2004-10

STATE OF MICHIGAN

IN THE COURT OF APPEALS

COSTCO WHOLESALE CORPORATION,

APPELLEE,

v.

THE CITY OF LIVONIA,
a municipal corporation,

APPELLANT.

Court of Appeals
Docket No. 258990

Wayne County Circuit Court
Case Nos. 04-412614AA
04-412165AA

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BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE [IN SUPPORT OF THE CITY OF LIVONIA]

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STATEMENT OF QUESTION PRESENTED

WHETHER THE CIRCUIT COURT REVERSIBLY ERRED BY:

A. IGNORING THE WELL ESTABLISHED AND RESPECTED HOME RULE AUTHORITY CONFERRED UPON CITIES TO GOVERN THEIR LOCAL AFFAIRS;

B. EVISCERATING MICHIGAN POLICY GRANTING LOCAL MUNICIPALITIES FUNDAMENTAL DECISION-MAKING AUTHORITY TO DETERMINE PERMISSIBLE LOCATIONS FOR ESTABLISHMENTS LICENSED TO SELL LIQUOR; AND,

C. FAILING TO AFFORD THE CITY DUE DEFERENCE AND EXCEEDING THE BOUNDS OF JUDICIAL REVIEW OF SPECIAL LAND USE DECISIONS MADE UNDER THE CITY AND VILLAGE ZONING ACT.

Plaintiff-Appellee says "no"

Defendant-Appellant says "yes"

The Circuit Court implicitly said "no"

INTRODUCTION

In *Schwartz v City of Flint,* 426 Mich 295, 313; 395 NW2d 678 (1986), our State Supreme Court said:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of **the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general.** (Emphasis supplied).

Similarly, the United States Supreme Court, by way of separate opinions of Justices, has recognized the significance of this exercise of special police power known as "zoning" in the overall scheme of maintaining quality of life in our country:

> "[Z]oning is a complex and important function of the State. It may indeed be **the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.** I therefore continue to adhere to the principle of *Village of Euclid v Ambler Realty*, 272 US 365, 47 S Ct 114, 71 L Ed 303 (1926), that **deference should be given to governmental judgments** concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land- use control mechanisms." (Emphasis supplied)

Village of Belle Terre v Boraas, 416 US 1, 13, 94 S Ct 1536, 39 L Ed 2d 797, 6 ERC 1417, 4 Envtl. L. Rep. 20,302 (1974) (Marshall, J. *dissenting*); see, also, *Young v American Mini Theatres*, 427 US 50, 71, 96 S Ct 2440, 49 L Ed 2d 310 (1976) (Powell, J., *concurring*).

Why Have Zoning Judgments Been Determined to be Local Government Matters for Which the Law Commands Judicial Deference?

From the very outset of the exercise of zoning authority, this specialized police power has been exclusively carried out at the local government level. An important justification for this, which also serves to particularly mandate judicial deference within the context of this case, is attributable to the extensive study, and analysis required in order to prepare and implement a

zoning ordinance. Indeed, the exercise of zoning authority, requiring information uniquely local in nature, becomes fair and rational *only* if undertaken by those who have studied the municipality with the view of promoting and protecting the public health, safety and welfare – generally with the counsel of an expert trained in municipal planning.

As a part of the zoning and planning process, the Legislature authorizes and directs the preparation of a "master plan," as contemplated in the Municipal Planning Act, MCL 125.31, *et. seq.* The Municipal Planning Act dictates that "the planning commission shall make and approve a master plan for the physical development of the municipality, ..." MCL 125.36. The master plan, "with the accompanying maps, plats, charts, and descriptive matter" shall reflect a plan for the city, including, but not limited to, all of the following:

> (a) **A land use plan and program**, in part consisting of a classification and allocation of land for agriculture, residences, **commerce**, industry, recreation, ways and grounds, public buildings, schools, soil conservation, forests, woodlots, open space, wildlife refuges, and **other uses and purposes**.
>
> (b) The general location, character, and extent of streets, railroads, airports, bicycle paths, pedestrian ways, bridges, waterways, and water front developments; flood prevention works, drainage, sanitary sewers and water supply systems, works for preventing pollution, and works for maintaining water levels; and public utilities and structures.
>
> (c) Recommendations as to the general character, extent, and layout for the redevelopment or rehabilitation of blighted areas; and the removal, relocation, widening, narrowing, vacating, abandonment, or changes or use or extension of ways, grounds, open spaces, buildings, utilities, or other facilities.
>
> (d) **A zoning plan for the control** of the height, area, bulk, location, and **use of buildings and premises**.

Id. (Emphasis supplied). Very clearly, the process of planning a city requires extensive information gathering, analysis, time, and resources. The product of such extensive effort and

expenditure forms a significant part of the basis for making the **value judgments** deemed to be so important, and entitled to deference, as recognized in *Schwart v City of Flint* and *Village of Belle Terre v Boraas*, supra.

Once the master plan is prepared, the City Council is then enabled under the City and Village Zoning Act to adopt zoning regulations for the entire area of the city. With clear and intended resemblance to the Planning Act, the city zoning regulations are authorized in MCL 125.581:

> (1) The legislative body of a city or village may **regulate and restrict the use of land and structures**; to meet the needs of the state's residents for food, fiber, energy and other natural resources, **places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities**; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and **to promote public health, safety, and welfare**, and for those purposes may **divide a city or village into districts** of the number, shape, and area considered best suited to carry out this section. For each of those districts **regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations**.
>
> (2) The land development regulations and districts authorized by this act shall be made **in accordance with a plan** designed to promote and accomplish the objectives of this act. (Emphasis supplied)

Again, it is clear that the task of preparing and implementing a zoning ordinance in a city, after undertaking the work of a comprehensive master plan, is complex, and is critical to the

short and long term success of the municipality. The significance of the sweeping legislative direction for planning and zoning was recognized in *Burt Township v Department of Natural Resources*, 459 Mich 659, 665 – 666; 593 NW2d 534 (1999), as a significant basis for upholding local zoning authority in the face of an attempt on the part of the State Executive Branch to substitute its judgement on land use matters. *See, also, Hess v Charter Township of West Bloomfield,* 439 Mich 550, 562-564; 486 NW2d 628 (1992).

Zoning Decisions Must Take into Consideration the Interests of the Community as a Whole

There is a critical underlying question that cries out from within the record of this case. Namely: must city officials be relegated to permitting blight to take hold in their community, and later try to explain what went wrong while attempting to find means of financing urban renewal? Distilled to its essence, this case is about a city's attempt to properly and evenhandedly employ planning and zoning techniques with the objective of maintaining a vibrant community, and, by such proactive action, avoid the unnecessary hand-wringing about blight.

The statutory design for local planning and zoning reflects a legislative recognition that the entire city is an interrelated and dynamic set of people, public and private properties, resources, systems, institutions, facilities, uses, and activities. The authorization or provision of particular uses and activities in one area of the city will have a generally predictable impact upon persons, businesses and properties in that area, and other areas of the city. Determining the proper number and location of establishments selling alcoholic beverages is certainly no exception to this general notion.

The Zoning Act provides for regulation of uses to insure that development is permitted in appropriate locations and relationships, and that limits are placed upon inappropriate overcrowding of land and congestion. The concentration of too many uses of a particular type,

including liquor sales – which may result in a blighting effect upon one or more areas of the city – is of equal importance to making adequate provision. The City, based upon study and experience, has the specialized knowledge and insight on where to draw lines within this fine balance.

Effective or "successful" regulation depends upon the ability of the City to control the important and interrelated land use variables and activities within the community. As the ability to control is encumbered, or second-guessed, the process of "comprehensive planning and zoning" is weakened. If the city is limited by a court acting as a superzoning board, the regulatory process becomes handicapped. Thus, if the City in this case is unable to consider and address licensed establishment locations, the ability to plan and regulate development, character, congestion, safety, and welfare within the City will be undermined. This, in turn, has important "ripple effects" upon the community as a whole in terms of stability, viability and, ultimately, financial survival.

As reflected in the administrative record in this case, discretionary decisions on the grant and denial of special land uses are, in part, guided by the dictates of unique local planning and character of the community. Such decisions are likewise justifiably entitled to deference from the judiciary.

Certainly, there are values of state-wide significance that must be interjected into the exercise of zoning authority, e.g., making provision for housing for the handicapped. However, the uniquely local attributes, limitations, and conditions within a city play the most critical part of the planning and zoning function. In short, zoning involves study and hard work to discern and protect local values, resources, and features as part of the larger job of regulating the public health, safety, and welfare. It has been recognized by law that land use regulation, expressly

including the regulation for the purpose of authorizing locations for liquor licensure, is an exercise of authority to be undertaken primarily by the local municipality. *Johnson v Liquor Control Comm'n* ,266 Mich 682; 254 NW2d 557 (1934).

Judicial Review of Discretionary Zoning Decisions

Discretionary zoning decisions relating to special land uses are, quite rightly, subject to judicial review. Again recognizing the conferral of local authority within this context, Michigan jurisprudence dictates that such judicial review is limited to ensuring that the City's decisions do not amount to an abuse of discretion. That is, because such decisions require local study and implementation, as described above, public policy places discretionary decision making in the hands of local municipalities, with judicial oversight designed as a safeguard to ensure that the exercise of discretion is undertaken lawfully.

In order to coordinate with overall community planning, the City of Livonia has had long-established and maintained standards for discretionary decision making relative to the grant and denial of zoning approvals required for the sale of liquor. A substantial hearing process recognizing the elements of due process is incorporated into the City's procedures -- fully administered in this matter.

Based upon the City's established standards, discretion was exercised by the Planning Commission and City Council by determining that the ordinance criteria required for approval of licensure at the subject locations had not been met. The record supports such exercise of discretion.

When called upon to examine the City's local decision making, the Circuit Court did not recognize that its review was limited to determining whether the City had abused its discretion. Indeed, the time-honored tradition mandating that **deference be given to governmental**

judgments concerning proper land-use allocation, *Belle Terre, supra, was entirely ignored.* The Circuit Court abruptly and summarily took it upon itself – with the benefit of substantially no background study and/or analysis – to sit as a superzoning board. The Court substituted its judgment for that of the City, an action which is entirely inconsistent with Michigan law and policy.

In the interest of the City, and for the integrity of the zoning jurisprudence in this State, the Circuit Court decision should not be permitted to stand.

STATEMENT OF FACTS

Amicus curiae adopts the Statement of Facts of Appellant, City of Livonia.

STANDARD OF REVIEW

Amicus curiae adopts the statement of Standard of Review specified by Appellant, City of Livonia.

ARGUMENT

THE CIRCUIT COURT REVERSIBLY ERRED BY:

A. IGNORING THE WELL ESTABLISHED AND RESPECTED HOME RULE AUTHORITY CONFERRED UPON CITIES TO GOVERN THEIR LOCAL AFFAIRS;

B. EVISCERATING MICHIGAN POLICY GRANTING LOCAL MUNICIPALITIES FUNDAMENTAL DECISION-MAKING AUTHORITY TO DETERMINE PERMISSIBLE LOCATIONS FOR ESTABLISHMENTS LICENSED TO SELL LIQUOR; AND,

C. FAILING TO AFFORD THE CITY DUE DEFERENCE AND EXCEEDING THE BOUNDS OF JUDICIAL REVIEW OF SPECIAL LAND USE DECISIONS MADE UNDER THE CITY AND VILLAGE ZONING ACT.

A.

Home rule, the authority conferred upon cities to govern local affairs, is well established and respected in Michigan, and was entirely ignored by the Circuit Court.

The Establishment of a Strong Home Rule Tradition

Local self-rule has had a well recognized grounding in the United States dating from the conception of the nation. As reflected in 1 McQuillin, Municipal Corporations (3rd Ed Rev) §1.37, pp 44-46:

> Since our country was conceived in the theory of local self-government, political power has, from the beginning, been exercised by citizens of the various local communities. Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority. One controlling idea of local self-government is to bring the officials nearer to the people whose interests are immediately affected by official conduct, ... Local self government is, thus, a guaranty of individual liberty. Further, local self-government better insures that the public will not lose interest in their government. When the

> public does lose interest in the government, they run the risk of having their government lose interest in them. Thus, local self-government is a way of insuring individual liberty through an alert citizenry.
>
> * * *
>
> The popular character of local administration, all-pervading in its scope, exerts a dominating influence upon the life of United States citizens. Local self-government draws the citizen close to government, makes him feel that he is a living part of it and responsible for its actions; it stimulates public confidence, teaches the necessity for legal restraints on individual and property rights, and motivates respect for the will of the people as expressed in the law; it promotes the habit of cooperation, inspires citizens to be devoted to duty to the community, and instills confidence in the authority of the representatives and servants of the people; it leads to reasonableness in discussion and consideration of proposed community action, promotes moderation and harmony of opinion and results in sensible public regulation and administration; and finally it engenders pride in the conduct of common affairs.

Michigan has had a particularly powerful history of recognizing the importance of local self-government. The concept is deeply rooted in our state constitution and in the general and common laws of the state. Justice Thomas M. Cooley placed Michigan in the forefront of a national dialogue on the legal point which, generally stated, holds that municipalities may act on matters of local concern free from interference by the state. Michigan courts have regularly recognized local home rule as being an indispensable component of our democratic system of government.

Justice Cooley's contribution to this Michigan jurisprudence was provided in his oft-quoted opinion in *People v Hurlbut,* 24 Mich 42, 96 (1871), which involved a decision by the Michigan Legislature to create a board of public works for the City of Detroit, and to allow state appointment of individuals to serve on that board. The 1850 Michigan Constitution provided that officers of the city were to be appointed or elected locally. The Detroit City Council had

already designated water and sewer commissioners. One of those displaced commissioners, Hurlbut, challenged the state's legislative action. The Court's opinion upheld the statute, allowing the state Legislature's creation of a board of public works, but invalidated the appointment of members by the Legislature for the full term of that office. The Court reasoned that the Legislature had the power to cause the creation of the board and to make provisional appointments to the board, but that the city council had to make the permanent appointments.

Although there were several opinions in the case, Justice Cooley's is particularly notable, Cooley posed the question before the Court as follows:

> The question, broadly and nakedly stated, can be nothing short of this: **Whether local self-government in this state is or is not a mere privilege, conceded by the Legislature in its discretion, and which may be withdrawn at any time at its pleasure?** I state the question thus broadly because . . . I can conceive of no argument in support of legislative authority which will stop short of this plenary and sovereign right. (Emphasis supplied)

Justice Cooley rejected the proposition that under a constitutional system of government representatives of the state could appoint people to an office the duties of which "are purely local." If there were nothing requiring those appointed to be citizens of the locality, he reasoned, then the concept of *self*-government is meaningless. Justice Cooley was particularly concerned that if the state Legislature were accorded such unencumbered power over municipalities, "self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing."

Cooley's opinion in *Hurlbut* drew from a wide range of authority, including historical concepts of constitutional freedom and practical history:

> The men who framed our institutions have not so understood the facts. With them it has been an axiom, that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the

> rest; and they have never questioned or doubted that the corporators in each municipality were exercising their franchises under the protection of certain **fundamental principles which no power in the state could override or disregard.** The state may mould local institutions according to its views of policy or expediency; **but local government is a matter of absolute right; and the state cannot take it away.** It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at its discretion sent its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all. (Emphasis supplied)

The fact that the federal and various state constitutions as then framed did not contain specific reference to these "inherent" local rights did not diminish them, in Cooley's view. "Some things," he said, "are too plain to be written."

In Michigan, as well as in many other jurisdictions, Cooley's view of the nature of municipal government prevailed. His arguments were a cornerstone of the home rule movement that took hold nationwide toward the end of the century.

Strong local control continued to be jealously guarded in Michigan, as evidenced in *Attorney General v Detroit Common Council,* 58 Mich 213; 24 NW 887 (1885), in which the Court underscored the importance of local self-regulation:

> It is also well settled that our State polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the Constitution was adopted. And any legislation, for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional.

In 1908, Michigan's constitution was amended to acknowledge broad autonomy for municipalities through a home rule provision, Const. 1908, art. 8, §20, that required the state Legislature to provide by general laws for the incorporation of cities and villages, and another

section, Const. 1908, art. 8, §21, that granted those cities and villages the right to adopt their own charters. This 1908 home rule provision was followed shortly by the Home Rule Cities Act (HRCA), MCL 117.1, *et seq.*, which was enacted to implement this constitutional mandate.

The Strengthening of the Home Rule Tradition

Michigan's 1963 Constitution made that local authority even clearer. Const. 1963, art. 7, §22, states:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its **municipal concerns, property and government**, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. (Emphasis supplied)

The language of another constitutional provision, Const. 1963, art. 7, §34, closes the circuit to firmly ensure local autonomy:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be **liberally construed in their favor**. (Emphasis supplied)

That the 1963 constitutional amendments were actually intended to *expand* the autonomy of local units of government is indisputable, as reflected in the Convention Comment, art. 7, §34. Michigan Municipal League, Michigan Association of Municipal Attorneys, Local Government Law and Practice in Michigan 1-9 (1999):

> [T]he framers of the 1963 Constitution stated that they wanted to "reflect Michigan's successful experience with Home Rule" by providing "a more positive statement of municipal powers, giving Home Rule cities and villages full power over their own property and government subject to this constitution and law." Convention Comment, art. VII, §22. Further, the framers described article VII, section 34 as "a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments." The framers also noted that "Home Rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to

> counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes."

The Strong Home Rule Tradition Continues

A contemporary discussion of municipal rights after the 1963 constitutional amendments is found in the recent decision in *Adams Outdoor Advertising, Inc.* v *City of Holland*, 234 Mich. App. 681, 600 NW2d 339 (1999); *aff'd* 463 Mich. 675; 625 NW2d 377 (2001). The plaintiff in *Adams* argued that the provision of the HRCA providing for "licensing, regulating, restricting, and limiting the number and locations of billboards within the city" did not "expressly grant" authority for home rule cities to prohibit new billboards. According to the plaintiffs, the city did not have the power to prohibit billboards because the Legislature had not specifically granted it that power.

The Court disagreed, saying that "unless a power or right is **specifically proscribed** by law, a home rule city has broad authority to enact ordinances for the benefit of the health, safety, and welfare of its residents. Home rule cities are not limited to only those powers expressly enumerated." *Adams* at 689. The Court based its conclusion on specific reference to Const. 1963, art. 7, §22 and the recent discussion by the Supreme Court in *Detroit v Walker*, 445 Mich 682, 689-690; 520 NW2d (1994), in which it was stated:

> Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. **Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance**. (Emphasis added.)

The *Walker* Court had broadly described the powers of all local government units in Michigan by stating, "Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of

granting enumerated rights and powers definitely and specifically." That general grant of right is not simply bestowed on municipalities by the Legislature; it resides in authority granted directly, in the 1963 Constitution itself and the democratic theories that precede it.

In *Brouwer v Bronkema*, 377 Mich 616; 141 NW2d 98 (1966), the Michigan Supreme Court took the opportunity to confirm that:

> And in Michigan, attention would have to be focused also upon our own traditions and historical regard for local self-government so ably expressed by the Justices of the Cooley Court in *People ex rel. Le Roy v Hurlbut and in People ex rel. Board of Park Commissioners of Detroit v. Common Council of Detroit.* Those Michigan traditions and history are reflected today in Article I, sections 1 and 23 of our Constitution of 1963 by which we have reaffirmed our conviction that all political power is inherent in the people and have reserved to ourselves all rights not otherwise enumerated in the Constitution.

There can be no doubt that, in Michigan particularly, there is a long and currently prevailing tradition of strong home rule. Matters of local concern are within the scope of authority of local decision-makers.

B.

The Circuit Court eviscerated Michigan policy that requires granting to cities "the greatest deference" in the review of their decisions on licensing establishments to sell liquor; such decisions have great local significance and require a complex set of local considerations that the law has left to the sound discretion of cities.

Determining the number and location of establishments licensed to sell liquor is an issue of great local concern, and, consistent with Michigan's strong home rule tradition, deference should be granted to the City to draw lines within its boundaries and otherwise make decisions on this subject matter.

Case Law Recognizes the Importance of Local Liquor Control

Johnson v Liquor Control Com'n, supra., recognizing the appropriate role of the State Liquor Control Commission as delegated by the Legislature, emphasized that, "The very nature of the liquor business is such that local communities, as a matter of policy, should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers . . ." Based upon reasoning in this regard, it was observed in *Jones v City of Troy,* 405 F Supp 464, 473 (1975) that, "the defendant City's chosen method of discharging its liquor control responsibility **is to be given the greatest deference**." (Emphasis supplied).

The record here discloses that the City has outstanding licenses to issue. Regardless of this fact, as long as applications are considered fairly and rationally, local values and goals take priority, and there is no obligation to issue all licenses authorized by State law. This point was made abundantly clear in *Fuller Central Park Properties v City of Birmingham*, 97 Mich App 517; 296 NW2d 88 (1980), in which it was recognized that, for many years, the City of Birmingham had refused to issue *any* of its authorized licenses. By the time the *Fuller Park* case came before the Court, the City had seven remaining licenses. Taking into consideration its local

determination of public need for the issuance of an additional license – as did the City of Livonia in this case – the City of Birmingham refused to grant the plaintiff in that case one of the available licenses. The Court upheld the City's denial, and confirmed that a city has no obligation to issue all licenses available to them.

Citing and relying upon the *Fuller Park* case, the Court in *Stafford's Restaurant, Inc. v City of Oak Park*, 129 Mich App 84; 341 NW2d 235 (1983), further highlighted the strong weight to be given to city decision-making, and the importance of local conclusions relating to this subject matter:

> [S]tate statutes and the interpretations of those statutes have **consistently recognized the importance of the local community** in the regulation of alcoholic beverages
>
> * * *
>
> The **city council adopted a policy** based upon **its** perception of the desires of a majority of the electorate of the City of Oak Park. The city council and its individual members have since 1966 applied this policy in a consistent and nondiscriminatory manner so as to promote, pursuant to **their determination** as the people's elected representatives, the **best interests of the city**. (Emphasis supplied)

Consistent with Michigan's strong home rule tradition, this brief case analysis reveals the great deference that has been given to local communities with regard to the issuance of liquor licenses. The administrative record in this case supports such deference.

Practical Considerations that Require Local knowledge and Decision Making

The administrative record in this case is enlightening in terms of the rationale for granting great deference to local communities with regard to licensure applications. The City has approved the issuance of a large number of SDD licenses, with six of them being within one mile of Plaintiff's Middlebelt property. (Planning Commission Minutes of January 27, 2004, p 20). The testimony of representatives of some of these area licensees clarifies that, due to the volume

of business conducted by Plaintiff, there is a serious concern for business survival. (City Council Minutes of March 22, 2004, pp 19 – 27). Obviously, the creation of blight is of great concern for the City. Blight affects property values, and is an anathema to a healthy, vibrant city. The concern for blight is essential to the public health, safety and welfare of a city.

Also within the immediate scope of public health, safety, and welfare is the effect of the consumption of alcoholic beverages. The Court can surely take judicial notice of the traffic safety issues arising out of drinking and driving incidents. The demand for police services is also impacted by the consumption of alcohol. Such demand is relevant to the City in terms of budgetary considerations involving the personnel and operation of the police department. Moreover, when police officers are dispatched for an alcohol-related traffic or other incident, such officers are not available to service other needs of the City.

The record shows that, at *each store* owned by Plaintiff, the gross annual SDD business is at least one million dollars. (Planning Commission Minutes of January 27, 2004, pp 3, 5 - 6). Given such volume of business proposed to be done at the two stores seeking SDD licensure in this case, one of two things would appear certain if the licenses were granted: (1) if the two million dollars of business would be taken from nearby stores currently in operation, the City would be authorizing severe economic impact upon the existing licensees, and potentially encouraging blight if and when their operations fail; or (2) if the two million dollars of business would not be taken from nearby stores, the City would be authorizing two million dollars worth of *additional* alcohol consumption in and around the City, which would presumably result in proportionately greater vehicular and other alcohol-related incidents and police demands.

The City's ordinances provide applicable standards and procedures for weighing these and other relevant matters relating to the issuance of SDD licenses. Armed with these standards

and procedures, the City is clearly in the best position to make intelligent decisions concerning the balance to strike in the allocation of licenses and related land usage.

C.

Judicial review of special land use decisions made under the City and Village Zoning Act is limited to determining whether the city abused its discretion; the Circuit Court exceeded its authority by ignoring the City's discretion, and substituting its judgment for that of the City's.

Plaintiff's case in the Circuit Court sought relief from the City's denial of a **special land use approval** under the City's Zoning Ordinance. As clarified in the City's Brief on Appeal under Statement of Standard of Review, Brief, pp 15 – 16, Plaintiff's case constitutes **an appeal.** *Carleton Sportsman's Club v Exeter Township*, 217 Mich App 195, 550 NW2d 867 (1996) (a review under the Township Zoning Act, which has substantially identical provisions as the City and Village Act); *see, also, Polkton Charter Township v Pellegrom*, 265 Mich App. 88, 693 NW2d 170 (February 3, 2005).

The Circuit Court in *Carlton*, like the Circuit Court in the present case, failed to recognize the limited nature of judicial review applicable to an appeal from a special land use denial. In that case, as is applicable here, the Court of Appeals was bound to conclude that,

> We find that such a motion [for summary disposition] was improperly considered by the circuit court because the court was **not sitting as a court of original jurisdiction**, but rather as a court of appellate jurisdiction . . . the circuit court was sitting as an appellate court and considering plaintiff's claim within the ambit of Const. 1963, Art. 6, § 28. In doing so, the circuit court was **required to review the record and decision of the township board for competent, material, and substantial evidence in support of the decision and to determine if it was authorized by law**. (Emphasis supplied)

217 Mich App at 201-203.

In *Gordon v Bloomfield Hills*, 207 Mich App 231, 232-233, 523 NW 2d 806 (1994), the Court affirmed the Circuit Court, again clarifying that,

> Administrative decisions are to be affirmed unless they are contrary to law or unsupported by competent, material, and

> substantial evidence on the whole record. Const. 1963, art. 6, § 28. . . . it must give due deference to the agency's regulatory expertise and may not "invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Id.;* see also *Murphy v. Oakland Co. Dep't of Health,* 95 Mich.App. 337, 339-340, 290 N.W.2d 139 (1980).

Most apposite was the Court's admonition in *Murphy* (cited in *Gordon, supra*) 95 Mich App at 339-340, to the effect that,

> The reviewing court **should not substitute its opinion** for that of the administrative agency where there is the requisite evidence to support the administrative decision, **notwithstanding that the court might have reached a different result had it been sitting as the agency.** (Emphasis supplied)

On a reading of the facts in this matter (*see,* City's Brief on Appeal under Statement of Facts), it is abundantly clear that the Circuit Court misapprehended its review limitation, and blatantly contradicted the review standards set forth in *Carlton, Gordon* and *Murphy, supra.* Very simply, with substantially no background understanding of the extensive planning and zoning in the City of Livonia, and with no meaningful review to understand the discretion exercised by the City, the Circuit Court merely substituted its judgment for that of the City's.

An elaboration of the proper review mandated under Const 1963, Article 6, Section 28 was provided in the case of *In Re Payne,* 44 Mich 679; 514 NW2d 121 (1994). A court reviewing a record addresses only *questions of law*:

> While the reviewing court addresses only questions of law, these questions include whether the record supports the findings of the lower court:
>
> > [I]n examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal. . . .

> See also *In Re Fredericks*, 285 Mich 262, 267; 280 NW2d 464 (1938) (on certiorari, the court will 'review the evidence to ascertain only whether there was reasonable ground for the decision made').

A majority of the Court in *In Re Payne* specifically addressed the phrase "substantial evidence," stating that courts will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. See *Arkansas v Oklahoma*, 503 US 91, 103; 112 S. Ct. 1046; 117 L.Ed. 2d 239, 259 (1992). The Court then defined "substantial evidence" as follows:

> 'Substantial evidence' has a classic definition: The amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, ***it may be substantially less than a preponderance.*** *Tomczik v State Tenure Commission*, 175 Mich App 495, 499; 438 NW2d 642 (1989); *Detroit Symphony Orchestra* at 122. Although we do not reach the constitutional question, the substantial evidence standard found in Const. 1963, Art. 6, § 28, does not depart from this definition, at least according to its drafters. (Emphasis added.)

Id. at 692. See also *Black v Department of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992) (a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result); *Traverse Oil Co. v Chairman, Natural Resource Commission*, 153 Mich App 679, 691; 396 NW2d 498 (1986) (great deference should be given to an agency's choice between two reasonable but differing views as a reflection of the exercise of administrative expertise); *Marrs v Board of Medicine*, 422 Mich 688, 693-694; 375 NW2d 321 (1985) (reversal of an administrative decision as "an abuse of discretion" requires a finding that the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias).

Under such authority, Plaintiff must prove, and the Court must find, that there was no competent, material, and substantial evidence in the record before the Planning Commission and City Council in support of the City's decision, bearing in mind that the amount of evidence that requires this Court to affirm the City's decision "may be substantially less than a preponderance." Plaintiff cannot meet that high standard.

For all of the reasons specified in the City's Brief (particularly, Brief pp 4-11, which will not be reiterated here), the decision to deny Plaintiff's licenses was supported by competent, material, and substantial evidence in the records made before the Planning Commission and City Council. There was substantial evidence presented under the discretionary zoning ordinance standards provided for special land use decision making were not met, including, among other grounds for denial, there was a failure of the applicant to show that the proposed licenses would be compatible to and in harmony with the surrounding uses in the area. Indeed, there was competent, material and substantial evidence in the record supporting the conclusion that granting the licenses would result in excessive licensure in the area, potentially leading to blight due to failures of existing licensees.

CONCLUSION AND RELIEF REQUESTED

Consistent with Michigan's powerful tradition of home rule, and in view of the extensive study, analysis, and information uniquely local in nature required in order to prepare and implement a zoning ordinance, it has been recognized that zoning decisions properly reside exclusively at the local government level. Moreover, it is well settled that, "Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general," and that, "deference should be given to governmental judgments concerning proper land-use allocation." *Schwartz v City of Flint, supra; Village of Belle Terre v Boraas, supra* (Marshall, J. *dissenting*).

Within the more specific context zoning decisions involving liquor licensing at particular sites, buttressing the requirement for local self-determination for zoning decisions in general, Michigan likewise holds that "the very nature of the liquor business is such that local communities, as a matter of policy, should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers . . ." *Johnson v Liquor Control Com'n, supra.* Again, such regulation "is to be given the greatest deference." *Jones v City of Troy, supra.*

Accordingly, it is no surprise that, when these local zoning and liquor licensing decisions are challenged, the integrity of the home rule structure in this State must be judicially due deference. In good part because courts have not been engaged on the local "front lines" in terms of information gathering, study and analysis concerning local conditions, aesthetics, economics, transportation, health, safety, and the community's aspirations and values, it has been mandated that local government judgments must stand unless they amount to an abuse of discretion.

In this case, the proceedings conducted by the City of Livonia were eminently fair, and the record contains competent, material and substantial evidence to support the denial of the SDD licenses applied for by Plaintiff. Yet, upon judicial review, the City's decision did not occupy the respected position compelled by Michigan zoning and liquor licensing jurisprudence. Rather, the Circuit Court reached an abrupt and unfounded "second guess" decision, effectively ignoring the judgment of the City. This contradiction of Michigan law may not be permitted to stand.

Respectfully submitted,
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