IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO.: SC01-382

5th DCA Case No. 5D00-1728

v.

COSTCO WHOLESALE CORP., a Washington Corporation,

Respondent.

_________________________________/

ANSWER BRIEF OF COSTCO WHOLESALE CORP.

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

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PRELIMINARY STATEMENT

Petitioner, Orange County, shall be referred to in this brief as, "Orange County," or, simply, the "County." Respondent, Costco Wholesale Corporation, shall be referred to as "Costco."

Citations to the record will be cited as "R-__" followed by the appropriate page number. Citations to the trial transcript of May 3, 2000, shall be cited as "TR-__" followed by the appropriate page number. Citations to the County's Initial Brief will be to "County's I.B. ___" followed by the appropriate page number. Citations to Respondent's Appendix shall be to "R. App. ___" followed by the appropriate tab and page number.

Unless otherwise noted, all factual allegations herein are set forth in either the Joint Stipulation of Facts or are contained in the Joint Exhibits accepted into evidence by the trial court. For the convenience of the Court, the Joint Stipulation of Facts is contained in Respondent's Appendix as R-1. Relevant joint trial exhibits are also set forth in Respondent's Appendix sequentially.

STATEMENT OF THE FACTS AND OF THE CASE

Almost without exception, the material facts which give rise to the instant litigation are undisputed. They are presented here chronologically.

The Florida Legislature enacted zoning enabling legislation for Orange County in 1955. Thereafter, the Board of County Commissioners ("BCC") appointed a Zoning Commission. The Zoning Commission, in turn, adopted initial Zoning Regulations. These initial regulations did not contain a separation distance for alcoholic beverage sales. R. App. 2

In 1956 the Zoning Commission amended its regulations by drawing a circle with a 5000 foot radius around each then existing package goods vendor and designating such circle to be a "County Beverage Zone." The amended Zoning Resolution prohibited any new package good vendor from opening within such a County Beverage Zone. The preamble to the Resolution stated its purpose was not to prevent the aggregation of liquor stores into "combat zones," as alleged by the County, but rather, ". . . to prevent the further scattering of business, trade and industrial uses within the unincorporated portions of the (county) to the detriment

of homes and uses of higher character ... ." R. App. 3, p.2.

In 1964 the County undertook efforts to update its zoning regulations. During this process the Zoning Commission, now known as the Planning and Zoning Commission ("P&Z Commission"), recommended that the 5000 foot separation distance for package sales vendors be repealed. R. App. 4, pp. 2-3. The recommendation was subsequently adopted by the BCC. R. App. 5, pp. 7-8. Thereafter liquor stores were allowed to locate anywhere within a C-1, C-2 or C-3 Commercial District. R. App. 6.

After the 5000 foot separation distance was repealed in 1964, at least two vendors moved to new locations within 5000 feet of other liquor vendors. Litigation ensued. Subsequently, the P&Z Commission passed a resolution to once again impose the 5000 foot separation distance. R. App. 7. The BCC adopted the resolution on February 14, 1966, R. App. 8, and the provision was eventually codified as Section 38-1414 (b). In 1992 and 1993 the BCC amended Section 38-1414(b) by adopting Ordinance No. 92-7 and Ordinance 93-01, respectively, to produce Section 38-1414(b) as it currently exists. R. App. 9, R. App. 10.

In early 1999 Costco Wholesale Corporation commenced construction of a new Membership Warehouse Club in the southern portion of Orange County to

replace an older, outdated facility. Costco applied to the appropriate state agency to transfer its existing liquor license (off-premises consumption only) to the new location. In order to transfer its license, however, Costco first needed to obtain zoning approval from the County. The County denied Costco's application based solely on Section 38-1414(b) because there was an existing package goods store 2,112 feet from Costco's new location. Costco applied for a variance which was also denied. R. App. 1.

On October 21, 1999, the Orange County Zoning Department proposed to the P&Z Commission that Section 38-1414(b) be repealed on the basis that it furthers no public health, safety, morals or welfare purpose. R. App. 1, pp. 4-5. The repeal proposal had been initiated by the Orange County Attorney's Office. R. App. 1, p.5. The County's Acting Zoning Director, Mitch Gordon, presented the staff recommendation to the P&Z Commission. During his presentation, Mr. Gordon noted that, "the 5000' separation requirement advances no particular zoning purpose, but primarily serves to keep new package stores from locating within three (3) square miles of long established package stores." R. App. 12, p. 2. Prior to making his presentation, Mr. Gordon had checked with the Orange County Sheriff's Office to determine if the sheriff would have any public safety concerns should the 5000 feet separation distance be repealed. The Sheriff's

Office had no problems with the proposed repeal. R. App. 17.

After Mr. Gordon made his presentation to the P&Z Commission a number of package goods vendors spoke in opposition. These vendors expressed their opinion that the current system had been operating successfully for a long period of time and that repealing the distance requirement would unfairly burden them. Specifically, they were concerned with the loss of market area protection. Ultimately, however, the P&Z Commission voted to recommend to the BCC that Section 38-1414(b) be repealed. R. App. 13 & 14. The County Chairman, however, subsequently directed the zoning department not to bring the P&Z Commission's recommendation forward for BCC consideration. R. App. 19. Thereafter, Costco filed for declaratory and injunctive relief seeking to have Section 38-1414 (b) declared unconstitutional as being arbitrary and capricious.

On May 3, 2000, trial was held before the Hon. James C. Hauser. Neither the County nor Costco presented any witnesses. Intervenor, ABC Liquors, however, presented the testimony of Ed Williams, a local planning consultant. Mr. Williams essentially testified that he believed the 5000 foot separation distance was adopted to prevent too many liquor stores from locating too closely to residential zones. Tr. 40, et seq.

At the conclusion of the trial, Judge Hauser entered an order denying

Costco's requested relief. Costco timely appealed. On appeal, as it had at trial, Costco acknowledged that the County has the right under its police power to adopt reasonable regulations pertaining to the sale of liquor. Costco further acknowledged that this right includes the right to prescribe a separation distance between package goods stores so long as such regulation is substantially related to the public health, safety, morals or welfare.[1] In other words, Costco did not challenge the County's police power, per se, but rather argued that the County must exercise its police power in a constitutional manner.[2]

The County, conversely, argued that local governments have an absolute power, given them by the 21st Amendment, to regulate alcoholic beverage sales and

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[1] The County continues to mis-state Costco's position and the true issue in this case. Costco has never disputed the County's right to regulate the sale of alcoholic beverages. Neither has Costco ever asserted that there is a constitutional right to sell alcohol. Nor has Costco ever argued that a court should "effectively repeal" an ordinance because it has become "outdated." The issue in this case is not whether the County has the right to set a separation distance; the issue is whether the particular separation distance Orange County set is reasonable and substantially related to the public health, safety, morals or welfare.

[2] Costco's arguments are founded primarily in the substantive due process protections afforded to citizens by the 14th Amendment to the United States Constitution and in Article I, Section 9 of the Constitution of the State of Florida. Moreover, despite the County's representation to the contrary, Costco also raised an equal protection argument at trial, albeit briefly, and in response to questioning by the trial judge. Tr. 95-96.

that this power is not impeded by any constitutional requirement of rationality.[3] In essence, the County argued that its 21st Amendment power trumps all other constitutional rights, save the right to free speech. Moreover, the County argued that, because it can completely prohibit the sale of alcohol in the county, it is free to define the areas where alcohol can be sold in any manner it sees fit, effectively picking and choosing which property owners will be granted the privilege of selling alcohol and which will be denied, all the while ignoring the Constitution's substantive due process provisions and equal protection clause.

The Fifth District Court of Appeal correctly rejected the County's arguments and reversed, finding that there was no reasonable relationship between the 5000 foot separation distance and the public's health, safety, morals or general welfare.[4] Costco Wholesale Corp. v. Orange County, 780 So. 2d 198, 203 (Fla. 5th DCA

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[3] The 21st Amendment grants the several states the right to regulate alcohol within their respective jurisdictions. In Florida this right is passed to the counties pursuant to Section 562.45(2), F.S.

[4] While the County asserts the district court decided the case on the basis of equal protection, the district court's decision was actually based on substantive due process. Towards the end of its opinion the district court offers a one paragraph, four sentence, 72 word, equal protection analysis, starting with the word, "Further," as a secondary rationale. Costco Wholesale Corp. v. Orange County, 780 So.2d 198, 203 (Fla. 5th DCA 2001). Additionally, Judge Harris fleshed out the equal protection analysis in his concurring opinion. Id. The decision, however, was clearly based on substantive due process.

2001).

Having correctly identified that the only issue was whether the 5000 foot separation distance was reasonably and substantially related to a legitimate government purpose, the district court then reviewed the record evidence. As noted by the County, the district court rejected the testimony of ABC's expert witness as incredible, illogical, and pure speculation without any factual foundation whatsoever. Id. at 202. The court weighed Mr. Williams' unbelievable testimony against the "uncontroverted evidence in the record that the challenged regulation bears no substantial relationship to public health, safety, morals and welfare ... ." Id, (emphasis added). This uncontroverted evidence clearly negated any conceivable rational basis for the regulation which could be substantially related to the public health, safety, morals or welfare.

In fact, the district court found that the record clearly showed that the only plausible reason for the 5000 foot distance was to provide an economic advantage to existing licensees by protecting by giving them a 3 square mile territorial monopoly. Id. Therefore, because, the only conceivable reason for the regulation was an impermissible one, and because the evidence negated the possibility of any other conceivable rationale for the ordinance, the lower court properly applied its substantive due process analysis and directed that an order be entered declaring

Section 38-1414(b) arbitrary, capricious, and unconstitutional.

In his concurring opinion, Judge Harris, fleshed out the court's one paragraph equal protection analysis. Moreover, he explicitly stated that which was implicit in the court's opinion - that this case is not about, "whether distance restrictions can, under proper standards, be validly enacted." Id. at 204-205. That question has been clearly and correctly answered by the Florida Supreme Court. Rather, this case is simply about whether Orange County's particular regulation is a valid and reasonable exercise of its police power so as not to arbitrarily impinge on its citizens' constitutionally protected rights to use their property for legitimate purposes. Id. at 204-205. Judge Harris, for the same substantive due process reasons stated in the main opinion, and on the basis of equal protection, concluded that the County's nearly one-mile separation requirement is arbitrary, capricious, and unconstitutional.

SUMMARY OF ARGUMENT

Despite the contrary representation in Petitioner's Initial Brief, this case is not now, nor has it ever been, about whether Orange County has the police power to regulate the location of liquor stores. Clearly it does. Moreover, Costco has never challenged that power and the power to reasonably regulate remains unscathed by the district court opinion. The district court merely reaffirmed the rule, as

articulated by both the U.S. Supreme Court and this Court, that any exercise of the police power must be accomplished within the framework of substantive due process and equal protection parameters, In other words, the police power cannot be exercised arbitrarily or capriciously.

In the instant case, a case which does not conflict with existing precedent nor call into question any issue of state-wide significance, the sole issue was and remains, whether Orange County's 5000 foot separation distance between liquor stores is substantially and reasonably related to the public health, safety, morals or general welfare. The district court thoroughly reviewed the record and found that there was no reasonable relationship between the separation distance and a legitimate government goal. Despite Orange County's heroic efforts to turn this case into something it is not, it really is that simple.

Among the County's efforts to turn this case into a case of constitutional significance is its argument that the 21st Amendment to the U.S. Constitution effectively trumps a citizen's right to due process under the 14th Amendment. This argument has been regularly rejected by the U.S. Supreme Court for the past 25 years. Craig v. Boren, 429 U.S. 190 (1976).

The 21st Amendment was intended to insulate "dry" states against commerce clause claims for impeding interstate commerce when they prohibit the importation

of alcoholic beverages across state lines. It was not intended to give states plenary power to regulate alcohol. 44 Liquormart, Inc. v. Rhode Island, 51 U.S. 484 (1996). Despite the County's ipse dixit pronouncement to the contrary, the 21st Amendment does not give the County "extraordinary" police powers. Park Benziger & Co. v. Southern Wine, Etc., 391 So.2d 681 (Fla. 1980)(fact that intoxicating beverages is the subject matter of legislation does not automatically make such legislation valid, and such an act must fall if it violates a constitutional prohibition).

The County also argues that the district court applied the stricter substantial relationship test when it should have applied a mere rational basis test. If §38-1414(b) involved only an adjustment of economic interests, the County would be correct. See, Dept. of Insurance v. Dade County Consumer Adv., 492 So.2d 1032 (Fla. 1986). This case, however, involves a zoning regulation and impacts directly upon private property. Accordingly, the County's position is contrary to the prior decisions of both the U.S. Supreme Court and this Court. See, Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926); City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953). While not affording property rights the same strict scrutiny review that is accorded other fundamental rights, both the U.S. Supreme Court and this Court have recognized that something greater than a mere

rational basis test is appropriate when property rights are involved. This, "something greater," is the substantial relationship test.

In the instant case, a review of the record shows that not only does the 5000 foot separation distance not have a reasonable and substantial relationship to a legitimate government interest, it actually has no relationship whatsoever to such an interest. In fact, the district court properly recognized that Costco had presented evidence which negated any conceivable rational basis for the regulation and the record evidence showed that the only plausible basis for the ordinance is to protect existing liquor stores from competition. This, of course, is not a legitimate zoning goal. Both the substantial relationship and legitimate interest prongs must be upheld for an exercise of the police power to be constitutional.

Moreover, while the primary basis for the district court's decision was the substantive due process provisions of the 14th Amendment, the court below also correctly noted that the County's regulation violated the equal protection clause as well. Specifically, the court noted that the ordinance creates two distinct classes without any rational basis. One class is a class of property owners who can use their property to sell a totally legal product (alcohol). The second class is a class of property owners who, because of the County's arbitrary and capricious efforts to protect existing liquor operators, cannot. The district court appropriately relied

on the same evidence that showed no reasonable and substantial relationship under its substantive due process analysis to reach the conclusion that there was also no justification for the ordinance under the minimal rational basis standard of the equal protection clause.

The County further argued below, and continues to argue here, that a zoning regulation only has to have a rational relationship to a legitimate goal when adopted. Thereafter, the county asserts, the regulation is forever insulated from constitutional challenge. Again, this argument has been rightfully rejected by both the U.S. Supreme Court and this Court. Palazzolo v. Rhode Island, 533 U.S. ___ , Slip Op. No. 99-2047 (June 28, 2001); Mayo v. Florida Grapefruit Growers' Protective Ass'n., 151 So. 25 (Fla. 1933).

Finally, the County contends that the sole remedy for a citizen who's constitutional rights have been trampled by a regulation is to seek change through the political process. According to the County the courts have no role beyond echoing the legislature's chant of "police power, police power." The irrationality of the 5000 foot separation distance in this case is exceeded only by the irrationality of this argument.

While courts rightfully should be hesitant to second guess legislative wisdom, when constitutional rights are at stake the courts have a constitutional duty

to step in and review the legislature's actions. It is this very system of checks and balances that anchors our constitutional republic. To hold that a citizen's only remedy for a constitutional deprivation is to go hat in hand to the very body denying the constitutional right in the first place would be to effectively subject the rights of the minority to the caprice of the majority. Our Constitution is constructed to prevent this very thing from happening.

The district court recognized the fallacies of the County's arguments, rejected them, and properly held the 5000 foot separation distance to be arbitrary, capricious, and unconstitutional. This Court should do no less.

ARGUMENT

Despite Appellant's characterization of the district court's opinion in this case, neither the Appellee nor the district court ever asserted that there is a constitutional right, let alone a fundamental constitutional right, to sell alcoholic beverages. The fundamental right involved in this case, as recognized by the district court, is the fundamental right of every property owner to use his or her property for legitimate purposes free from arbitrary government regulation. This right is commonly known as the right to substantive due process and derives from the 14th Amendment to the United States Constitution and from Article I, Section 9 of the Florida Constitution.

There are several levels of scrutiny which the courts use to determine whether a regulation is arbitrary under substantive due process analysis. The lowest of these levels is the rational basis standard. Under this standard, a regulation will be upheld if there is any rational relationship between it and a legitimate government objective.

In the instant case, the County, argues that there is an even lower standard available to it when it adopts a regulation pertaining to alcoholic beverages. The County insists that, because of the 21st Amendment, the County is free to adopt any regulation pertaining to alcohol without having to give any consideration as to whether such regulation is reasonable or arbitrary under the 14th Amendment.

I. PETITIONER'S CLAIM THAT THE 21ST AMENDMENT TRUMPS THE 14TH AMENDMENT AND RAISES THE COUNTY'S POLICE POWER TO A POSITION SUPERIOR TO A CITIZENS' CONSTITUTIONAL RIGHT TO BE FREE OF ARBITRARY AND CAPRICIOUS REGULATION IS INCORRECT AS A MATTER OF LAW.

The County claims that the 21st Amendment gives the County "extraordinary" powers to regulate alcohol. County's I.B. at 14, et seq. It argues that its alcohol regulations are entitled as a matter of law to an extra presumption of validity. According to the County, this extra presumption means the County doesn't even have to satisfy the rational basis test, let alone the substantial

relationship test prescribed for zoning regulations in Euclid, supra.[5] The County's argument, however, is founded on a position the U.S. Supreme Court abandoned almost immediately as historically inaccurate and analytically incorrect.

A. The 21st Amendment was intended only to exempt state regulation of alcohol from the effects of the dormant commerce clause and the states must still comply with all other constitutional provision and protections when regulating alcohol.

The cornerstone of the County's appeal is §2 of the 21st Amendment to the U.S. Constitution. Section 2 provides that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The County asserts that this provision enhances the police power of states and local governments when it comes to the regulation of alcoholic beverages and, conversely, reduces the substantive due process standard for gauging the constitutionality of such regulation. The County supports this contention with a quote from the 1972 U.S. Supreme Court case, California v. LaRue, where the court stated that, "the broad sweep of the Twenty-first Amendment has been

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[5] Counsel for Orange County and counsel for Intervenors raised the "added presumption of validity" argument at trial based on language in California v. LaRue, 409 U.S. 109 (1972). Tr. 38-39, 80-81. The trial court implicitly accepted the argument and the County again raised the argument before the district court. The district court rejected the argument without discussion.

recognized as conferring something more than the normal state authority over public health, welfare and morals." 409 U.S. 109, 114 (1972). What the County doesn't note, however, is that the Supreme Court retreated from this unfortunate over-statement a mere three years later and acknowledged that the intent of §2 was merely to exempt state liquor regulations from the normal operation of the Commerce Clause. Craig v. Boren, 429 U.S. 190 (1976).[6]

In Boren, the Court considered an equal protection challenge to an Oklahoma statute which set different drinking ages for males and females. Oklahoma argued that it had plenary power to regulate alcoholic beverages under the 21st Amendment and that, therefore, the normal equal protection analysis should not apply and the lower, rational basis test should be used. This argument was clearly rejected by the Supreme Court, which stated:

> This Court's decisions ... have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. (Citations omitted) ... . Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked, "Neither

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[6] The Commerce Clause provides that, "Congress shall have Power ... [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const., Art. I, sec. 8, cl. 3. Courts have read the Commerce Clause to also limit the power of the States to erect barriers against interstate trade. See, e.g., Lewis v. BT Investment Managers, Inc.,447 U.S. 27 (1980). This implicit restriction is often referred to as the Dormant Commerce Clause.

> the text nor the history of the Twenty-first Amendment, suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." (Citation omitted.)

429 U.S. at 206. The Court went on to point out that the applicability of the 21st Amendment to regulations directly impacting upon the importation of intoxicants is "transparently clear," and such regulations warrant, "only the mildest review under the Fourteenth Amendment." 429 U.S. at 207 (citations omitted). However, the Court continued, cases involving individual rights protected by the Due Process Clause, must be treated in sharp contrast. Id., citing Wisconsin v. Constantineau, 400 U.S.433 (1971)(21st Amendment found not to qualify the scope of plaintiff's due process rights to object to statute which had been on the books for 40 years and which allowed sheriff to designate certain persons as "excessive drinkers" and post such persons' names at liquor stores to prevent the sale or gift of alcohol to such persons).

The Supreme Court again rejected the 21st Amendment trump card argument in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691(1984). In Capital Cities, the Court decided that an Oklahoma regulation pertaining to the advertising of alcoholic beverages was pre-empted by regulations promulgated by the Federal Communications Commission. Oklahoma again argued that, while other state

regulations may be subject to a standard pre-emption analysis, the fact that this regulation was adopted pursuant to the 21st Amendment rescued it from pre-emption. The Supreme Court acknowledged that states enjoy broad power under the 21st Amendment to regulate the importation and use of alcoholic beverages within their borders. The Court went on, however, to point out that, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." 467 U.S. at 712. See also, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

The Court went even further in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) where it stated, "without questioning the holding of LaRue, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment." 517 U.S. at 516. The Court specifically noted that the 21st Amendment does not in any way diminish the supremacy clause, the establishment clause, the equal protection clause, or First Amendment rights as it was intended only to provide an exception to the commerce clause to allow "dry" states to prohibit the importation of alcohol across state lines without being threatened with suits charging restraint of interstate trade. Id. See also, Park Benziger & Co. v. Southern Wine, Etc., 391 So.2d 681 (Fla. 1980)(fact that intoxicating beverages is the subject matter of legislation does not automatically make such legislation valid, and such an act must

fall if it violates a constitutional prohibition).

B. The district court correctly concluded that the fact that the County has the right to ban the sale of alcohol does not give the County the right to ignore constitutional protections against arbitrary regulations when it adopts lesser alcohol regulations.

The County urges this Court to reject the well reasoned opinion of the district court and to adopt the rationale relied upon by the trial court. This rationale was the simplistic and seemingly logical conclusion that, because the County can completely prohibit the sale of alcoholic beverages it is free to adopt any lesser regulation regardless of whether there is any rational basis for such lesser regulation. However, as recognized by the district court, this seemingly simple syllogism cannot be applied so cavalierly when a citizen's constitutionally protected rights are at stake.

The trial court was seduced by the simple rule: the greater includes the lesser. As with most rules, however, there are exceptions. Sometimes the rule's deceptive simplicity makes it easy to overlook the exceptions. In fact, in 1986 the U.S. Supreme Court itself succumbed to the temptation to dispose of a case using this appealing little rule. In Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328 (1986), a case involving a ban on casino advertising, the Court stated that "the greater power to completely ban casino gambling necessarily

includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-346. The Court also stated that, "because the government could have enacted a wholesale prohibition of [casino gambling] it is permissible for the government to take the less intrusive step of allowing the conduct but reducing the demand through restrictions on advertising." Id. If this case were still good law, the County would have prevailed below.

A decade after using the greater includes the lesser rule to decide Posados, the Court considered the applicability of the rule again in the matter of 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). In 44 Liquormart, the plaintiff challenged a 1956 Rhode Island statute which prohibited liquor vendors from advertising their prices anywhere but inside their store. Liquor stores were free to advertise their location and their products, they simply could not publish their prices.

In defense of its statute, Rhode Island argued that, because it had the undisputed right to completely ban the sale of alcohol, it logically followed that the State could adopt any regulation short of a complete ban. 517 U.S. at 508. The Supreme Court rejected this argument, finding it "inconsistent with both logic and well settled (constitutional) doctrine." 517 U.S. at 510-511 (per Justice Stevens, with three Justices concurring and five Justices concurring in the judgment). While

the Court freely acknowledged the right of the State to intensely regulate, and even outright ban, the sale of certain legal products such as alcohol, the Court found that, whatever method the State chose to regulate such products must still be consistent with constitutional safeguards. See also, Rubin v. Coors Brewing Co., 514 U.S.476 (1995)(rejecting a similar argument as a basis for supporting a statutory prohibition against revealing the alcoholic content of malt beverages on product labels).

Rhode Island had also argued that courts must grant great deference to the state's regulations pertaining to alcoholic beverages because of their "added presumption of validity" under the 21st Amendment recognized in California v. LaRue, supra. The Court rejected this argument as also being without merit in light of its decision in Craig v. Boren, supra.

While the 44 Liquormart case was concerned solely with state interference with the right of free speech its rationale is equally applicable to all other constitutionally protected rights, including the substantive due process right to be free of arbitrary and capricious government regulation. This fact was recognized by the district court and is supported by the numerous U.S. Supreme Court cases cited supra. Legislative bodies simply cannot justify irrational actions by stating that, "if we can ban it completely, we can adopt any regulation short of a total ban,

regardless of the rationality (or irrationality) of such regulation." If the simple, "greater includes the lesser," logic is allowed to prevail the guarantee of substantive due process is completely eviscerated in such areas. In this regard, the district court's opinion is absolutely consistent with the law of the land and should be upheld.

II THE CORRECT STANDARD FOR EVALUATING A ZONING REGULATION UNDER SUBSTANTIVE DUE PROCESS IS THE SUBSTANTIAL RELATIONSHIP STANDARD SET IN THE EUCLID CASE SEVENTY-FIVE YEARS AGO.

The County next argues that the district court applied too stringent a standard when it required a substantial relationship between §38-1414 (b) and a legitimate government goal. The County argues that the minimal, rational basis standard should have been applied. If the regulation in the instant case were a purely economic regulation, the County would be right. However, the right to own and use property in any legal manner is a fundamental right the sanctity of which the U.S. Supreme Court recognized in the seminal zoning case of Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). While the Court in that case confirmed for the first time that the right to zone property is inherent in a state's police power, the Court was "equally emphatic that if such zoning did not have some substantial relation to the public health, safety, morals and general welfare, it

would be held to be arbitrary, unreasonable and unconstitutional." Davis v. Sails, 318 So.2d 214, 222 (Fla. 1st DCA 1975), quoting City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953)(emphasis added). See, Euclid, 272 U.S. at 395.

A. The right to own and enjoy property free from arbitrary and capricious government regulation is a fundamental right protected by the substantive due process provisions of the Fourteenth Amendment.

While there may be no constitutional right to sell alcoholic beverages, once the government determines that alcoholic beverages may be sold, any regulations pertaining thereto must not be arbitrary. The 14th Amendment clearly demands that all government regulations be reasonable.

Moreover, it is clear that the framers of the 14th Amendment were concerned not only with protecting the liberty of the newly freed slaves in the south, but also in protecting the constitutional right of the former slaves (and all others) to own and use property. In its efforts to prevent the states from repealing or otherwise impeding these federal guarantees, the drafters of the 14th Amendment crafted three distinct causes of action under the 14th Amendment. Specifically, the due process clause gives rise to claims: (1) for violations of incorporated provisions of the Bill of Rights; (2) for violations of the substantive component of the due process clause; and, (3) for violations of procedural due process.

Furthermore, the framers made no distinction between relative importance of the right to liberty and the right to property. It cannot be disputed that the framers of the 14th Amendment intended to protect property rights along with other fundamental rights. Congress adopted the Civil Rights Act of 1871, a predecessor to 42 U.S.C. §1983, for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment," including the "enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." Cong.Globe, 42nd Cong., 1st Sess., App. 69 (1871), quoted in Lynch v. Household Finance Corp., 405 U.S. 538, 545-546 (1971). See also, Garrity v. New Jersey, 385 U.S. 493 (1967)(the "right" to engage in interstate commerce is a right of constitutional stature to be protected under the 14th Amendment); accord, Dennis v. Higgins, 498 U.S. 439 (1991); Burch v. Apalachee Community Mental Health Services, 804 F.2d 1549 (11th Cir. 1986).

As the U.S. Supreme Court stated in Shelley v. Kraemer, 334 U.S. 1 (1948):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

334 U.S. 1 at 10.

The fact that Shelley involved the equal protection clause of the 14th Amendment rather than the due process clause should be immaterial to this Court's analysis. The basic concept is that property rights are, and historically have been, fundamental and equal to liberty rights. This Court should simply substitute the phrase, "arbitrary and capricious" for the word, "discriminatory" in the above quote. Doing so makes the statement no less logical, no less historically accurate, and no less compelling. The same rationale and historical context demands that the same result be reached in this case whether the Court relies on a substantive due process analysis, an equal protection analysis or, as with the district court, both.

B. Inasmuch as the right to own and use property free from arbitrary and capricious government regulation is a fundamental right, the standard for evaluating a zoning regulation is more than a rational basis test, it is the substantial relationship test.

The United States Supreme Court has long recognized that the right to private property is basic and fundamental to our democratic system. For example, in Wilkinson v. Leland, 27 U.S. 627 (1828), the Court stated that:

> The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.

27 U.S. at 657. This position has also been adopted by the Supreme Court of Florida. In Corn v. State, 332 So. 2d 4 (Fla. 1976), the plaintiff was asked to leave

a commercial mall and was told by the owner's security guard that he would be prosecuted for trespass if he returned. The plaintiff subsequently returned and was arrested pursuant to the §821.01, F.S., "Trespass after warning." He challenged his subsequent conviction alleging that §821.01violated his equal protection rights and was arbitrary and discriminatory in that it should not apply to public or quasi-public places such as a mall. 332 So.2d 4, 6.

In deciding the case, this Court engaged in a telling discourse on the nature and significance of property rights, both public and private. The Court noted with approval that, "[the] right of property has been characterized as a sacred right, the protection of which is an important object of government," and acknowledged that, "'[i]t is not a right, therefore, over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.'" 332 So.2d at 7, quoting Spann v.City of Dallas, 235 S.W. 513, 515 (Tex. 1921) (emphasis added).

In fact, the right to own property and to deal with it as the owner chooses so long as such use doesn't harm his neighbors is a right as old, if not older, than the Magna Charta. It is "anchored in the first section of the first article of our Constitution." Corn, 332 So. 2d 4, 7 f.n.1, quoting Billings v. Hall, 7 Cal. 1, 6. As with the framers of the 14th Amendment, the original framers of the United States

Constitution held property rights to be of equal importance to the fundamental right of liberty. For example, John Adams clearly stated that, "property is surely a right of mankind as truly as liberty," and that a, "nation is stronger when its citizens are guaranteed the right to earn decent wages, acquire, possess and protect property, risk capital, and venture for additional profits." Corn, 332 So. 2d at 8, quoting, Coker, Democracy, Liberty and Property, at 125-6. Accordingly, the Florida Supreme Court plainly stated 25 years ago that:

> While we have many regulatory measures protecting the civil rights of citizens, we also have (a) constitutional duty to protect the rights of property and the business community.

Corn, 332 So.2d 4, 8 (Fla. 1976)(emphasis added).

This bold acknowledgment by Florida's high court 25 years ago was not a change of course for the Court. While some courts have lost sight of the significance and fundamental nature of property rights, the Florida Supreme Court has long heeded the original Euclid admonition that zoning regulations must be reasonable and bear a substantial relationship to the public health, safety, morals or welfare. See, e.g., City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954)(in order to be valid a zoning ordinance must bear a substantial relation to the public health, safety, morals or general welfare); City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1954)(courts have a duty to maintain the constitution as

fundamental law and the proper standard for evaluating whether a zoning ordinance violates that law is whether it has a substantial relation to the public health, safety, morals and general welfare). See also, Burritt v. Harris, 172 So.2d 820 (Fla. 1965); State ex rel. Dixie Inn, Inc. v. City of Miami, 24 So.2d 705 (1946); Davis v. Sails, 318 So.2d 214 (Fla. 1st DCA 1975).

That this Court considers liberty interests and property interests to be co-equal fundamental rights is further evidenced by the Court's use of the same "substantial relationship" standard in cases involving statutes which impact upon liberty interests. See, State v. O.C., 748 So.2d 946 (Fla. 1999)(statute enhancing criminal penalty based on gang membership violated principles of substantive due process as it had no reasonable and substantial relation to the object sought to be attained and was arbitrary and capricious and thus facially unconstitutional); State v. Saiez, 489 So.2d 1125, 1128 (Fla. 1986)(due process required that the standard for evaluating penal statute forbidding unauthorized possession of credit card embossing machine was whether statute had "a reasonable and substantial relation to object sought to be attained and was not ... unreasonable, arbitrary, or capricious") (emphasis added).

Further evidence that the substantial relationship test is an actual heightened level of scrutiny and not merely the result of sloppy language by the courts, as

contended by some, is provided by the this Court's recognition and rejection of the substantial relationship test in substantive due process cases involving mere economic regulations rather than regulations impacting fundamental rights. For example, in 1984 the Dade County Consumer Advocates Office challenged §§ 626.611(11) and 626.9541(1)(h)1, F.S. (1983), which prohibited insurance agents from negotiating a lower commission with their clients than provided by their insurer. The Consumer Advocates Office alleged that these anti-rebate statutes violated substantive due process and were an invalid exercise of the police power. The trial judge found that the statutes were rationally related to a legitimate government objective and upheld them. The Consumer Advocates Office appealed.

The First District Court of Appeal reversed. Specifically, the district court stated that there was no substantial relationship between the challenged statutes and any legitimate government objective. In fact, the district court stated it was unable to find any apparent rational relation between the statutes and the legitimate state purpose of safeguarding the public welfare. Dade County Consumer Advocate's Office v. Dept. of Insurance, 457 So.2d 495 (Fla. 1st DCA 1984). The Department of Insurance then appealed to this Court.

On appeal, the department argued that the anti-rebate statutes were intended

to guarantee insurer solvency and prevent discrimination. The department further argued, as in the instant case, "that the district court applied a too-rigorous standard of review in stating that the statutes must 'reasonably and substantially promote the public health, safety or welfare.'" Dept. of Ins. v. Dade County Consumer Adv., 492 So.2d 1032, 1033 (Fla. 1986)(emphasis original). According to the department, the correct standard for regulations designed for the economic protection of Florida's consumers is a mere rational basis test.

This Court agreed. Nonetheless, the Court upheld the district court's decision, noting that while, "the district court recited an incorrect standard of review," because the statute failed even the rational basis test the district court's use of the more stringent standard was harmless error. In other words, after reviewing the record, this Court also could find "no identifiable relationship" between the statutes and the public welfare, despite the Department's alleged reasons. Id. at 1035. See also, Chicago Title Ins. Co. v. Butler, 770 So.2d 1210 (Fla. 2000)(Court unable to find any rational relationship between title insurance anti-rebate statute and public welfare).

To reiterate, this Court has previously clearly articulated that zoning regulations are entitled to a heightened standard of due process review because they impinge upon the fundamental right to own and use property. Furthermore, while

the standard used to review zoning regulations may be less than the strict scrutiny standard used when other, enumerated rights, such as free speech, are implicated, the standard is clearly higher than the mere rational basis test used for economic regulations. Stated another way, regulations touching upon purely economic matters warrant only the mildest review under the 14th Amendment, see, Craig v. Boren, 429 U.S. 190, 207 (1976), but this Court properly applies the heightened substantial relationship test when considering regulations which impinge upon liberty or property interests.

There are only two rational explanations for this Court's use of the "substantially related" language in substantive due process cases. Either the County is correct and this and other courts have been very careless with their language for over a half a century, or there are separate substantive due process standards being applied based on the nature of the rights involved. The case law and common sense strongly indicate that it is the latter. The district court obviously understood this and applied the correct standard.

C. The district court applied the proper substantive due process analysis and reached the correct conclusion when it found Orange County's 5000 foot liquor store separation distance was an unconstitutional exercise of the County's police power.

As shown, supra, when the government regulates property rights by way of

zoning regulations, as in the instant case, the regulation must be substantially related to the public health, safety, morals or welfare. Euclid, supra. The district court properly applied the substantial relationship test. Moreover, the district court recognized that the substantial relationship rule is substantive law. As the district court said, "in order for a zoning ordinance to be valid it must have some substantial relationship to promotion of the public health, safety, morals or general welfare." Costco Wholesale Corp. v. Orange County, 780 So.2d 198 (2001) citing, Davis v. Sails, 318 So.2d 214 at 217 (Fla. 1st DCA 1975). Put another way, a zoning ordinance "is invalid if it discloses no purpose to prevent some public evil or fill some public need." Costco Wholesale Corp., 780 So.2d at 201.

While the application of a zoning regulation to a particular piece of property is subject to the "fairly debatable" standard of review, when the underlying constitutionality of a zoning ordinance is challenged, "the fairly debatable rule does not modify the requirement that the ordinance itself *and* the application thereof must have a reasonable relationship to the health, safety, morals or general welfare." Davis, at 217 (italicized emphasis original). Thus, it is the province of the court to determine in the first instance whether a challenged regulation bears the necessary substantial relationship to the health, safety, morals or general welfare. If it does not, the regulation is unconstitutional and the court need look no further. Id. See

also, Burritt v. Harris, 172 So.2d 820 (Fla. 1965)(the polestar for determining the validity of a zoning ordinance is whether the zoning restriction exceeds the bounds of necessity for the public welfare).

In the instant case, the district court did what it was supposed to do - the same thing that the First District Court and the Florida Supreme Court did in the insurance regulation cases referenced supra. The district court started with a presumption that the challenged regulation was constitutional. Costco Wholesale Corp., 780 So.2d at 201. The court then reviewed the record to determine whether the challenging party, Costco, had negated every conceivable reason for the regulation which would be substantially related to the public health, safety, morals or welfare. The district court found that Costco had presented "uncontroverted evidence in the record that the challenged regulation bears no substantial relationship to public health, safety, morals and welfare." Id. at 202 (emphasis added). Furthermore, the court properly reviewed the entire record and took great pains to meticulously examine the testimony of ABC Liquor's hired expert. Each of his theories and arguments was considered and rejected as implausible and unsupported by facts in the record. Thus, in the end, the district court was left with nothing in the record but the uncontroverted evidence, including statements' from the County's own employees and the Orange County Sheriff's office, which

showed that the 5000 foot separation distance serves no legitimate zoning purpose.

After having thoroughly reviewed the record and implicitly finding that the evidence negated any conceivable rational basis for the regulation, the district court went even further. It identified the real reason for the 5000 foot separation distance - a reason that was clearly supported by the great weight of the evidence. The only plausible or conceivable rationale for this "extreme" separation distance was for the "economic protection of existing package stores." Costco Wholesale, 780 So.2d 198 at 202. Of course, as noted by the district court, such reason, while plausible and probable, is clearly impermissible. Id.

It has long been black letter law that the public welfare with which local governments must be concerned is the welfare of the entire community. An economic benefit to a special interest group within the community is not enough to support the exercise of the police power. Burritt v. Harris, 172 So.2d 820 (Fla. 1965); Fogg v. City of South Miami, 183 So.2d 219 (Fla. 3rd DCA 1966)(city could not use its zoning regulations to prohibit a drive through dairy store in its downtown commercial district where the purpose of the regulation was to force potential buyers out of their cars so they might engage in additional shopping for the benefit of existing downtown merchants) ; Wyatt v. City of Pensacola, 196 So.2d 777 (Fla. 1st DCA 1967) (a municipality may not establish a zoning

classification for the purpose of restricting competition in an industry through the use of the police power).

The Wyatt case is particularly instructive and bears many similarities to the instant case. In Wyatt, the City of Pensacola adopted a zoning code in 1967 which listed among the permitted uses for C-1 Neighborhood Commercial Districts launderettes and dry cleaning establishments that utilize solvents rated as nonflammable. The code provision went on, however, to state that such dry cleaning establishments would not be permitted in the C-1 classification until January 1, 1970.

The plaintiffs, who wanted to open such a dry cleaning establishment prior to 1970, challenged that portion of the provision which prohibited them from opening prior to 1970. They argued that this portion of the zoning code was intended only to protect existing businesses from competition and did nothing to promote the health, safety, morals or welfare of the general public. As such, they argued, this portion of the ordinance was an invalid exercise of the City's police power which deprived them of a legal use of their property without due process of law.

The evidence presented at trial supported the plaintiffs' claims. In fact, the evidence showed that the city councilmen believed that the C-1 classification was the ideal classification for dry cleaning establishments using nonflammable solvents,

but that allowing them to locate immediately in C-1 zones would put the present dry cleaning establishments in such zones which used flammable solvents at a competitive disadvantage. One councilman went so far as to say that, "the idea is to give a grace period where people can adjust themselves to new competition... ." 196 So.2d at 778.

Noting that the only credible evidence in the case showed that the challenged regulation had been adopted solely to restrict competition through the use of the police power, the court struck down the regulation as unconstitutional. The Court noted that, where the sole basis for a zoning regulation is economic impact it cannot stand. As the court stated, "when economic impact standing alone becomes a sufficient basis for such discriminatory legislation it will mark the extinction of the last vestige of the economic system under which this government operates." Id. at 779, quoting Abdo v. City of Daytona, 147 So.2d 598 (Fla. 1st DCA 1962). See also, Fogg, supra.

D. Even if the correct due process standard were the rational basis test, Orange County's ordinance fails even that minimal test and is, therefore, an unconstitutional exercise of the County's police power.

The County incorrectly argues that the district court applied to stringent a standard in evaluating the relationship between Section 38-1414(b) and the public

health, safety, morals or welfare. Even if the County were to prevail in this argument the regulation must still be struck down as it fails even that minimal test. The rational basis test does not convert the presumption of constitutionality enjoyed by legislative acts into an irrebuttable presumption. The courts must still consider the record to determine if there is a conceivable relationship between the regulation and a legitimate goal. While the rational basis test is, as labeled by the U.S. Supreme Court, the mildest form of Fourteenth Amendment review,[7] it isn't the constitutional equivalent of "open sesame." The courts need not, and in fact can not, merely roll out of the legislature's way to open the storehouse of our constitutional treasures whenever the legislature chants, "rational basis, rational basis." While the judicial branch clearly must grant deference to the legislative branch, it cannot abdicate its position as the primary guardian of our constitutional rights.

One need look only to Dept. of Insurance v. Dade County Consumer Adv., supra, and Chicago Title Insurance, supra, to see that this Court has granted proper deference to the legislature without abdicating its role in our constitutional republic. This Court has regularly struck down statutes which have faced only the rational basis test when it found that there simply was no rational basis for the legislature's

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[7] Craig v. Boren, 429 U.S. 190 (1976).

action. See, e.g., Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949)(striking down regulation setting a minimum retail price for which a retailer could sell a product to the consumer); Larson v. Lasser, 106 So.2d 188 (Fla. 1958)(striking down a statute that prohibited public adjusters from soliciting business); Stadnik v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962)(striking down a anti-competitive price regulation for pharmacies). See also, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)(while mentally retarded did not constitute a quasi-suspect class entitled to intermediate scrutiny under equal protection analysis, there was no reasonable basis for zoning regulation requiring group homes for the "feeble-minded" to obtain a special use permit).

In the instant case, as previously discussed, there is uncontroverted evidence in the record demonstrating that there is no real relationship between the County's 5000 foot separation distance and the public's health, safety, morals or welfare. The record in this case include statements from the Orange County Zoning Director that the 5000 foot distance advances no particular zoning purpose and merely serves to keep new package stores from locating within three square miles of long established package stores. There is evidence that the Orange County Sheriff's Office reported that no problems would be created if the restriction did not exist. There was substantial testimony before the County's Planning and Zoning

Commission which ultimately found that the regulation served no legitimate zoning purpose and should be repealed. There was evidence which clearly negated the County's contention that the aggregation of liquor stores would create a "combat zone." In short, the evidence effectively negated every conceivable, legitimate, basis for the regulation.

Moreover, even if the County or this Court could come up with a rationale with some merit, if that rationale isn't in some credible manner rationally related to the public health, safety, morals or welfare, this Court should still strike the regulation as unconstitutional. For example, in Chicago Title Ins. Co. v. Butler, 770 So.2d 1210 (Fla. 2000), the appellant argued that, if title insurance agents were allowed to negotiate the amount of premium they collect, they might cut corners to remain competitive, thus jeopardizing the quality and level of skill necessary to perform their services and harming their clients. Id. at 1218. In response, this Court said, "[w]e recognize that this argument is not without merit but we are not convinced that it validates the exercise of the police powers of the state." Id. at 1219.

Given the record in this case, there is no conceivable basis for the County's 5000 foot separation distance which has even the modicum of merit enjoyed by Appellant's argument in Chicago Title Insurance. Therefore, even under the

rational basis test, this Court should affirm the district court's finding that Section 38-1414(b) is arbitrary, capricious, and unconstitutional.

III THE COUNTY'S 5000 FOOT SEPARATION DISTANCE FOR PACKAGE STORES NOT ONLY VIOLATES THE SUBSTANTIVE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT BUT ALSO VIOLATES THE EQUAL PROTECTION CLAUSE BY CREATING AN IRRATIONAL CLASSIFICATION

Petitioner takes great umbrage with the second rationale suggested by the district court as mandating that §38-1414(b) be struck down. Specifically, the County argues that the equal protection analysis should not apply at all in this case because the regulation does not impact a fundamental constitutional right or divide citizens on the basis of a suspect class such as race. In fact, the County argues that the 5000 foot separation distance creates no classifications at all as classifications cannot be based on location. County's I.B., p.27. This position, however, is simply an incorrect statement of the law. See, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) which held that state's classification by geographic location for purpose of school funding was not irrational and thus did not violate equal protection. As Justice Marshall noted in his dissent:

> ... this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location.

411 U.S. 1 at 94 (emphasis added)(string citation omitted). Cf., Ohio ex rel. Lloyd v. Dollison, 194 U.S. 445 (1904)(confirming right of local jurisdictions to regulate the sale of alcoholic beverages by creating "dry zones" but not discussing the rational basis or equal protection implications thereof).

Orange County further argues that there is no classification created by §38-1414 (b) because any citizen is free to pursue a liquor license by finding a commercial property that isn't within 5000 feet of an existing package goods store. [8] This argument may be correct, as far as the citizenry at large is concerned, but it completely ignores the sub-set of citizens known as property owners. And while it is perfectly acceptable to divide property owners into classes by zoning their property (thus giving rise to a class of residential property owners, a class of commercial property owners, a class of industrial property owners, etc.), such

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[8] In what is probably its most unusual argument, the County contends that Orange County's distance separation requirement applies only to locations, not to persons. Initial Brief, p. 29. Perhaps if Costco sells liquor on its property in violation of the 5000 feet the County intends to arrest the property and leave the people alone since the law only applies to the property, not the owner thereof.

classification must be reasonable and substantially related to the public health, safety, morals or welfare. Euclid, supra. Furthermore, all statutory classifications that treat one person or group differently than others must bear some reasonable relationship to a legitimate state objective and cannot be discriminatory, arbitrary, or oppressive. St.Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961, 971 (Fla. 2000); Palm Harbor Special Fire Control Dist. V. Kelly, 516 So.2d 249, 251 (Fla. 1987). The irrationality of the County's argument was not lost on the district court which saw clearly that the County has created, for no valid reason, two classes of commercial property owners in Orange County: those who can use their property for the sale of alcoholic beverages and those who cannot.

The County argues that it is perfectly reasonable to adopt a regulation which essentially pits neighbor against neighbor in a race to see who can open a liquor store today, thus preventing his neighbors for a mile in any direction from opening one in the future. What legitimate government interest could justify this scheme to create limited territorial monopolies? The district court could find none. Furthermore, how can the County call its system rational when the County started this land rush in 1956 by pointing the starter's pistol at the head of all those property owners within a mile of existing package goods stores. Those property owners never even got to participate in the race. Their rights to legally use their

commercially zoned property to sell a legal product were taken away by the very first "County Beverage Zones." And for what rational and legitimate purpose? According to the legislative history, for the purpose of preventing the dispersal of liquor stores in the County. In 1956, as now, the County's stated justification was just an irrational sham for an illegal economic protection ordinance.

As stated all along, Costco does not dispute for a moment that the County has the authority to adopt liquor store separation requirements or, for that matter, separation requirements for billboards, cemeteries, junk yards, or adult entertainment establishments. Costco vigorously asserts, however, that the mere fact that such separation requirements are common does not exempt the County from the requirement that they be adopted in the constitutionally prescribed manner, i.e., that they be reasonably and substantially related to the public's health, safety, morals or welfare.

IV ORANGE COUNTY'S ARGUMENT THAT ORDINANCES WHICH HAVE BEEN ON THE BOOKS A SUFFICIENT PERIOD OF TIME ARE FOREVER IMMUNE FROM CONSTITUTIONAL CHALLENGE IS INCORRECT AND HAS NO SUPPORT IN THE LAW.

Orange County would have this Court believe that the district court acted improperly in considering contemporary evidence in its effort to determine whether

§38-1414(b) is arbitrary, capricious and unconstitutional. In effect, the County argues that the courts can only look at circumstances that surrounded the ordinance at the time of its original passage in 1956 and, if there is any conceivable rationale for its enactment at that time, it is irrelevant that there is no conceivable connection between the regulation and the contemporary public health, safety, morals or welfare. Under this concept, if a regulation were not immediately challenged, it would be forever insulated from constitutional scrutiny. This argument, however, has very recently been rejected by the U.S. Supreme Court.

In Palazzolo v. Rhode Island, 533 U.S. ____ (2001)(No. 99-2047, June 28, 2001) Mr. Palazzolo alleged that a wetland regulation effected an unconstitutional taking without just compensation of his property. The state responded that, because the regulation had been adopted before Mr. Palazzolo took title, he had no right to challenge the constitutionality of the regulation as applied to his property.

The high court rejected the state's argument and noted that, while a zoning regulation may be reasonable when enacted, it may also be unreasonable and does not become less so through passage of time or title. Slip Op. at 17. Moreover, the Court noted, were the Court to accept the state's argument, "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." Id. This position is

unacceptable. "Future generations, too, have a right to challenge unreasonable limitation on the use and value of land."

The Supreme Court was particularly concerned about the arbitrary results the state's argument would create if accepted. For example, some property owners might not have the resources to challenge a state regulation when first adopted and others simply might prefer to sell their land rather than fight the state. As a result of the inequality of the present property owners' resources and/or fortitude, future property owners may forever be stuck with a regulation that is arbitrary, capricious, and blatantly unconstitutional. This was unacceptable to the Court and, while the Palazzolo case involved the takings clause, there is no reason to believe the Court's analysis would be any different under a substantive due process or equal protection analysis.

In the instant case, there are myriad reasons why the County's 5000 foot regulation may not have been challenged upon adoption. For example, far fewer citizens and property owners were likely impacted in 1956. Those that were impacted may not have had the resources to undertake the difficult, time consuming, and expensive litigation necessary to strike down an unconstitutional regulation. Moreover, its mere passage shows that this regulation was favored by those with political power. Minority interests may have been intimidated

economically or otherwise. As this Court stated while reviewing a constitutional challenge to the Fair Trade Act in Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949), if courts are not willing to regularly scrutinize legislation, even if it the legislation has been previously upheld, then "constitutional guaranties are of no effect to minorities and majorities have no need for them." Id. at 375.

One need only look at City of Miami v. State ex rel. Green, 180 So. 45 (Fla. 1938)(upholding a Miami ordinance that prohibited alcohol sales in an area of the city known as "Negro Town"), one of the cases relied upon by the County in its brief, to see why old regulations should not be declared immune from constitutional scrutiny. Can the County, or anyone else, honestly believe that an African-American in Miami in 1938 could have brought a successful constitutional challenge to that regulation? Yet, under the County's argument, if this regulation were still on the books a court could only determine if it was rationally related to the public health, safety, morals or welfare in 1938. The court would be precluded from reviewing its constitutionality under contemporary standards and would have to defer to the Miami city council to change the ordinance. What would have been a fair time to ask a black citizen in 1936 to wait for the Miami city council to protect his constitutional rights? Would it be okay to deprive him of those rights until the civil rights movement in the 1960s forced the Miami city council to change the

regulation? According to Orange County, such a delay in constitutional rights is not only appropriate, it is mandatory. Costco respectfully disagrees.

Moreover, the County's argument that the district court acted merely because it perceived the regulation to be "out of date" or "unwise" is not only incorrect but assigns an improper motive to the district court for no apparent reason other than the County's dissatisfaction with the result below.   The district court properly reviewed the record and struck down the regulation because it bears no reasonable and substantial relationship to the public health, safety, morals or welfare. Furthermore, the district court committed no error when it examine §38-1414(b) in light of today's society. As recognized by the Court in Palazzolo, such analysis is wholly appropriate. Further, this proposition should come as no surprise to this Court, which stated over 65 years ago in Mayo v. Florida Grapefruit Growers' Protective Ass'n., 151 So. 25 (Fla. 1933):

> That a police regulation, valid when made, may become, by reason of changed conditions affecting the subject of it, so arbitrary and confiscatory in operation or application, as to be capable of being subsequently struck down by judicial action, though previously judicially reviewed and then held to be valid, is to be conceded.

When reviewing whether a zoning ordinance serves a legitimate police purpose, the court must view the ordinance in light of the way the community exists

today, not how it may have existed almost 50 years ago. It doesn't matter that a zoning law may have been valid in the past or may be valid at some time in the future, the constitutional validity of a zoning law must be tested at the time it is brought before the court, and, despite the County's argument to the contrary, it is always the right time for the courts to protect a citizen's constitutional rights from arbitrary government regulation. Davis v. Sails, 318 So.2d 214, 218 (Fla. 1st DCA 1975); Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949); City of Miami Beach v. First Trust Co., 45 So.2d 681 (Fla. 1949). See also, 44 Liquormart, supra, (U.S. Supreme Court reviewed and struck down a 1956 Rhode Island statute on constitutional grounds 40 years after it was adopted).

The Record below is replete with evidence that the challenged separation distance bears no substantial relationship to the public health, safety, morals or welfare. The County's own Zoning Director not only pointed out that the 5000 foot separation distance serves no particular zoning purpose, but also pointed out that no other jurisdiction his staff surveyed had a separation distance anywhere near as extreme as Orange County's. Moreover, in discussing the fact that other jurisdictions do not require such extreme separation, Mr. Gordon stated that:

> The concern of aggregating package stores does not appear to be well founded. On the local front a good example is the intersection of Michigan Street and Orange Avenue. Within several hundred feet

> there is an ABC, Albertsons, and Walgreens package stores. There appears (sic) to be no ill affects from the clustering of these package stores.

R. App. 11.

CONCLUSION

The district court thoroughly reviewed the record below and applied the correct substantive due process standard, the substantial relationship standard, which applies to zoning regulations under the Euclid case and the Burritt v. Harris case. The district court properly concluded that that §38-1414(b) of the Orange County Code is arbitrary, capricious and unconstitutional. Moreover, even if the correct standard were the minimal, rational basis standard as argued by the County, §38-1414(b) would still fall under substantive due process because the record evidence negated any conceivable relationship between the 5000 foot separation distance and a legitimate government purpose. In fact, the overwhelming weight of the evidence showed that the only plausible explanation for the County's 5000 foot separation distance is to provide an economic advantage to existing liquor store operators. This, of course, is not a legitimate function of the zoning power. Accordingly, this Court should affirm the opinion of the Fifth District Court of Appeals in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, via first class mail, postage prepaid, this ___ day of August, 2001, to: James F. Page, Jr., Esquire, Gray, Harris & Robinson, P.A., P.O. Box 3068, Orlando, FL 32802; to John F. Bennett, Esq. 170 E. Washington St., Orlando, FL 32801; and to Mark Fisher, Esq., P.O. Box 1946, Orlando, FL 32802.

____
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Rule 9.210, Fla. R. App. P.

____
Scott A. Glass