

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.

**REPLY 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 Orange County's Initial Brief filed with this Court will be cited as "SCIB-" followed by the appropriate page number, while citations to Costco's Answer Brief will be cited as "SCAB-" followed by the appropriate page number.

STATEMENT OF THE FACTS

In its Statement of the Facts, Costco mischaracterizes Orange County's purpose in enacting the distance separation requirement at issue by quoting from the preamble to the "Orange County Zoning Commission Resolution," which expressed the County's general desire to prevent the further scattering of business, trade and industrial uses within the County. SCAB-1. In adopting the specific distance separation requirement, however, the County provided the following separate preamble:

WHEREAS, in the interest of, and in order to protect the health and morals of the public, this Commission deems it desirable and appropriate to exercise the powers so conferred, as in this resolution provided.

R-App. 3. Although the County did not state that it was adopting the distance separation requirement to prevent the concentration of package liquor stores into what are sometimes referred to as "combat zones," that is one of the primary reasons why local governments adopt such requirements.

ARGUMENTS OF LAW

Under the Twenty-first Amendment, the Florida Beverage Law and its own police powers, Orange County is empowered to prohibit all of its citizens from selling package liquors in areas where such activity is deemed undesirable, including within 5,000 feet of an existing establishment engaged in the sale of package liquors. In State

ex rel. Dixie Inn, Inc. v. City of Miami, 24 So. 2d 705 (Fla. 1946), this Court held that local governments may prohibit the sale of alcoholic beverages in designated areas through the use of distance separation requirements like Orange County's. Subsequently, in Chaiken v. City of Miami, 30 So. 2d 101 (Fla. 1947), this Court upheld a 2,500 foot distance requirement.¹ In Glackman v. City of Miami Beach, 51 So. 2d 294 (Fla. 1951), this Court recognized that the purpose for distance separation requirements is "well founded in the protection of the health and morals of the public." Therefore, when Orange County enacted its distance separation requirement in 1956, it acted pursuant to powers already recognized by this Court in at least three decisions. Those decisions remain valid and control the instant case. They were not even addressed by Costco in its Answer Brief.

Because the distance separation requirement does not infringe upon fundamental rights, it does not violate anyone's right to substantive due process. Because it does not create any classifications, it does not deny anyone's right to equal protection. Because the requirement represents a rational effort to mitigate undesirable secondary effects associated with the sale of package liquors, it is neither arbitrary nor capricious. While the district court may have disagreed with the wisdom of the requirement, it erred, as a matter of law, in substituting its judgment for that of Orange County.

¹ Costco's proposed new location is 2,112 feet from an existing package goods store. AB-3.

I. THIS COURT HAS CONSISTENTLY UPHeld A LOCAL GOVERNMENT'S RIGHT TO IMPOSE DISTANCE SEPARATION REQUIREMENTS, PURSUANT TO THE TWENTY-FIRST AMENDMENT, FLORIDA'S BEVERAGE LAW AND THE GOVERNMENT'S POLICE POWERS.

Costco's challenge to Orange County's distance separation requirement is based on the false assumption that one has a fundamental right to use his or her property to sell alcoholic beverages. No one, however, has such a right. Permission to sell alcoholic beverages is a privilege conferred by the State of Florida and its local governments, pursuant to the Twenty-first Amendment. It is a privilege granted subject to the County's right to regulate how, when and where alcoholic beverages may be sold. SCIB-33-34. The district court, therefore, erred as a matter of law when it treated the privilege of selling alcoholic beverages as if it were part of "a landowner's constitutionally protected property rights."

In its Initial Brief, Orange County quoted the United States Supreme Court's holding in California v. LaRue, 409 U.S.109, 114 (1972), that "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." Costco, in answer, argues that the Court "retreated" from that statement in Craig v. Boren, 429 U.S. 190 (1976). SCAB-15. There was, however, no such "retreat" for cases, like the instant one, which regulate locations where alcoholic beverages may be sold and which do not

affect fundamental rights. In New York State Liquor Auth. v. Ballanca, 452 U.S. 714, 717 (1981), the Court reaffirmed its position in LaRue and held that the “State’s power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.”

Again, in Newport v. Jacobucci, 479 U.S. 92 (1986), the Court held that while “the reach of Twenty-first Amendment is certainly not without limit, . . . previous decisions of this Court have established that, in the context of liquor licensing, the Amendment confers broad regulatory powers on the States.” The Court in so doing, reaffirmed its holding in LaRue as to the Twenty-First Amendment conferring something more than normal state authority over public health, welfare and morals. The Court further quoted its holding in LaRue that the Twenty-first Amendment requires an “added presumption in favor of the validity of . . . regulation in this area.” Id. at 97 (emphasis added). In dissent, Justice Stevens noted that the majority had rejected the very argument Costco now makes, that the Twenty-First Amendment merely created an exception to the normal operation of the Commerce Clause. Id. at 97-98.

The Court’s decision in 44 Liquor Mart v. Rhode Island, 517 U.S. 484 (1996), did nothing to alter its holding in Ballanca. In Ballanca, the Court, like the trial court in the instant case, recognized that the greater power to entirely ban the act of selling

alcohol included the lesser power to prohibit the act of selling alcohol in certain locations. In 44 Liquor Mart, the Court held that the right to ban the act of selling alcohol did not include the right to ban the separate, constitutionally protected act of advertising alcoholic beverages. The two decisions are entirely compatible.

Costco has attempted to avoid the fact that no one has a fundamental right to sell alcoholic beverages by stating that it "is the fundamental right of every property owner to use his or her property for legitimate purposes free from arbitrary government regulations." SCAB-13. Were Costco's argument adopted, however, a local government's right to legislate under the Twenty-first Amendment - - at least as to any activity involving, even indirectly, the use of land - - would be more restricted than its power to legislate under its police powers. No case has so held.

In fact, not one of the cases cited by Costco in its Brief concerns an ordinance that, like Orange County's distance separation requirement, does nothing more than restrict locations where alcoholic beverages may be sold. In Craig, 429 U.S. at 190, Oklahoma sought to impose different drinking ages for males and females, thereby creating an obvious equal protection issue. In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the Court found that an Oklahoma state ban against the retransmission of out-of-state beverage commercials by cable television systems was preempted by a federal law. In 44 Liquor Mart, Inc., 517 U.S. at 484, Rhode Island

tried to ban constitutionally protected advertising under its power to regulate the sale of alcoholic beverages.

Contrary to the district court's opinion and arguments advanced by Costco, the instant case is not controlled by the reasoning of Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). In that decision, the Supreme Court upheld the right of municipalities to zone property for specified uses but only so long as such zoning was substantially related to the public health, safety, morals and general welfare. The Court's reasoning in Euclid was premised on the constitutional principle that, because a property owner has the right to make any lawful use of his or her property, infringement upon that right by zoning requires substantial justification. The fallacy in Costco's argument and in the district court's opinion, is the presumption that a property owner's right to make lawful use of his or her property includes the right to use it for the sale of alcoholic beverages. It does not. The use of one's property for the sale of alcoholic beverages is unlawful unless made lawful by the State and the appropriate local government. Thus, this Court has correctly recognized that local governments may impose distance separation requirements under the broad powers accorded them in the area of regulating the sale of alcoholic beverages. There has been no change in federal or state law that would warrant this Court receding from its repeated and consistent recognition of the validity of such requirements.

II. UNDER EITHER A SUBSTANTIVE DUE PROCESS OR AN EQUAL PROTECTION ANALYSIS, ORANGE COUNTY'S DISTANCE SEPARATION REQUIREMENT MUST BE UPHOLD SO LONG AS IT HAS ANY CONCEIVABLE LEGITIMATE BASIS.

In its Initial Brief, Orange County argued that the district court's decision raised a non-existent equal protection issue and resolved that issue by improperly applying a traditional zoning analysis. Costco now argues that the decision "was actually based on substantive due process." Costco makes that argument, even though the phrase "due process" never appears in the court's opinion. In reality, the analysis applied by the district court is unclear. What is clear, however, is that the court did not do the one thing it should have done: apply standards applicable to the regulation and the sale of alcoholic beverages articulated by this Court in Dixie Inn, 24 So. 2d at 705; Chaikin, 30 So. 2d at 101; Glackman, 51 So. 2d at 294; and State ex rel. Eichenbaum v. Cochran, 114 So. 2d 797 (Fla. 1959).

Orange County has never argued that the Twenty-first Amendment "trumps" the Fourteenth Amendment or any other provision of the United States Constitution. Orange County recognizes that, absent sufficient justification, it cannot use its powers under the Twenty-first Amendment to abridge rights protected by the First Amendment and that it cannot impose different regulations on different citizens based upon their race, sex or national origin. Orange County does assert, however, that

under the Twenty-first Amendment, the Florida Beverage Law, its own police powers and this Court's prior decisions, it has the right to restrict where alcoholic beverages may be sold, so long as there is any conceivable basis for such regulation.

A. Substantive Due Process

If, as Costco asserts, the district court applied a substantive due process analysis, it erred as a matter of law, because the distance separation requirement did not infringe upon a fundamental right. See National Paint and Coatings Ass'n. v. City of Chicago, 45 F.3d 1124 (7th Cir.) cert. denied, 515 U.S. 1143 (1995). Moreover, even had a substantive due process analysis been appropriate, the district court still applied too high a standard.

Those who challenge an ordinance on the basis of substantive due process "shoulder a heavy burden," and must show that the local government "could have had no legitimate reason for its decision." Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1238 (9th Cir.), cert. denied, 513 U.S. 870 (1994). If there is "any conceivable rational basis for the legislation, it must be affirmed." Shelton v. City of College Station, 780 F.2d 475, 477 (5th Cir.) (en banc) certs. denied, 477 U.S. 905 (1986); 479 U.S. 822 (1986). Where, as here, a governmental action does not impinge on fundamental rights, courts do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a

legitimate reason for acting as it did." Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994); Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 66 (9th Cir. 1994). Under the Florida Constitution, the test for determining whether a statute violates substantive due process is likewise whether the statute bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive. Ilkanic v. City of Fort Lauderdale, 705 So. 2d 1371, 1372 (Fla. 1998) (citing Lite v. State, 617 So. 2d 1058 (Fla. 1993)).

A municipal ordinance is "arbitrary and capricious," and hence is unconstitutionally invalid as transgressing substantive due process requirements only "if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate government interest." Curto v. Harper Woods, 954 F.2d 1237, 1243 (6th Cir. 1992). However, if any conceivable legitimate governmental interest supports the contested ordinance, that measure is not "arbitrary and capricious" and hence cannot offend substantive due process norms. 37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 619 (6th Cir. 1997).

Given this Court's decisions in Dixie Inn, Chaikin, Glackman, and Eichenbaum, which recognize the legitimacy of similar distance separation requirements, Orange County's requirement cannot be held violative of anyone's right to substantive due process.

B. Equal Protection

In its Initial Brief, Orange County pointed out that the district court's opinion: (1) improperly treated as a protected classification persons residing within those areas of the County where the sale of package liquor is prohibited; (2) applied an intermediary substantial relation test, when it should have applied, at most, a minimal rational relation test; and (3) imposed upon the County the burden of showing a substantial relation, when it should have required Costco to "negative every conceivable basis" for the distance separation requirement. Costco, in its Answer Brief, has failed to show a classification of protected citizens. Costco has equally failed to explain why a substantial relation test should have been applied or why the burden of proving that relation should have been imposed upon Orange County.

The distance separation requirement prohibits the sale of package liquor within geographical areas. It creates no classifications of citizens. In its Initial Brief, Orange County acknowledged that the requirement would be unconstitutional as a deprivation of equal protection if it prohibited, for example, Hispanics from selling alcoholic beverages within 5,000 feet of a licensed establishment. SCIB-32-33. Orange County further recognizes that this would be equally true, as Justice Marshall noted in his dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), if the ordinance adversely and without rational basis affected a section of property known

to be inhabited, to continue the hypothetical, by Hispanics.² However, that is not the case with the Orange County distance separation requirement. The requirement singles out no particular area of the County and affects no distinguishable classification of citizens. Being located within 5,000 feet of an existing package liquor store is certainly not a "characteristic" of a protected group. The requirement permits everyone on an equal basis to apply for a permit in a permissible location and prohibits everyone on an equal basis from selling packaged liquors in a prohibited location.

III. BECAUSE THE DISTANCE SEPARATION REQUIREMENT PREVENTS THE CONCENTRATION OF PACKAGE LIQUOR STORES AND ENCOURAGES THEIR DISPERSEMENT THROUGHOUT THE UNINCORPORATED AREAS OF ORANGE COUNTY, IT HAS A RATIONAL BASIS AND IS NEITHER ARBITRARY NOR CAPRICIOUS

Although Costco argues that the distance separation requirement is in some manner arbitrary, the determining of what distance to impose is a task to be exercised at the discretion of the appropriate branch of government. That branch of government in our system is the Legislature. See generally Chebacco Liquor Mart, Inc. v.

² Orange County did not rely on City of Miami v. State ex rel. Green, 180 So. 2d 45 (1938), which obviously would be reversed as odious today. Orange County simply indicated by parentheses that that case was cited by this Court in Chaiken, 30 So. 2d at 101.

Alcoholic Beverages Control Comm'n., 711 N.E.2d 135 (Mass. 1999) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928)(Holmes, J., dissenting).

Across the nation, local governments have long debated how best to reduce undesirable activities associated with the sale of alcoholic beverages. In that debate, many local governments have advocated the dispersion of establishments licensed to sell alcoholic beverages, while others have advocated their concentration. There has been no single solution to the problem. Under such circumstances, courts have universally left, and must continue to leave, decisions as to appropriate distance separation requirements to local governmental bodies. If citizens disagree with decisions reached by their officials, they are free to elect new officials with different views.

The fact that Orange County's present zoning director, Mitch Gordon, questioned the necessity for the distance separation requirement in no way negates the requirement's constitutional validity. While Gordon may not perceive any problem with having three package liquor stores in close proximity to a major Orlando intersection at Michigan Street and Orange Avenue, that does not mean Orange County must allow similar concentration. Likewise, the fact that the City of Orlando has chosen not to separate package liquor stores does not mean there can be no validity in doing so within unincorporated Orange County.

According to Orange County's former Planning Director, Edward Williams, Orange County has more commercial acreage where package liquor stores may be located than almost any jurisdiction in the country. TR-42-43. As a result, more commercial properties are located in close proximity to residential districts where the adverse secondary impacts of congregating package liquor stores, such as greater traffic congestion, noise and occasional fighting in parking lots will have a greater impact on homeowners than might be the case in an already congested urban area. Moreover, because Orange County is a large county, it is more feasible than might be true within an urban area to disperse package liquor stores across the County and thereby minimize the increased traffic and noise that would result if such stores were allowed to concentrate.

Apart from minimizing the adverse impacts package liquor stores would have on surrounding residential areas, the distance separation requirement actually works to assure that such stores will be more widely available throughout the County, thereby minimizing the risk that package liquor will be consumed in a store parking lot before initiating a long drive home, than would be true if such stores were concentrated in the more densely populated areas of the County.

In concluding that there was no justification for the requirement, Judge Harris, in his concurring opinion, postulated that having package liquor stores closer together

might reduce the frequency of incidents in store parking lots and the risk of intoxicated drivers. He then speculated that without the requirement, one might have a store "500 feet down the road," rather than a mile, which might reduce the number of those who drive while intoxicated or, at least, reduce the distance they must travel. Costco Wholesale Corp. v. Orange County, 780 So. 2d 198,204 (Fla. 5th DCA 2001).

While such reasoning might be true for an urban area, it is not necessarily true for a large area like unincorporated Orange County. As the district court noted, the number of package liquor licenses is limited "by state law to a set number per county." Id. at 202 n.3. This being so, it is reasonable to believe that without the distance separation requirement, those with package liquor licenses would tend to congregate closer to metropolitan areas, like Orlando, leaving large areas of the County without any stores in close proximity. Residents in the outlying district, far from having a store in walking distance, might be required to travel many miles to purchase package liquors. With the requirement, however, there will be only one store in any given three square mile area. Furthermore, stores would tend to be more widely scattered and, thus, more accessible across the County. Is this not also a valid, rational basis for the requirement? In any case, is this not a determination properly left to the local governing body - - particularly given the additional deference that must be accorded legislation under the Twenty-first Amendment?

CONCLUSION

This Court has correctly upheld the validity of distance separation requirements like Orange County's as "well founded in the protection of the health and morals of the public." Given the deference accorded such legislation under the Twenty-first Amendment and Orange County's recognized right to entirely ban the sale of alcohol within its borders, the County's decision to ban the sale of package liquors within 5,000 feet of an existing package liquor store must be constitutionally valid.

Costco has failed to show that Orange County's requirement violates anyone's right to substantive due process or equal protection of the laws. Even if it did, however, courts have universally recognized that such requirements represent a legitimate means of mitigating undesirable secondary effects associated with the sale of alcoholic beverages. Given the territorial extent of unincorporated Orange County and the presence of considerable commercial property in close proximity to residential neighborhoods, it is both feasible and desirable that Orange County retain its distance separation requirement.

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 September, 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; John F. Bennett, Esquire, Fishback, Dominick, et al., 170 E. Washington Street, Orlando, FL 32801; William H. Adams, III, Esquire, Bank of America Tower, 50 North Laura Street, Jacksonville, FL 32202; and Frank A. Shepherd, Esquire, Pacific Legal Foundation, Post Office Box 522188, Miami, FL 33152.

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

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