

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COSTCO WHOLESALE CORPORATION,

Plaintiff-Appellee,

v

CITY OF LIVONIA,

Defendant-Appellant.

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UNPUBLISHED

September 14, 2006

No. 258990

Wayne Circuit Court

LC No. 04-412164-AA

04-412165-AA

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

I. Introduction

Plaintiff Costco Wholesale Corporation (Costco) submitted applications to defendant, the City of Livonia (City), in which it sought waiver uses under the City's zoning ordinances to permit it to sell liquor at each of its two Livonia stores, one located on Middlebelt Road and the other on Haggerty Road. Specifically, Costco sought the City's approval to sell SDD-licensed beverages at both of its Livonia store locations.<sup>1</sup> The City's planning commission denied both applications and Costco appealed to the city council, which also denied the applications. Costco then filed an appeal in the Wayne Circuit Court, which reversed the city council's decision. This Court subsequently granted the City's application for leave to appeal, and stayed the circuit court order pending resolution of this appeal. We now reverse the circuit court's order and remand for entry of an order reinstating the city council's decision denying Costco's applications.

II. Facts

Like most municipalities in this state, the City has enacted zoning ordinances to regulate the placement of liquor licenses within its boundaries. In particular, Livonia Zoning Ordinance No. 543 requires that SDD licenses be approved as waiver uses under § 11.03(r). At the time Costco's applications were denied, that section provided, in pertinent part, as follows:

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<sup>1</sup> A Specially Designated Distributor (SDD) license allows a licensee to sell alcoholic liquor, other than beer and wine, for consumption off the licensee's premises. Defendant had previously granted plaintiff Specially Designated Merchant (SDM) licenses that permitted plaintiff to sell beer and wine at both its stores.

Section 11.03 Waiver Uses. The following uses are permitted upon review and submission of findings by the City Planning Commission and approval by the City Council. Such use shall be approved only if the proposal for such use complies with the special requirements and regulations provided therefore and with the standards set forth in Section 19.06 of this ordinance. The following uses are also subject to site plan approval in accordance with the requirements and standards of Sections 18.47 and 18.58 of this ordinance:

\* \* \*

(r) S.D.D. and S.D.M. Licenses; provided, however, that S.D.D. licenses which were approved and in use at locations prior to March 7, 1977, and S.D.M. licenses which were approved and in use at locations prior to April 11, 1983, may continue to be used to the extent and in the manner previously established at such locations without waiver use approval; provided further, that:

(1) Such proposed S.D.D. licensed establishments shall be located at least one thousand (1,000) feet distant from any existing S.D.D. licensed establishment, as measured from the nearest point on the building proposed to be licensed to the building in which the existing licensed establishment is located; and further provided, that such S.D.M. licensed establishment shall be located at least five hundred (500) feet distant from any existing S.D.M. licensed establishment, as measured from the nearest point on the building proposed to be licensed to the building in which the existing licensed establishment is located; provided, however, that the foregoing one thousand (1,000) foot and five hundred (500) foot limitations may be waived by action of the City Council.

(2) Such proposed S.D.D. or S.D.M. licensed establishment shall be located at least four hundred (400) feet distant from any church or school building, either public or parochial, as measured from the nearest point on the building proposed to be licensed to the existing church or school building.

(3) Access to such S.D.D. or S.D.M. licensed establishment shall be from a public street having a right-of-way width of at least one hundred twenty (120) feet, as indicated on the Master Thoroughfare Plan of the City of Livonia.

(4) All S.D.D. licensees who sell alcoholic liquor other than beer and wine in their original package for consumption off the premises and whose total gross receipts derived from the sale of all alcoholic beverages do not exceed 35% of the total gross receipts of all sales, both alcoholic and non-alcoholic, shall display such alcoholic liquor behind a counter with no direct public access for a qualified employee at least eighteen (18) years of age to distribute to the customer; compliance with this provision shall occur no later than 180 days following publication of the summary of this ordinance amendment.

The parties do not dispute that Costco satisfied three of the first four criteria set forth in § 11.03(r). In addition to applying for SDD licenses, Costco also requested that the City waive the

fourth requirement in § 11.03(r), that packaged liquor, other than beer and wine, be sold only from behind a counter.

In addition to the requirements of § 11.03(r), an applicant for a waiver use must also meet the general discretionary criteria set forth in § 19.06(1)(a), (b) and (h) of the City's ordinance, which provide:

(1) Where this ordinance empowers the City Planning Commission to review waivers or approval of conditional uses to be approved by the City Council, such waiver or use shall be approved only where the proposal complies with all of the special requirements for the waiver or use sought to be approved, except that any or all such special requirements may be waived or modified by a separate resolution, specifically delineating the special requirement(s) waived or modified, in which two-thirds (2/3) of the members of the City Council concur. Whether or not any special condition is waived, all such proposals must comply with all of the following general standards:

(a) The proposed use must be of such location, size and character that it will be in harmony with the appropriate and orderly development of the surrounding neighborhood.

(b) The location and size of the proposed use or uses, the nature and intensity of the principal use and all accessory uses, the site layout and its relation to streets giving access to it, shall be such that traffic to and from the use and uses, and the assembly of persons in connection therewith, will not be hazardous or inconvenient to the neighborhood nor unduly conflict with the normal traffic of the neighborhood. In applying this standard, the Commission shall consider, amongst other things: convenient routes for pedestrian traffic, particularly of children; the relationship of the proposed use to main traffic thoroughfares and to streets and road intersections; vehicular turning movements in relation to routes of traffic flow; location and access of off-street parking and provisions for pedestrian traffic with particular provision to minimizing child-vehicle contact in residential districts; and the general character and intensity of the existing and potential development of the neighborhood.

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(h) The proposed use must be in accord with the spirit and purpose of this ordinance and not be inconsistent with or contrary to the objectives sought to be accomplished by this ordinance and principles of sound planning. . . .

The city council denied Costco's applications for both stores for the following reasons:

1. That the petitioner has failed to affirmatively show that the proposed use is in compliance with all of the general waiver use standards and requirements as set forth in Section 19.06 of the Zoning Ordinance No. 543;

2. That the proposal is not in compliance with the regulations set forth in subparagraph (4) under paragraph (r) of Section 11.03 of the Zoning Ordinance, which require that all alcoholic liquor products allowed to be sold in connection with the use of an SDD license shall be displayed behind a counter with no direct public access;

3. That this area of the City is currently well served with existing SDD licensed retail establishments and twenty percent of the active SDD licensed businesses in the City are located within one mile of this location;<sup>2</sup>

4. That there is no demonstrated need for additional SDD licensed facilities in this area of the City;

5. That the proposed use is incompatible to and not in harmony with the surrounding uses in the area;

6. That Costco has demonstrated a history of violating the rules and regulations of the Michigan Liquor Control Commission; and

7. That the City has a consistent past practice of denying similar requests from Costco and other large retail stores and similar establishments.

On appeal to the circuit court, the court reversed the city council's decision to deny both applications. Refusing to give the experiences and conclusions of the council any deference, the trial court concluded that the council's decisions were arbitrary and lacked a rational basis, given that the council had previously approved SDM licenses for Costco that allowed it to sell beer and wine, which the court believed had as much of a deleterious impact on a community as the sale of packaged liquor. The circuit court also disagreed with the city council's concern that Costco would compete with smaller retailers. The trial court's complete ruling was:

*THE COURT:* Well I'm going to give you the opportunity to try because the decision of the city council is hereby reversed. It was arbitrary. It did lack rational basis. And I don't understand where all of this opposition comes from given the fact that this same city council or its land use arm must have approved a beer and wine license. *I see no difference between, in my view, common experience tells me the liquor license is far less deleterious to the life of the community than the beer and wine. And so Mr. Schaefer, or I'm sorry, Mr. Fisher thinks that the experience of the city council should be given great deference by this Court, I think they are wrong. I think they should have stopped Costco at the*

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<sup>2</sup> This reason was listed only for the Middlebelt store. For the Haggerty store, the city council listed, for reason three:

3. That the City is currently well served with existing SDD licensed retail establishments located in the City and in adjacent communities.

*beginning from having the beer and wine license if they're worried about this smaller potential harm now. But I still don't think that Costco competes with the interests that were represented to the city council.*

There is no way, Mr. Stoepker, while I'm looking at this side of the green grass that I will declare unconstitutional their power to regulate it. As to the sale of liquor on the open shelves, I also reverse that decision and grant Costco that ability notwithstanding the decision of the city council. I think I've touched every matter. Nobody asked for costs and none are awarded. I assume this matter isn't going, well, it can't stop with me because the Liquor Control Commission will undoubtedly get an earful from the city or this matter can be available for, obviously, appeal to the Michigan Court of Appeals. So having prevailed, you can present an order. [Emphasis added.]

### III. Analysis

Having reviewed the circuit court record, and in particular the ruling quoted above, we readily agree with the City that the circuit court improperly substituted its judgment for that of the city council, a decision that does not square with Michigan law. A legislative body, such as a city council, may act as a zoning board of appeals. MCL 125.585(1). MCL 125.585(11) establishes the standard of review for a circuit court when reviewing a decision of a zoning board of appeals. The statute provides:

The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

Therefore, the circuit court was required to affirm the city council's decision unless it was "(1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 339; 675 NW2d 271 (2003) (citation omitted). Additionally, when applying MCL 125.585(11), a reviewing court must give due deference to the agency's expertise and may not invade its province of exclusive administrative fact-finding by displacing the agency's choice between two reasonably differing views. *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995).

Accordingly, the circuit court was required to defer to the findings of fact made by the city council if those findings were supported by competent, material, and substantial evidence on the record, *The Jesus Center v Farmington Hills Zoning Bd of Appeals*, 215 Mich App 54, 60; 544 NW2d 698 (1996), even if the circuit court might have reached a different result had it been making a de novo review, *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). “‘Substantial evidence’ is evidence that a reasonable person would accept as sufficient to support a conclusion.” *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). “While this requires more than a scintilla of evidence, it may be substantially less than a preponderance.” *Id.* Under the applicable standard of review, the circuit court could not substitute its judgment for that of the city council. See *City of Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 267; 673 NW2d 815 (2003).

This Court reviews de novo a trial court’s decision in an appeal from a city’s zoning board. *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). This Court must determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the factual findings, a standard of review “indistinguishable from the clearly erroneous standard of review.” *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

In characterizing the city council’s decision denying the applications as arbitrary, the circuit court did not address all of the reasons given by the council. Nor did it conclude that there was not substantial evidence supporting the decision. Rather, the court simply disagreed with the conclusions reached by the council as to the effect granting the applications would have on the city, and instead imposed its view and its common experiences in determining what was the best decision on the issue. Misapplication of the standard of review alone constitutes reversible error.

Nevertheless, as noted, one of the reasons cited by the city council for denying the applications was that Livonia had enough SDD licensees both in the area surrounding the Middlebelt store and in the community as a whole. Pursuant to § 19.06, the city council had discretion to apply the general standards of that section in determining whether it should grant the applications. See *Jeffrey Lauren Land Co v City of Livonia (On Remand)*, 119 Mich App 682, 685-686; 326 NW2d 604 (1982). Section 19.06(a) allowed the city council to consider the appropriate and orderly development of the surrounding areas, which included how additional SDD licenses would impact those areas surrounding the locations. Similarly, § 19.06(h) allowed the city council to consider whether additional SDD licenses for the community as a whole was consistent with sound principles of community planning. Thus, there was clearly a legal basis supporting this reason to deny the applications.

There was also competent, material, and substantial evidence on the record to support the city council’s decision on this point. Evidence submitted to the planning commission and city council revealed that the area surrounding the Middlebelt store had a substantial number of SDD licensees. The record showed that there are six SDD-licensed establishments within one mile of Costco’s Middlebelt store, and at the time, the City had 29 liquor licenses and 20.7% were located in that area. Although the area is a major thoroughfare for retail businesses and Costco’s proposed license would not be inconsistent with the surrounding area, the record supports the city council’s determination that the surrounding area is adequately served by current SDD licensees.

While the area immediately surrounding Costco's Haggerty store was not as saturated with SDD licensees, the city council determined that the 29 SDD licenses it had issued for the community as a whole was sufficient to serve the community's needs, even though it was permitted to issue 34 licenses. A municipality is well within its rights in deciding not to issue new liquor licenses even if a license is available, and it is for the requesting party to show that there is a need for additional licenses. *Fuller Central Park Properties v City of Birmingham*, 97 Mich App 517, 529; 296 NW2d 88 (1980). To the extent that the city council decided not to issue Costco the licenses because the community as a whole had enough SDD licensees at the time, its decision should have been affirmed by the circuit court. Costco has not shown that the city council's decision on this point was not supported by competent, material, and substantial evidence.

In sum, the council's decision should have been affirmed because it was supported by at least one proper reason that was supported by competent, material, and substantial evidence.<sup>3</sup> The circuit court improperly substituted its judgment for that of the city council, and therefore the order of the circuit court is reversed, and this matter is remanded for entry of an order affirming the city council's decision. Jurisdiction is not retained.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto

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<sup>3</sup> We also conclude, however, that the discussion of the "equal treatment rule" and the question whether it was proper for the city council to rely on Costco's alleged failure to satisfy the counter requirement, when Costco submitted a separate application for waiver of that requirement, implicates the reasons for the city council's decision to deny Costco SDD licenses, a decision that we have already affirmed. Lastly, we note that because Costco has not challenged the circuit court's determination that the counter requirement is constitutional, this issue need not be addressed.