchored shopping centers located in the State of Florida. For the purposes of this petition, the relevant shopping centers all consist of five or more tenant stores. The tenants in Regency's shopping centers operate various types of storefronts, and some tenants may currently possess an alcoholic beverage license, while others may seek one in the future.

2. In Regency's shopping centers, each tenant operates under a 'common, but not identical' lease. While Regency generally uses its own form of lease to begin negotiating terms with tenants, certain tenants – typically larger, 'anchor' tenants – may require Regency to use a different form of lease to begin negotiations. In addition, Regency has acquired some of the shopping centers with existing leases in place, and therefore some leases are based on forms from prior owners of the shopping center.

3. Regency's leases for any particular shopping center contain common elements, though each lease is separately negotiated between Regency and its tenants, and may contain terms and conditions that are different from other tenants' leases in the same shopping center. Several of these leases contain a provision that permits Regency to collect annual percentage rent in an amount no more than ten percent of a store's gross proceeds.

4. Regency now poses a question regarding 561.17(1), Florida Statutes, which requires persons entitled to percentage payment from the proceeds of an alcoholic beverage license to be disclosed on an application for alcoholic beverage license. Based on its reading of the statute, Regency proposes that it continue to operate its current business model without submitting to disclosure on its tenants' applications for alcoholic beverage license(s).
CONCLUSIONS OF LAW

5. The Division has jurisdiction over this matter pursuant to Sections 120.565, 561.02, 561.08, 561.11, Florida Statutes, and is responsible for the application and enforcement of Chapter 561, Florida Statutes.

6. Though Petitioner does not hold an alcoholic beverage license, the Division may require its disclosure as an interested party. Petitioner is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

7. Section 120.565, Florida Statutes, provides:

   (1) Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.

   (2) The petition seeking a declaratory statement shall state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

8. Rule 28-105.001, Florida Administrative Code (2007), provides:

   A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner’s particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

9. The Division cannot issue a declaratory statement concerning events that have already taken place, or continue to take place. “The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance.” Here, Petitioner is already engaged in leasing space to tenants that possess alcoholic beverage licenses. “[A] petition for declaratory

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1 Novick v. Dept of Health, Bd. of Med., 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002).
statement which seeks approval or disapproval of conduct which has already occurred is properly
denied.\textsuperscript{2}  

For the above stated reasons it is hereby:

**ORDERED** that Petition for Declaratory Statement is **DENIED**.

Dated this \underline{30} day of May, 2011.

\begin{center}
\hspace{0.5cm}
John R. Powell, Director
Division of Alcoholic Beverages and Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-1020
\end{center}

\textsuperscript{2} Id.
RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH SARAH L. WACHMAN, AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Regency Centers, L.P. c/o Richard W. Hawthorne, Esq., One Independent Drive, Suite 1200, Jacksonville, Florida 32202 on this ______ day of May, 2011.

______________________________
Michael W. Ross
Chief Attorney.
RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH SARAH L. WACHMAN, AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard W. Hawthorne, Driver, McAfee, Peek & Hawthorne, P.L., One Independent Drive, Suite 1200, Jacksonville, Florida 32202 on this 8 day of July, 2011.

[Signature]
Michael W. Ross
Chief Attorney.
PETITION FOR DECLARATORY STATEMENT BEFORE
THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

The Petitioner Regency Centers, L.P., by and through its undersigned attorney, and
pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code,
hereby files its Petition for Declaratory Statement, and states as follows:

1. Name and Address of Petitioner:

Regency Centers, L.P.
One Independent Drive, Suite 114
Jacksonville, Florida 32202
Phone: (904) 598-7600
Fax: (904) 634-3428

2. Petitioner’s Attorney:

Richard W. Hawthorne, Esq.
Driver, McAfee Peck & Hawthorne, P.L.
One Independent Drive, Suite 1200
Jacksonville, Florida 32202
Phone: (904) 301-1269
Fax: (904) 301-1279

3. Statutory provision on which the declaratory statement is sought:

Section 561.17(1), Florida Statutes, which states in its entirety:

561.17 License and registration applications; approved person.—

(1) Any person, before engaging in the business of manufacturing, bottling,
distributing, selling, or in any way dealing in alcoholic beverages, shall file, with
the district licensing personnel of the district of the division in which the place
of business for which a license is sought is located, a sworn application in duplicate
on forms provided to the district licensing personnel by the division. The
applicant must be a legal or business entity, person, or persons and must include
all persons, officers, shareholders, and directors of such legal or business entity
that have a direct or indirect interest in the business seeking to be licensed under
this part. However, the applicant does not include any person that derives revenue
from the licensee solely through a contractual relationship with the licensee; the
substance of which contractual relationship is not related to the control of the sale
of alcoholic beverages. Prior to any application being approved, the division may
require the applicant to file a set of fingerprints on regular United States Department of Justice forms for herself or himself and for any person or persons interested directly or indirectly with the applicant in the business for which the license is being sought, when so required by the division. If the applicant or any person who is interested with the applicant either directly or indirectly in the business or who has a security interest in the license being sought or has a right to a percentage payment from the proceeds of the business, either by lease or otherwise, is not qualified, the application shall be denied by the division. However, any company regularly traded on a national securities exchange and not over the counter; any insurer, as defined in the Florida Insurance Code; or any bank or savings and loan association chartered by this state, another state, or the United States which has an interest, directly or indirectly, in an alcoholic beverage license shall not be required to obtain division approval of its officers, directors, or stockholders or any change of such positions or interests. A shopping center with five or more stores, one or more of which has an alcoholic beverage license and is required under a lease common to all shopping center tenants to pay no more than 10 percent of the gross proceeds of the business holding the license to the shopping center, shall not be considered as having an interest, directly or indirectly, in the license.

4. Description of how the statute may substantially affect the petitioner in the petitioner's specific set of circumstances:

Petitioner is a developer, owner, and operator of grocery-anchored and community shopping centers. The majority of tenants in Petitioner's shopping centers operate retail stores, while a minority operates businesses that offer services to the public (e.g., fitness centers, doctor's offices, and the like). This petition relates only to those shopping centers owned by Petitioner in Florida consisting of five or more stores. The tenants in all of the shopping centers Petitioner owns in Florida are under common, but not identical, leases. The leases are common in that Petitioner typically uses its own form of lease to begin negotiating terms with its tenants. Certain tenants (typically the larger, "anchor" tenants) may require Petitioner to use a different form of lease to begin negotiations. In addition, Petitioner acquired some of the shopping centers with existing leases in place and therefore some leases are based on forms from prior owners of the shopping center. In the end, as is standard in the real estate industry, all of the
leases for a particular shopping center contain common elements, but each lease is separately negotiated between Petitioner and its tenants, and may contain terms and conditions that are different from other tenant's leases in the same shopping center. Many, but not all, of the leases contain a provision that permits Petitioner as landlord to collect percentage rent, usually from Petitioner's retail tenants (Petitioner does not usually collect percentage rent from tenants that offer services).

Certain of Petitioner's grocery-anchored shopping centers in Florida contain tenants that either have, or may be in the process of applying for, an alcoholic beverage license from the Division of Alcoholic Beverages and Tobacco (the "Division") to operate a liquor store selling alcohol to the public for off-site consumption. The tenants who operate, or intend to operate, liquor stores are required by their leases to pay Petitioner percentage rent in an amount no more than ten percent (10%) of the liquor store's gross proceeds.

Section 561.17(1), Florida Statutes, provides that if the applicant for an alcoholic beverage license, or any person who "has a right to a percentage payment from the proceeds of the business, either by lease or otherwise, is not qualified," then the application for the alcoholic beverage license must be denied by the Division. As described above, Petitioner has a contractual right to collect percentage rent from certain tenants who are also applying for an alcoholic beverage license. If Petitioner's collecting percentage rent somehow disqualifies Petitioner under the statute, then it appears that the tenant's application for an alcoholic beverage license would automatically be denied. This would have a substantial effect on Petitioner by preventing Petitioner from collecting a percentage-payment from the proceeds of its tenants' businesses, which Petitioner has a contractual right to do.
Section 561.17(1), Florida Statutes, goes on to state that "a shopping center with five or more stores, one or more of which has an alcoholic beverage license and is required under a lease common to all shopping center tenants to pay no more than 10 percent of the gross proceeds of the business holding the license to the shopping center, shall not be considered as having an interest, directly or indirectly, in the license." Thus, a shopping center meeting these criteria will not be considered as having an "interest" in its tenant's alcoholic beverage license. This provision appears to provide a shopping center that meets the criteria with an exception to the rule described in the paragraph above.

The Petitioner respectfully requests the Division to determine the following questions:

1. Assuming that Petitioner owns a shopping center with five or more tenants and one or more of which has an alcoholic beverage license and is required under its lease to pay percentage rent, how does Petitioner determine if its negotiated leases as described in Paragraph 4 above, satisfy the statutory criteria of "a lease common to all shopping center tenants?"

2. If Petitioner has a right to a percentage payment from the proceeds of a tenant’s business (as provided for in a lease between Petitioner and tenant), and that tenant is in the process of applying to the Division for an alcoholic beverage license, will the tenant’s application be automatically denied? How does Petitioner ensure that it is “qualified” under these circumstances?

3. If Petitioner’s shopping centers meet the criteria described in the last sentence of Section 561.17(1), Florida Statutes, will Petitioner be deemed not to have an “interest” in its tenants’ alcoholic beverage licenses?

4. If Petitioner’s shopping center meets the criteria described in the last sentence of Section 561.17(1), Florida Statutes, and a tenant in that shopping center is in the process of
applying to the Division for an alcoholic beverage license, will the tenant’s application automatically be denied?

Dated: April 26, 2010

DRIVER MCAFEE PEEK & HAWTHORNE, P.L.

By

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