

## Costco loses CityGate Wine & Spirits court battle

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Costco Wholesale Corp. has lost a court bid to oust CityGate Wine & Spirits from the plaza it shares with the locally owned liquor store.

In what initially was attempt to keep CityGate Wine & Spirits from opening at all, Costco—the upscale plaza's anchor tenant—sued Anthony J. Costello & Son Development LLC and GAP IV Partners IV LLC, the partnership that owns the liquor store, last year.

Eleven months after the case's October 2015 filing, U.S. District Judge David Larimer handed down a decision last week dismissing Costco's complaint.

GAP IV, whose principal member is Patrick Burke, managing principal of Burke Group Capital IV LLC, opened in early 2016 despite Costco's opposition.

Costco, nevertheless, press on with the case, continuing to maintain that the liquor's location in the plaza violates a pact it inked with Costello & Son months before GAP IV kicked off construction of the CityGate Wine & Spirits store.

Costco filed the court case following the State Liquor Authority's turndown of a CHM Liquors Inc.'s application to open a liquor store adjacent to Costco's 156,000 square foot CityGate store.

New York law forbids grocers from selling hard liquor. Costco stores elsewhere in the state have adjacent but separately accessed liquor stores that are not branded as Costco operations but promote themselves as @Costco stores.

Whether the New York City-based CHM Liquor is a Costco affiliate was a point of debate.

Attorneys for GAP Partners believed it was. A Costco lawyer stated in court papers that CHM and Costco are separately incorporated.

In either case, Burke beat CHM to the punch, applying for and winning a liquor license for City Gate Wine & Spirits first. Ruling that the area already had plenty of liquor stores, SLA commissioners later turned down CHM's application.

Costco's lawyers argued that terms of a 2014 contract it inked with Costello & Son were clear: a non-Costco affiliated CityGate liquor store could only open in a building also occupied by Siemens Building Technologies.

That pact was superseded by an oral agreement offered by a Costco attorney at the 2015 hearing at which SLA commissioners nixed CHM's liquor license application, Costello & Son attorney Glen Pezzulo of Culley, Marks, Tanenbaum & Pezzulo LLP maintained in court papers.

The alleged oral bargain was struck in a deal between Costco and Burke in which Burke consented to withdraw his earlier opposition to CHM's license application in exchange for Costco's agreement to let CityGate Wine & Spirits open where it now sits, lawyers for GAP IV maintained in court filings.

The 2014 contract no longer matters, however, Larimer decided.

"The reasons why the parties agreed to limit the permissible locations of liquor stores at

CityGate are not apparent from the record, but the harm that Costco alleges as a result of the violation of the (2014 contract), is clear: the SLA's denial of CHM's application for a liquor license. The record shows, however, that the SLA's denial was in no way related to the alleged violation of the (contract)," the judge wrote.

Whether Costco plans to drop the dispute or pursue the case further is not immediately clear. Costco attorney Harold Kurland of Ward, Greenberg, Heller & Reidy LLP could not immediately be reached for comment this week.

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