IN THE SUPREME COURT OF FLORIDA

ORANGE COUNTY, a political subdivision of the State of Florida,

Petitioner,

CASE NO: SC01-382
5DCA CASE NO: 5D00-1728

v.

COSTCO WHOLESALE CORPORATION, a Washington corporation,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER, ORANGE COUNTY, FLORIDA

On Review from the District Court of Appeal, Fifth District State of Florida

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PRELIMINARY STATEMENT

Petitioner, Orange County, Florida, was an Appellee before the District Court of Appeal, Fifth District, and a Defendant before the trial court. It will be referred to in this brief as "Orange County." Respondent, Costco Wholesale Corporation, was the Appellant before the District Court of Appeal, Fifth District, and the Plaintiff before the trial court. It will be referred to in this brief as "Costco." ABC Liquors, Inc. and Issa "Chris" Safar d/b/a Liquor Plus were granted intervenor status as Defendants and were Appellees below.

Citations to the record will be cited as "R-" followed by the appropriate page number. Citations to the trial transcript of May 3, 2000, will be cited as "TR-" followed by the appropriate page and line number. Citations to Costco's Initial Brief filed with the District Court of Appeal, Fifth District, will be cited as "IB-" followed by the appropriate page number.

STATEMENT OF THE FACTS AND OF THE CASE

The sole issue before this Court, as it was before the courts below, is the constitutional validity of Subsection 38-1414(b) of the Orange County Code, which prohibits any new or relocated package liquor sale vendor from opening or starting a business of package liquor sales within 5,000 feet of an established, licensed, package liquor sale vendor's place of business.[1] Section 38-1414 was first adopted by the Orange County Board of County Commissioners in 1956. It was repealed in 1964, but was readopted in 1966. It was amended in 1992 and 1993.

As articulated in Subsection 38-1414(c):

> The purpose of creating the distance requirements mentioned in subsection (b) of this section is to provide and require that no package sale vendor which is located or proposes to locate in the unincorporated portion of the county outside of any municipality shall be permitted to operate at a new location within a distance of five thousand (5,000) feet of the location of any package sale vendor which is both (i) established, existing and licensed at the time of the package sale vendor's application to operate at the new location and (ii) located in any area of the county either unincorporated or within a municipality in the county.

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[1] At trial, Costco withdrew both its facial and its "as applied" challenge to the validity of the ordinance. TR-112, IB-18. Because this case involves a facial challenge to that provision, there are no relevant "as applied" facts. The only relevant evidence is the ordinance itself. The factual background of the case is, however, set forth in the decision below, Costco Wholesale Corp. v. Orange County, 780 So. 2d 198 (Fla. 5th DCA 2001).

The ordinance was adopted as part of a general zoning plan by which Orange County used the distance separation requirement to disperse package liquor sale vendors' places of business, so as to prevent the concentration of such establishments in what could become "combat zones," while, at the same time, prohibiting any further dispersion of such establishments by concentrating them in areas zoned for commercial uses where such businesses are permissible. R-101.

At trial, Edward Williams, who had been the director of the Orange County Planning Department at the time all Orange County ordinances were readopted and consolidated into one code (TR-40-42), testified that the purpose of the ordinance was to provide a balance between the desired use and the desirability of protecting residential districts. He also noted that the distance separation requirement represents approximately a one-mile radius, which is "typically the distance for a primary market for a store or facility of this nature." TR-49. Such a distance provides residents enough opportunity to use such facilities without allowing them to become so dense that they become a problem. Id.

The purpose of Section 38-1414 was not to protect the economic interests of package liquor store owners, but to have a reasonable buffer and distance between their businesses. TR-50. According to Mr. Williams, the problem with aggregating such businesses was not an evil inherent in the stores themselves but

primarily the secondary effects associated with those stores. Mr. Williams testified that allowing such stores in close proximity "lowers residential property values and creates an extraordinary amount of traffic in and about those residential areas." TR-55. There are also activities typically associated with package stores, such as drinking in their parking lots, fights, and driving while intoxicated. TR-56. Thus, "[s]preading them out while allowing sufficient opportunity to accommodate the need for them was our [the County's] primary objective." Id. According to Mr. Williams, "spreading them out seemed to minimize the adverse impacts associated with such uses, while allowing them to congregate seemed to create an impact greater than the number of uses." TR-58.

The ordinance in question affects only the unincorporated areas of Orange County. There was no testimony that the ordinance unduly restricts the number of package stores. The parties stipulated that there are currently 65 licenses (designated as 3PS) specifically for package liquor stores issued in unincorporated Orange County. R-101. There are also currently 149 businesses within the unincorporated areas which hold licenses designated as 4COP that permit the sale of package alcoholic beverages. Id. Of these businesses, only approximately 12 are unable to offer package sales because of the 5,000-foot distance separation requirement. R-101-102.

At trial, Mr. Williams noted that Orange County is different from other jurisdictions in that it has "more commercial acreage per thousand population than just about any other jurisdiction in the country." TR-42-43. At the time the ordinance was reenacted in 1992, the County had over 8,000 acres zoned commercial where package liquor stores could be located, with an additional 7,000 acres projected by the year 2010. TR-43. According to Mr. Williams, "there were more than enough opportunities to accommodate and provide reasonable use" for package liquor stores. TR-43-44. For that reason, Mr. Williams did not feel the ordinance was overly restrictive. TR-45.

Furthermore, within many of the incorporated areas of Orange County, such as Orlando or Winter Park, there are few, if any, restrictions, thus providing ample areas for locating package liquor stores. Mitch Gordon, Acting Zoning Director of Orange County, testified by affidavit: "At no time have I been told that there is an insufficient supply of package stores in Orange County or that they are located in areas that inconvenienced the shopping public." R-70.

Upon conclusion of the evidence, the trial court granted judgment in favor of Orange County, holding:

> The right of the County to regulate locations that sell alcoholic beverages is grounded in Section 562.45(2), *Florida Statutes*, and is clearly related to the health, safety and welfare of its citizens. Glackman v. City of Miami Beach, 51 So. 2d 294 (Fla. 1951).

> Inasmuch as Orange County clearly has the authority under state law to completely prohibit the sale of alcohol in Orange County, it logically follows that the County has the power to prescribe any separation distance it chooses, be it 500 feet, 2,500 feet, 5,000 feet, 10,000 feet, or even greater, with regard to the separation of package goods vendors.
>
> The Supreme Court of Florida has upheld numerous distance regulations between vendors selling alcoholic beverages. While the 5,000 foot restriction in Section 38-1414 is longer than those approved by the Supreme Court of Florida, nothing before this Court has demonstrated that the 5,000 foot restriction is arbitrary and capricious or unrelated to the health, safety and welfare of the citizens of Orange County.

R-256-257.

On appeal, Costco relied heavily on the United States Supreme Court's decision in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). In that case, the Court held that the greater right to completely ban the sale of alcoholic beverages cannot be expanded to permit a state to impose unconstitutional restrictions on protected speech. According to Costco, that decision necessarily meant that the County, despite having the greater right to completely ban the sale of alcoholic beverages, did not have the lesser right to prohibit the sale of packaged liquors in areas of the County where such sales are deemed undesirable. Second, Costco essentially argued that a court should strike down legislative enactments when, in the opinion of the court, they become outdated, even if it means ignoring

the doctrine of *stare decisis*. At no time did Costco raise an argument based on a denial of its right to equal protection of the laws.

The District Court of Appeal, Fifth District, however, applied an equal protection analysis and reversed. Costco, 780 So. 2d at 198. Ignoring the uniquely broad powers accorded local governments to regulate the sale of alcoholic beverages, and equally ignoring the fact that no landowner has a right to sell package alcoholic beverages at any given location, the district court of appeal characterized the case as one involving "the balance between a landowner's constitutionally protected property rights and the police powers of a county." Id. at 200. The court treated the case as if it involved a standard zoning issue as to "the constitutional right of property owners to make legitimate use of the property" (Id. at 201) and held that unless it bore a "'substantial relation to the public health, safety, morals, or general welfare,' the ordinance should be declared unconstitutional." Id. (citing Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926)). The court also held that, because the distance separation requirement "impacts constitutionally-protected rights," the County "carries the burden of demonstrating the reasonable [sic] relationship." Costco, 780 So. 2d at 203-204.

The court then questioned the testimony of Mr. Williams, found his testimony wanting and rejected it as insufficient to show a substantial relationship between the distance separation requirement and the County's police powers. The court never asked whether there might have been other reasons for the distance separation requirement. Instead, the court opined that "if Orange County permits some vendors to sell alcoholic beverages, then it must permit all citizens to have an equal right unless there is a reason substantially related to the public health, safety, morals, and welfare of the community which justifies unequal treatment of the law." Id. at 203. Finally, the court applied the United States Supreme Court's decision in 44 Liquormart, 517 U.S. at 484, and held that "just because a product is a 'vice' product or otherwise heavily regulated, it does not mean that the states are free to regulate a legal product in such a manner as to trample organic constitutional rights." Id. The court cited no support for its assumption that the right to sell package liquors at a given location was an "organic constitutional right." The court made no reference whatsoever to this Court's previous decisions which uniformly upheld distance separation requirements.

In a concurring opinion, Judge Harris reiterated the majority's premise that "all similarly situated persons are equal under the law and must be treated alike and, therefore, that all citizens (natural persons or corporations) located within the same

zoning classification should have the same right to apply for a license authorizing the off-site sale of liquor at the XYZ Liquor Store located two blocks away unless the zoning prohibition has a substantial relationship to public health and safety." Id. Judge Harris cited no provision in Section 38-1414 which prohibited anyone from applying for a license to sell package liquor in those areas where such sales are permitted. Although Judge Harris made an oblique reference to previous decisions of this Court, he dismissed them as seeming "to focus on the question whether the zoning entity has the authority to enforce distance restrictions." Id. at 204. Judge Harris distinguished the instant case by saying the question here is "whether the 5,000-foot restriction imposed by Orange County actually has a substantial relationship to public health and safety." Id.

Orange County timely sought review by this Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, in that the district court of appeal's decision expressly and directly conflicts with this Court's opinions in State ex rel. Dixie Inn, Inc. v. City of Miami, 24 So. 2d 705 (Fla. 1946); Chaikin v. City of Miami, 30 So. 2d 101 (Fla. 1947); Glackman v. City of Miami Beach, 51 So. 2d 294 (Fla. 1951); and State ex rel. Eichenbaum v. Cochran, 114 So. 2d 797 (Fla. 1959).

SUMMARY OF THE ARGUMENTS

This Court has consistently recognized the authority of local governments, like Orange County, to adopt and enforce ordinances prohibiting the sale of alcoholic beverages within a specified distance of an existing business licensed to engage in such sales. As this Court recognized in Glackman, 51 So. 2d at 294, "the basic purpose for restricting the distances between businesses of this kind seems well founded in the protection of the health and morals of the general public." In upholding the constitutionality of the Orange County distance separation requirement, the trial court correctly cited this Court's decision in Glackman, found that nothing presented to the court demonstrated that the 5,000 foot restriction was arbitrary and capricious or unrelated to the health, safety and welfare of the citizens of Orange County, and concluded that, since Orange County has the authority to completely prohibit the sale of alcohol within the county, it has the power to prescribe any distance separation it chooses.

The district court of appeal impermissibly ignored this Court's decisions in Glackman and other similar cases, which affirmed the authority of local governments to impose distance separation requirements. Instead, the district court applied a combination of traditional zoning law and equal protection analysis, imposed an inappropriately high substantial relation test, and struck the ordinance

as unconstitutional. The ordinance, however, in no way violated anyone's right to equal protection. The ordinance does not discriminate against a particular class of similarly situated citizens. In fact, it does not discriminate against anyone because it treats similarly situated persons equally. Everyone who meets all other requirements has a right to sell package liquors more than 5,000 feet from a business engaged in such sales. No one has a right to sell package liquors within such a distance.

Furthermore, the right to sell alcohol is a privilege accorded by the state and the local governments. It is not a constitutionally protected right. Under the Twenty-first Amendment to the United States Constitution and Florida's Beverage Law, local governments like Orange County have extraordinary powers to restrict locations where alcoholic beverages may be sold. The trial court correctly recognized this fact, the district court did not. Instead, the district court used the aura of the Equal Protection Clause to effectively repeal an ordinance with which it disagreed. It is not, however, the domain of the judiciary to legislate. If Costco disagrees with the distance requirement, its proper recourse is to the Commissioners of Orange County, not to the courts.

In Chaikin, 30 So. 2d at 1101, this Court affirmed the constitutionality of a 2,500 distance separation requirement adopted by the City of Miami, stating simply

that the contentions of those challenging that ordinance had previously been decided adversely. This Court made that statement, even though the cases it cited in support thereof involved distance separations no greater than 500 feet. Thus, this Court recognized that local governments have the right not only to impose distance separation requirements, but to determine what distances are appropriate. Courts will not second guess the wisdom of such decisions.

The decision of the district court of appeal is squarely and impermissibly in conflict with Chaikin. If Miami's 2,500-foot distance separation requirement was authorized based on cases concerning shorter distances, so too was Orange County's 5,000-foot distance separation requirement. If Miami's distance separation requirement did not violate the equal protection rights of those within 2,500 feet of an established licensee, neither did Orange County's requirement violate the equal protection rights of those within 5,000 feet of an established package liquor store. If Miami's requirement was not arbitrary and capricious, neither was Orange County's. The district court of appeal, however, failed to recognize such logic and impermissibly substituted its wisdom for that of Orange County.

STANDARD OF REVIEW ON APPEAL

Because this case concerns a question of law, the standard of review is de novo; whether the trial court correctly decided the issues. See, e.g., Village of Tequesta v. Loxahatchee River Environ. Control Dist., 714 So. 2d 1100 (Fla. 4th DCA 1998). However, this Court is required to concede every presumption in favor of the validity of the ordinance. See Griffin v. State, 396 So. 2d 152, 155 (Fla. 1981). It is this Court's duty to uphold the validity of the ordinance in all cases where that result can be lawfully reached. See Horsemen's Benevolent and Protective Ass'n., Fla. Div. v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulations, 397 So. 2d 692, 694 (Fla. 1981). Legislative enactments are presumed to be constitutional. Gulfstream Park Racing Ass'n., Inc. v. Dept. of Bus. Regulation, 441 So. 2d 627 (Fla. 1983).

ARGUMENTS OF LAW

The district court of appeal framed this case as one involving "the balance between a landowner's constitutionally protected property rights and the police powers of the County." It is not. No landowner has a constitutionally protected right to use his or her property for the sale of alcoholic beverages. The Twenty-first Amendment to the United States Constitution grants the states exclusive power

to regulate or even ban the sale of alcoholic beverages. Under the Florida Beverage Law and case law, local governments are accorded that same power. The sale of alcoholic beverages is, therefore, a privilege, not a right. It is a privilege granted under and subject to what this Court has repeatedly recognized as the broad powers of local governments to regulate or restrict such sales. See, e.g., City of Miami Beach v. State ex rel. Patrician Hotel Co., 200 So. 213, 217 (Fla. 1941).

Thus, the only issue in this case is the authority of Orange County to prohibit the sale of package liquor within 5,000 feet of an existing package liquor store. In Dixie Inn, 24 So. 2d at 705; Chaikin, 30 So. 2d at 101; Glackman, 51 So. 2d at 294; and Eichenbaum, 114 So. 2d at 797, this Court repeatedly recognized that the County has such authority. The decision of the district court of appeal cannot be reconciled with those cases and must, therefore, be reversed.

I. ORANGE COUNTY IS AUTHORIZED UNDER POWERS ACCORDED IT BY THE TWENTY-FIRST AMENDMENT, THE FLORIDA BEVERAGE LAW AND ITS OWN POLICE POWERS TO PROHIBIT THE SALE OF PACKAGE LIQUORS WITHIN 5,000 FEET OF AN EXISTING PACKAGE LIQUOR STORE.

Citing this Court's decision in Glackman, 51 So. 2d at 294, the trial court correctly recognized that Orange County's right to regulate locations that "sell alcoholic beverages is grounded in Section 562.45(2), Florida Statutes [the Florida Beverage Law], and is clearly related to the health, safety and welfare of its citizens." The trial court further recognized that, since the County has the authority to prohibit the sale of alcoholic beverages, it must logically have the power to impose whatever distance separation requirement it may choose. Because Costco failed to demonstrate that the 5,000-foot restriction was arbitrary and capricious, the trial court correctly upheld the constitutionality of that provision. The district court of appeal, in contrast, failed to recognize that the ability to use one's property to sell alcoholic beverages is a privilege granted by the State and local governments, not a right. Instead, it improperly accorded that privilege the status of a "constitutionally protected property right." As a result, it erred by applying traditional zoning case law, which is based on the premise that a landowner has a constitutionally protected right to make any lawful use of his or her land, rather than on case law recognizing the broad authority of local governments to restrict the

privilege of selling alcoholic beverages. Because the district court of appeal's decision is based on a fundamental misconception of the law and is in express and direct conflict with decisions of this Court, it must be reversed and the decision of the trial court reinstated.

A. Both This Court and Federal Courts Have Consistently Recognized the Authority of Local Governments to Establish Distance Separation Requirements as a Means of Regulating the Sale of Alcoholic Beverages.

In enacting Subsection 38-1414, Orange County acted not only pursuant to its inherent police power to protect the health, safety and welfare of its citizens, but also pursuant to powers recognized by the Florida Legislature and the Twenty-first Amendment to the United States Constitution. As this Court has long recognized, "[t]he legislative power of municipalities to regulate the sale of alcoholic beverages within its territorial limits is not questioned." Patrician Hotel, 200 So. at 217. In the exercise of such regulatory power it is well settled that a local government may limit the number of licenses to be issued by granting the privilege to sell alcoholic beverages only within stated areas. Id.

Florida's Beverage Law, Chapter 562, Fla. Stat., specifically provides that nothing therein "shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary

regulations therefor, of any licensee under the Beverage Law within the county or corporate limits of such municipality." § 562.45(2)(a), Fla. Stat. (emphasis added). The Beverage Law thus gives local governments the power to create zones wherein alcoholic beverages may not be sold. City of Miami v. Kichinko, 22 So. 2d 627, 629 (Fla. 1945). The Beverage Law itself provides a distance separation requirement, prohibiting a site for on-premises consumption of alcoholic beverages from being located within 500 feet of a school, unless the county or municipality specifically approves the location as promoting the public health, safety and general welfare of the community. Id.

The United States Supreme Court has consistently recognized that a state has "broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold." New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981). Moreover, the Twenty-First Amendment of the United States Constitution confers broad regulatory powers on the states. Thus, in California v. LaRue, 409 U.S. 109, 114 (1972), for example, the Court held:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to regulate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been

> recognized as conferring something more than the normal state authority over public health, welfare and morals.

Furthermore, the United States Supreme Court has never attached any constitutional significance to a state's delegation of its authority over alcohol to local governments like Orange County. As a result, a local government may even regulate what would otherwise be a form of constitutionally protected expression in locations licensed to sell alcoholic beverages. See, e.g., City of Newport v. Iacobucci, 479 U.S. 92 (1996).

The United States Supreme Court has also recognized the constitutionality of distance separation requirements, even when applied to activities protected by the United States Constitution. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), for example, the Court held that a City of Detroit zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments.

Again, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court affirmed an ordinance prohibiting any adult motion picture theater from locating within 1,000 feet of a residential zone, a single or multi-family dwelling, a church, or a park or within one mile of any school. In that case, the Court recognized that, in attempting to mitigate the effects of adult entertainment

establishments, a city may regulate them "by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton." Id. at 52. Quoting from its previous decision in American Mini Theatres, 427 U.S. at 71 (1976), the Court concluded:

> It is not our function to appraise the wisdom of its [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id.

This Court likewise has a long history of affirming the constitutionality of ordinances like the one in question. For example, in Patrician Hotel, 200 So. at 213, this Court held that it was in the legislative power of a municipality to regulate the sale of intoxicating liquors within its territorial limits in that municipalities have the power to limit the number of permits or licenses to be issued within their borders.

In Dixie Inn, 24 So. 2d at 705, this Court first considered an ordinance imposing distance separation requirements like those in question. In that case, this Court recognized that nothing in the Florida Beverage Act "shall be construed to affect or impair the power or right of any incorporated town or city of the State thereafter to enact ordinances regulating the hours of business and location of places of business and prescribing sanitary regulations of any licensee under the

Beverage law within the incorporate limits of such city or town." Id. at 707. According to this Court, the Florida Legislature has accorded broad and liberal powers to local governments for regulating the sale or consumption of alcoholic beverages within such governmental areas. This Court further recognized that the Legislature itself, by enactment of Section 561.44, Florida Statutes, specifically imposed separation requirements. Id. at 706. This Court concluded its analysis by finding that:

> The State, in the exercise of its police power, may enact a valid law forbidding the sale of intoxicating liquors in a particular locality such as prohibiting sales within specified distances of Churches, schools and other buildings. Similar power may be conferred upon municipalities . . . . It has the power to regulate and even the power to prohibit the sale of intoxicating liquors in designated areas and may confer on municipalities similar power.

Id. at 707. Thus, this Court affirmed a Miami ordinance which provided that no certificate of occupancy could issue for the sale or consumption of liquor if the applicant's place of business was situated less than 500 feet from an established licensee within the downtown business zone area.

In Chaikin, 30 So. 2d at 101, this Court affirmed a Miami ordinance which prohibited the issuance of a new license to sell intoxicating liquors in a package liquor store for one whose place of business would be located within what was

termed a "combination residential and business zone," within 2,500 feet of an established licensee. In a very brief decision, this Court recognized that the contentions of those challenging the ordinance had previously been decided adversely. Id. at 102 (citing City of Miami v. State ex. rel. Green, 180 So. 45 (Fla. 1938); Kichinko, 22 So. 2d at 627; and Dixie Inn, 24 So. 2d at 705).[2]

In Glackman, 51 So. 2d at 294, this Court again considered a challenge to an ordinance which prohibited a vendor from selling liquor in a place of business located within 1,000 feet of another like place. This Court found the 1,000-foot distance requirement reasonable and held "the basic purpose for restricting the distances between businesses of this kind seems well founded in the protection of the health and morals of the general public." Id. at 296.

When Orange County adopted the distance separation requirement of Section 38-1414 on April 25, 1956, and again in 1966, this Court had, therefore, already expressly affirmed and reaffirmed the right of local governments like Orange County to impose distance separation requirements between package liquor vendors. It had already recognized that such legislation is within the broad police powers of local governments as being "founded in the protection of the health and morals of the general public." Glackman, 51 So. 2d at 296. There was no reason

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[2] In a subsequent decision, State ex rel. Eichenbaum v. Cochran, 114 So. 2d 797 (Fla. 1959), the constitutionality of a 2,500 distance requirement was assumed.

for Orange County to reassert or provide justification for that fact. When Orange County enacted Section 38-1414, it simply adopted an ordinance, the provisions of which this Court had previously found valid. Orange County was entitled to rely on such holdings. See Renton, 475 U.S. at 50-51. The enactment of the ordinance was, therefore, fully within Orange County's police powers.

The validity of Section 38-1414 has now become so accepted that challenges have been limited to such issues as how the ordinance should be applied. In Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082 (Fla. 1978), for example, Skaggs-Albertson's questioned whether the 5,000-foot distance separation between vendors should be measured from the grocery department entrance of a store or from the liquor department entrance. In that case, Skaggs-Albertson's did not question the validity of the ordinance itself on either substantive or procedural grounds and this Court characterized the ordinance as "valid." Id. at 1090.

B. The Trial Court Correctly Recognized that the Greater Power of Orange County to Prohibit the Sale of Alcoholic Beverages Includes the Lesser Power to Prohibit the Sale of Package Alcoholic Beverages in Certain Locations of the County.

The trial court upheld the constitutional validity of Section 38-1414 by, *inter alia*, applying the time-tested syllogism that the greater power of the County to totally prohibit the sale of alcoholic beverages necessarily includes the lesser power

to prohibit the sale of package liquor in certain locations of the County. In so doing, the trial court properly applied a long-recognized maxim. In fact, the most influential exponent of the concept that the greater power includes the lesser power was Justice Holmes, who began expounding the doctrine while still at the Supreme Court of Massachusetts. See McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892). For a recent application of the doctrine, see United States of America v. Figueroa, 984 F. Supp. 71, 78 n.16 (D.P.R. 1997).

In its Initial Brief filed with the district court of appeal, Costco, nevertheless, argued that the trial court erred in applying the syllogism. IB-10-30 . Costco attempted to support its argument by implying that the United States Supreme Court in 44 Liquormart, 517 U.S. at 484, rejected continued application of the syllogism. In that case, however, the United States Supreme Court far from repudiating the syllogism, in fact, expressly reaffirmed its validity.

In 44 Liquormart, the Court simply rejected an argument by Rhode Island that its power to ban the sale of alcoholic beverages somehow gave it the right to also ban the constitutionally protected right to advertise the sale of such beverages. In rejecting that argument, the Court stated:

> Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial *activity* is "greater" than its power

> to ban truthful, nonmisleading commercial *speech*. Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. . . . In short, we reject the assumption . . . that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it.

Id. at 511 (emphasis added).

As can be seen, the Court in no way rejected the syllogism applied by the trial court. In fact, the Court earlier specifically applied the syllogism to a state's right to restrict the sale of alcoholic beverages. According to the Court, having power absolutely to prohibit the manufacture, sale, transportation, or possession of intoxicants, a state may permit these things only under definitely prescribed conditions, because the greater power includes the lesser. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).

Unlike Rhode Island, Orange County is not attempting to use its power to ban an activity as a justification for seeking to suppress a constitutionally protected right, such as commercial speech. Rather, Orange County is limiting an activity based on its power to prohibit that activity. Because Orange County has the right to prohibit the activity of selling alcoholic beverages anywhere within its borders, it follows inalterably that Orange County equally has the right to prohibit the activity of selling package liquors within designated portions of the County.

C. The Imposition of a 5,000-Foot Distance Separation Requirement Was Neither Arbitrary Nor Capricious.

The district court of appeal, having incorrectly assumed that the right to sell alcoholic beverages is a constitutionally protected property right, found Orange County's 5,000-foot distance separation requirement "arbitrary, capricious and therefore unconstitutional." In so holding, the court ignored the permissible bases for the requirement, disregarded this Court's repeated affirmation of such requirements and improperly substituted its own wisdom for that of the County.

"A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by the facts or logic, or despotic." Agrico Chemical Co. v. State, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied sub nom. Askew v. Agrico Chemical Co., 376 So. 2d 74 (1979).

Orange County's distance separation requirement is based upon a logical and rational belief that dispersing businesses that sell package liquors will result in fewer adverse consequences than if the businesses were allowed to be concentrated. Edward Williams, former director of the Orange County Planning Department, testified that the purpose of the distance separation requirement was to give residents enough opportunity to use package liquor stores "without allowing them to become so dense they become a problem." TR-49. He testified as to the

adverse impacts of such establishments, which include a reduction in the value of adjoining properties, an "extraordinary amount of traffic," and "drinking in their parking lots, fights and driving while intoxicated." TR-56. He testified that spreading out package liquor stores "seemed to minimize the adverse impacts associated with such uses, while allowing them to congregate seemed to create an impact greater than the number of uses." TR-58.

There was nothing irrational about such reasoning. It was not illogical; it certainly was not despotic. Orange County recognized a potential problem and sought to mitigate it. As the United States Supreme Court recognized in American Mini Theatres, 427 U.S. at 71, local governments have the right to disperse activities that can have harmful secondary effects. It is not the function of the courts to appraise the wisdom of such decisions. Id.

Furthermore, distance separation requirements are not unique to businesses selling package liquors. The parties stipulated that:

> Orange County, pursuant to its police power, frequently restricts the distances [within] which various types of structures or businesses can be located. It does so with bed and breakfast facilities, adult entertainment uses, day care centers, community residential homes, billboards, and communication towers, such as cell phone towers. Such restrictions are common for municipalities and counties and around the country.

R-101. In all such cases, traffic concerns, desires to protect nearby residential districts, concern for associated criminal activity or sheer aesthetics warrant dispersing the particular activity.

Finally, a 5,000-foot distance separation requirement between package liquor stores is no more arbitrary or capricious than the 2,500 foot distance requirement affirmed in Cochran, 114 So. 2d at 800, nor is it any more arbitrary than distance requirements between billboards, communication towers, or day care centers. This is true even if certain members of the County staff may personally disagree with the requirement. Thus, the district court of appeal erred in holding the distance separation requirement arbitrary and capricious.

II. ORANGE COUNTY'S DISTANCE SEPARATION REQUIREMENT DOES NOT VIOLATE ANY CITIZEN'S RIGHT TO EQUAL PROTECTION.

At no time in any of the briefs filed below was the issue of equal protection ever raised. The district court of appeal, nevertheless, made the supposed denial of equal protection the cornerstone of its opinion. Furthermore, the court, citing Davis v. Sails, 318 So. 2d 214 (Fla. 1st DCA 1975), engrafted the substantial relationship test used to determine the constitutionality of traditional zoning regulations onto its equal protection analysis, thereby imposing an impermissibly

high standard upon Orange County and improperly transferring the burden of proof from Costco to the County.

A. Because It Creates No Classifications of Persons Eligible to Sell Package Liquors At a Given Location, the Distance Separation Requirement Cannot be Violative of The Equal Protection Clause.

Costco failed to challenge the distance separation requirement on equal protection grounds for good reason - - the requirement does not violate anyone's right to equal protection of the laws. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits equally situated persons from being treated in a disparate manner, absent cause. Denial of equal protection "entails, at a minimum, a classification that treats individuals unequally." Coalition for Economic Equity v. Wilson, 122 F.3d 692,707 (9th Cir.), cert. denied, 522 U.S. 963 (1997).[3] An ordinance thus potentially runs afoul of the Equal Protection Clause only when it creates classifications of citizens which are treated differently.

The ordinance in question, however, imposes no classifications whatsoever. Every citizen is treated equally. Provided all other requirements are met, every

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[3] The district court of appeal never indicated whether its equal protection analysis stemmed from the United States or from the Florida Constitution. Federal cases, however, are relevant and persuasive to the consideration of whether Florida's equal protection clause has been violated. Osterndorf v. Turner, 426 So. 2d 539, 543 (Fla. 1982).

citizen has a right to sell package liquors in any commercial district, so long as the location chosen for conducting such an activity is not within 5,000 feet of an established package liquor store. At the same time, no citizen has a right to sell package liquor within 5,000 feet of any established package liquor store.

The district court of appeal sought to avoid this truth by perceiving a classification between the business that first obtains the right to sell package liquor and those within 5,000 feet of that establishment who are subsequently prohibited from engaging in such activity. To create such a classification, however, is to so totally distort the meaning of classifications in an equal protection analysis as to subject any limiting ordinance to an equal protection challenge. Every distance separation requirement - - whether for cemeteries, junk yards, billboards or adult entertainment establishments would be subject to challenge, as would every ordinance or regulation that limited the number of permits or licenses that could be issued. No court has ever so expanded the reach of the Equal Protection Clause.

Moreover, as the United States Supreme Court has recognized, the Equal Protection Clause relates to equality between persons as such, rather than between areas; territorial uniformity is not a constitutional prerequisite. McGowan v. Maryland, 366 U.S. 420, 427 (1961). As a result, courts have recognized, for example, that the guarantee of equal protection of the laws is not denied by a local

option law that allows traffic in intoxicating liquors to be made a crime in certain territory and permitted elsewhere. Ohio ex rel. Lloyd v. Dollison, 194 U.S. 445 (1904).

Orange County's distance separation requirement applies only to locations. Even if it creates a disparity between locations where package liquor can be sold and locations within 5,000 feet of those locations, where package liquor cannot be sold, the ordinance does not apply to persons. All persons have an equal opportunity to obtain approval for selling package liquors at an initial location. Thereafter, anyone can obtain property in one of the many other permissible locations within Orange County and seek approval for selling package liquors at that location. Within the prohibited 5,000 feet, however, no property can be used by anyone for selling package liquors. Thus, the ordinance applies to properties. It does not impermissibly classify citizens and, therefore, cannot be in violation of the Equal Protection Clause.

B. Even If An Equal Protection Issue Was Present, The District Court of Appeal Erred in Applying A Substantial Relation Test in Determining the Constitutionality of the Distance Separation Requirement.

Not only did the district court of appeal raise an equal protection challenge where no such challenge had been made and where none existed, it also applied the wrong standard in its review.

1. The District Court of Appeal Erred in Failing to Consider the Appropriate Test for Determining the Constitutionality of Orange County's Distance Separation Requirement.

In determining whether an ordinance violates the Equal Protection Clause, courts apply various levels of judicial scrutiny, depending upon the type of classification utilized and the nature of the right affected. In a series of cases, the United States Supreme Court has recognized three degrees of scrutiny.

First, if the ordinance disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," courts will employ strict scrutiny, requiring the government to demonstrate that the classification has been precisely tailored to serve a compelling governmental interest. Strict scrutiny of a legislative classification is applied only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. See Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1975); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Fundamental rights include such rights as those of a uniquely private nature (Roe v. Wade, 410 U.S. 113 (1973)), the right to vote (Bullock v. Carter, 405 U.S. 134 (1972)), the right of interstate travel (Shapiro v. Thompson, 394 U.S. 618 (1969)), rights guaranteed by the First Amendment (Williams v. Rhodes, 393 U.S. 23 (1968)), and the right to procreate (Skinner v. Oklahoma ex rel. Williamson, 316

U.S. 535 (1942)). Suspect classes include race (McLaughlin v. Florida, 379 U.S. 184 (1964)), ancestry (Oyama v. California, 332 U.S. 633 (1948)), or alienage, Graham v. Richardson (403 U.S. 365 (1971)).

Regulations involving quasi-suspect classifications, such as gender and legitimacy, and regulations which are content neutral but which, nevertheless, concern conduct that incidentally affects activities protected by the First Amendment are subject to intermediate scrutiny. In such an analysis, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand such scrutiny. This level of intermediate scrutiny has been infrequently applied and then generally to discriminatory classifications based on sex or illegitimacy. Clark v. Jeter, 486 U.S. 456, 472 (1988); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Mills v. Habluetzel, 456 U.S. 91 (1982); Mathews v. Lucas, 427 U.S. 495 (1976).

If neither strict nor intermediary scrutiny is appropriate, then the statute must be tested for mere rationality. See, e.g., Heller v. Doe, 509 U.S. 312, 319-21 (1993); Clark, 486 U.S. at 472.

The district court of appeal made no effort to determine which test to apply. Instead, it adopted a substantial relation test based not on equal protection law but

on traditional zoning law, which presumes that the constitutional right to make any lawful use of one's property is at issue. In so doing, the district court erred as a matter of law.

2. Because the Distance Separation Requirement Does Not Involve a Suspect Classification or a Fundamental Right, its Constitutionality Should Have Been Determined by the Rational Relation Test.

Because Orange County's distance separation requirement neither disadvantages a "suspect class" nor infringes upon the exercise of a "fundamental right," it is subject to, at most, a rational relation test. Furthermore, a state's power to regulate the liquor industry, although not absolute, allows the widest discretion and is subject to minimal demands of the Fourteenth Amendment's equal protection requirements. Spudich v. Smarr, 931 F.2d 1278 (8th Cir. 1991), cert. denied, 502 U.S. 866 (1991). In fact, in State Bd. of Equalization of California v. Young's Mkt. Co., 299 U.S. 59, 64 (1936), the United States Supreme Court held that "a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Orange County's distance separation requirement obviously does not involve a suspect classification. Had the ordinance, for example, permitted all citizens, except Hispanics, to sell package liquors, it would have affected a suspect classification requiring a compelling governmental reason to be justified under the

Equal Protection Clause. There is no such classification in the instant case. Moreover, liquor licenses are not an inherently suspect classification and the government can impose regulations on liquor traffic that are more stringent than would be permitted in other businesses. See, e.g., City of Batavia v. Allen, 578 N.E. 2d 597 (Ill.2d Dist. 1991).

Furthermore, the distance separation requirement affects no constitutionally protected right. In Crowley v. Christensen, 137 U.S. 86 (1890), the United States Supreme Court early held that "the police power of the State is fully competent to regulate the business [of selling alcoholic beverages] - to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail . . ." In Cronin v. Adams, 192 U.S. 108 (1904), the Court, therefore, affirmed the decision of a trial court holding that no one may engage in the business of selling liquor without a license. According to the Court one seeking a license "has no absolute right to sell at all. It is only a privilege he gets when a license is granted." Id. at 114. Thus, a city has the "exclusive power to prohibit, restrain, tax and regulate the sale of intoxicating liquors. It may exercise that power to prohibit the sale altogether; or, if it see fit, it may regulate the sale and impose such conditions as it deems necessary." Id. at 115.

Thus, no citizen has a constitutional right to sell alcoholic beverages. That is a privilege accorded by the State of Florida and by local governments. "[T]he acquiring of a license to sell intoxicating liquor is a matter of privilege and not a matter of right." Patrician Hotel, 200 So. at 216. A license is not property in a constitutional sense, nor is it a contract. State ex rel. First Presbyterian Church of Miami v. Fuller, 187 So. 148, 150 (Fla. 1939). As this Court has recognized, "[w]hen a person engages in the sale of liquor he does so with a full knowledge of the right and power of the Legislature not only to regulate but to prohibit." State ex. rel. First Presbyterian Church of Miami v. Fuller, 183 So. 726, 727 (Fla. 1938). In fact, not even possessing an established liquor business accords one a vested right "over which the Legislature is powerless to enact laws regulating or prohibiting the same." First Presbyterian Church, 183 So. at 727. See also State ex rel, First Presbyterian Church of Miami v. Fuller, 182 So. 888 (Fla. 1938) (holding that selling liquor within the City of Miami was a privilege authorized under that city's ordinances and that the privilege was subject to revocation when issued in violation of a city distance separation requirement).

The necessity of applying at most a relational relations test is illustrated by the decision in Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Comm'n., 1995 Del. Super LEXIS 520 (1995). In that case, the court affirmed an

ordinance which established lesser minimum distance requirements for liquor stores located inside municipalities than for stores located outside incorporated areas. The requirements in that case, unlike those in the instant case, discriminated between classes of liquor stores, thus subjecting the requirements to a review under the Equal Protection Clause of the Constitution. However, the court recognized that because the classification did not involve fundamental rights or draw distinctions based on suspect classifications, the constitutionality of the statute was presumed and the classifications had only to relate rationally to a legitimate state interest. Id. at p.5 (citing Rodriguez, 411 U.S. at 1; City of Dallas v. Stanglin, 490 U.S. 26 (1989); Vance v Bradley, 440 U.S. 93 (1979); City of New Orleans v. Dukes, 427 U.S. 297 (1976)). The court also noted that under the rational-basis equal protection test, the court will not weigh conflicting evidence to determine whether the act will effectuate the legislature's stated goals. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). Finally, the court recognized that there is no fundamental right to operate a liquor store. In the words of the court, "given the nature of the Twenty-first Amendment and cases interpreting it, it may be that any interest in operating a liquor store is among the least protected in the law." Prices Corner Liquors, 1995 Del Super LEXIS 520 at p. 5 (citing Bellanca, 452 U.S. at 715).

As in Prices Corner Liquors, the distance separation requirement in the instant case neither affects a suspect class nor involves a fundamental right. Even if Orange County's requirement were properly subject to an equal protection challenge, its constitutionality should have been tested under a rational relation test. Accordingly, the district court erred as a matter of law when it applied a substantial relation test.

C. Because the Distance Separation Requirement Is Rationally Related to Minimizing Undesirable Secondary Effects Associated with the Sale of Package Liquors, It Does Not Violate the Equal Protection Clause.

The rational-basis analysis, which should have been applied by the district court of appeal, is most clearly articulated in the United States Supreme Court's decision in FCC v. Beach Communications, Inc., 508 U.S. 307 (1993). In that case the Court considered a congressional act requiring the regulation of cable television facilities that serve separately owned and managed buildings, while exempting from such regulation facilities that serve one or more buildings under common ownership or management. In affirming the constitutionality of the disparate treatment, the Court held:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds

> along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts it could provide a rational basis for the classification . . . Where there are "plausible reasons" for Congress' action "our inquiry is an at an end." . . . This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Id. at 313-314 (citations omitted).

According to the Court in Beach Communications, on rational basis review, a classification in a statute bears a strong presumption of validity. Id. at 314 (citing Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988)). Those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." Id. at 315 (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1993)). The Court further noted that it never requires a legislature to articulate its reasons for enacting a statute. "It is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motived the legislature." Id. at 315. Thus, according to the Court, the absence of legislative facts explaining the distinction on the record has no significance in a rational-basis analysis. According to the Court, the Equal Protection Clause "does not demand for purposes of rational-basis review that a

legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." Id. (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)). In other words, a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data. Id. The Court stressed that "[o]nly by faithful adherence to this guiding principal of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." Id. (quoting Lehnhausen, 410 U.S. at 365).

The rational-basis review in an equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller, 509 U.S. at 319. Nor does such review authorize "the judiciary [to] sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Thus, in Ferguson v. Skrupa, 372 U.S. 726, 731-732 (1963), the Court held that it would not strike down state laws simply because they may be "unwise, improvident, or out of harmony with a particular school of thought." In that case, the Court refused to strike a Kansas debt adjusting statute as unwise, because "relief, if any be needed, lies not

with us but with the body constituted to pass laws for the State of Kansas." Id. at 732.

In Cochran, 114 So. 2d at 797, this Court demonstrated the broad latitude that must be accorded any governmental regulation of the sale of alcoholic beverages under a relational relation test. In that case, this Court considered an ordinance which prohibited those holding a package liquor store license from locating within 2,500 feet of a church or school, unless they were located within a shopping center having a minimum of 65,000 square feet of floor area. In the case of such shopping centers, a single license could be issued to a single business within the center, which business could be located not less than 500 feet from a church or school. In challenging the ordinance, the appellee argued that the ordinance created an unusual classification in favor of licensees within such shopping centers. In reviewing the challenge, however, this Court held that:

> the regulation and control of the alcoholic beverage business is peculiarly a legislative function. In this connection, as in all similar situations, when the legislative branch of the government exercises a legislative power in the form of a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforceability in question. To this end the limits of the court's authority is [sic] to measure the validity of the legislative enactment by the requirements of the controlling law. If those standards are met, the legislation should be upheld.

Id. at 800.

Recognizing that Dade County had undertaken to classify "shopping centers" over a certain size for particular regulation regarding the sale of alcoholic beverages, this Court held that it could not "conclude from the face of the ordinance that it establishes an unreasonable classification or that without justification and reason it discriminates in favor of a [particular class]." Id. According to this Court:

> [w]hether one as an individual might consider it a good idea to make it possible to have a package liquor store in practically every large 'shopping center' in the affected county is entirely beside the point. The question involves merely the constitutionality of the decision reached by the County Commissioners of Dade County as evidenced by the duly enacted ordinance. . . . we cannot, on the showing made, be impelled to the conclusion that the County Commissioners have drawn a classification or regulation without foundation in reason or other characteristics that would distinguish the class from others which are regulated differently. This is the ultimate test. Relief, if any, must come from the law-making body, not the courts.

Id.

In its decision in the instant case, the district court of appeal violated almost every guideline for properly resolving an equal protection challenge. It created a classification of citizens when none existed. It converted the privilege of selling package liquors into a constitutionally protected property right. It applied a

substantial relation test when it should have applied, if anything, a rational relation test. It improperly imposed upon Orange County the burden of showing a substantial relationship between the distance separation requirement and the protection of the County's health, safety and welfare, when it should have required Costco to "negative every conceivable basis" for the ordinance. Beach Communications, 508 U.S. at 315.

Finally, the district court of appeal not only failed to defer to the wisdom of the County in adopting the distance separation provision, but it actively challenged the County's refusal to repeal that provision. Moreover, the court questioned the continued validity of the ordinance by applying comments concerning the ordinance made by present-day Orange County officers - - comments which are irrelevant in determining the constitutionality of an ordinance first adopted in 1956, readopted in 1966 and amended in 1992 and 1993.

In applying contemporary comments to strike the ordinance, the district court effectively legislated the repeal of an ordinance which the Orange County Commission had refused to repeal. The prejudice of the district court is reflected in its comments that, following a recommendation by the Orange County Planning and Zoning Commission that the restriction be repealed, the Board of County Commissioners "for unexplained reasons, never acted on the recommendation."

Costco, 780 So. 2d at 200. There was, of course, no reason why the Orange County Commission had to act on a recommendation by a subordinate commission to repeal an existing ordinance. The district court of appeal went on to cite various comments made by present day County Commissioners when they, in subsequent proceedings, refused to grant Costco variances. Id. at 200-201. Again, such comments are irrelevant in determining the constitutionality of an ordinance adopted over 30 years previously.

At the same time, the district court of appeal rejected Mr. Williams' testimony that allowing package liquor stores in close proximity "lowers residential property values and creates an extraordinary amount of traffic" and gives rise to secondary undesirable activities "such as drinking in their parking lots, fights and driving while intoxicated." TR-56. It gave no credence to Mr. Williams' testimony that spreading out such establishments "seemed to minimize the adverse impacts associated with such uses, while allowing them to congregate seemed to create an impact greater than the number of uses." TR-58. Such a basis for the distance separation requirement, even if it had been speculated rather than given as testimony by a former director of the Orange County Planning Department, should have sufficed to support the constitutionality of the ordinance. In rejecting that

testimony, the district court of appeal impermissibly substituted its wisdom for that of Orange County. In so doing, it erred as a matter of law.

III. COURTS CANNOT EFFECTIVELY REPEAL LEGISLATION SIMPLY BECAUSE THEY BELIEVE IT TO BE OUTDATED.

The district court of appeal made little effort to conceal its distaste for the Orange County distance separation requirement and effectively acted to repeal that requirement when Orange County had refused to do so. Should this Court now affirm that decision, it would encourage courts to act as legislatures, repealing valid ordinances any time they consider those ordinances out of tune with present conditions. Obviously, courts may not make such decisions without usurping legislative powers in violation of the doctrine of the separation of powers. See generally Kahn v. Shevin, 416 U.S. 351 (1974). Courts should never usurp legislative functions. See American Bankers Life Assur. Co. of Fla. v. Williams, 212 So. 2d 777 (Fla. 1st DCA 1968).

Furthermore, were the courts to entertain every challenge to an ordinance on the basis that it has become outdated, they would literally be inundated with litigation. Every time anyone thought that any statute was no longer reflective of societal conditions, he or she could challenge that statute. If the challenge was not successful one year, it could be raised the next year and the next year and the next

year, until eventually a court might conclude the time had come to declare the statute unconstitutional. Such, however, is not the legislative process mandated by the United States or Florida Constitutions.

Courts cannot be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea to cure the ill or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve that intended end, the legislation must be upheld. See Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075, 1081 (M.D. Fla. 1978). The United States Supreme Court has recognized that it must judicially "tolerate" what personally it may regard as a "legislative mistake." Harisiades v. Shaughnessy, 342 U.S. 580 (1952). It is "out of bounds" for the judiciary to deny a local government a choice of policy, so long as the policy is not unrelated to the problem and not forbidden by some explicit limitation on the government's power. Beauharnais v. Illinois, 343 U.S. 250 (1952). Thus, the proper forum for the correction of what one may consider to be ill-considered legislation is a responsive legislature, not the courts. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949).

If Costco believes validly adopted legislation no longer is in tune with the present conditions of Orange County, its recourse is to the Board of County

Commissioners, not to the courts. See Cochran, 114 So. 2d at 800. The district court of appeal erred as a matter of law when it disregarded this fundamental principle of law.

CONCLUSION

As this Court has repeatedly recognized, Orange County, acting under the extremely broad powers accorded it by the Twenty-first Amendment to the United States Constitution and the Florida Beverage Law, was fully authorized to adopt the distance separation requirement of Section 38-1414 in 1956 and again in 1966. The imposition of such a distance requirement is properly founded on a local government's right to protect the public health, safety and welfare of its citizens. Because the ordinance does not create any classifications, it should never have been subjected to an equal protection analysis. Furthermore, because the ordinance has a rational basis in protecting county citizens and does not discriminate against a protected class or infringe upon constitutionally protected rights, it cannot be in violation of anyone's right to equal protection of the laws. In finding to the contrary, in substituting its wisdom for that of Orange County and in effectively repealing the distance separation requirement of Section 38-1414, the district court of appeal impermissibly usurped the County's legislative power and erred as a matter of law.

For all the above reasons, the district court of appeal's decision of February 2, 2001, should now be reversed and the decision of the trial court recognizing the validity and enforceability of Section 38-1414, should now be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been served by U. S. Mail this ____ day of August, 2001 to: Scott A. Glass, Esquire, Shutts & Bowen, LLP, 300 South Orange Avenue, Suite 1000, Orlando, FL 32801; Mark F. Fisher, Esquire, Meininger, Fisher & Mangum, P.A., Post Office Box 1946, Orlando, FL 32802-1946; and John F. Bennett, Esquire, Fishback, Dominick, et al., 170 E. Washington Street, Orlando, FL 32801.

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The undersigned counsel for Appellant hereby certifies that this Initial Brief has been generated in Times New Roman, 14-point font.

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