Regulating Discount Superstores: 
Ordinances Restricting Big Box Retailers with Grocery Departments

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I. Introduction.

Over the past decade a new form of grocery store has transformed the national supermarket industry: the big box retail discount store that contains within it a large full-service supermarket. Appearing as “Wal-Mart Supercenters,” “Super Kmart’s,” or “Super Targets,” these “Discount Superstores” have been extremely successful, particularly for the largest operator of these stores, Wal-Mart. Applying economies of scale and increased bargaining power, these stores offer consumers significantly lower prices. For example, groceries at a Wal-Mart Supercenter are estimated to be 20% cheaper than at the major supermarket chains. The success of Wal-Mart’s Supercenters has led it to become the nation’s largest grocer, a remarkable feat considering that it only entered the grocery business in 1988.

However, the benefits of Discount Superstores, particularly their lower prices, come with certain costs. Communities have found that Discount Superstores take business away from existing neighborhood supermarkets, often causing store closures and, consequently, urban blight. With the closure of neighborhood supermarkets, consumers are forced to make longer trips for their groceries, since Discount Superstores are generally located at the urban fringes. Such longer trips can result in increased traffic congestion and air pollution. Thus, the impacts of Discount Superstores may be similar to those of suburban shopping malls which have been accused of “sucking the life” out of many downtown areas. Furthermore, their lower prices likely are due, in part, to lower employee compensation and fewer benefits, resulting in strong opposition from labor interests.

Although there is currently only one Discount Superstore in California, Wal-Mart expects to open two more this fall and has announced that it intends to open 40 Supercenters in California over the next few years. The reaction has been a proliferation of local ordinances designed to restrict the expansion of Discount Superstores. Wal-Mart has responded with a combination of legal challenges and local ballot measures. And where Supercenters have been approved, local citizens groups have sometimes filed legal challenges to the approvals. This paper will discuss the various options available to cities that decide they want to limit, or even outright prohibit, the operation of Discount Superstores, and other related legal issues.

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1For the purposes of this article, we will use the generic name “Discount Superstore,” when discussing this type of store in general, and will only use the term specific to a particular company, such as Super Target or Supercenter, when referring to that specific company.

2Supercenters and the Transformation of the Bay Area Grocery Industry, p. 30 (Bay Area Economic Forum, January 2004). In fact, Wal-Mart has been so successful in keeping its prices low that it is argued that one eighth of the productivity gains of the U.S. economy in the late 1990s were due to Wal-Mart’s relentless drive for efficiency, and that the resulting increased efficiency is partly responsible for the low interest rates we have enjoyed for the past few years. “Is Wal-Mart Too Powerful?” Business Week, October 6, 2003.


II. Background.

A. The Discount Superstore.

The Discount Superstore is patterned on the European hypermarket. It is a large general-purpose discount store that contains within it a large full-service grocery store. Discount Superstores are generally 150,000 to 210,000 square feet, although the Wal-Mart Supercenters proposed for California are 180,000 to 220,000 square feet. The average size of the grocery department contained within a Discount Superstore is 60,000 square feet. In contrast, the average size of supermarkets nationally is less than 45,000 square feet.

B. The companies that operate Discount Superstores.

Wal-Mart is by far the largest operator of Discount Superstores, controlling 79% of the national Discount Superstore market. It has announced an ambitious plan to open 40 supercenters in California over the next three to five years. It therefore has received the most attention. But there are other Discount Superstore operators. Kmart has Super Kmart, and Target has Super Targets. The Meijer Company operates Discount Superstores in the Upper Midwest, and Fred Meyer operates them in the Pacific Northwest. In 2002, Wal-Mart was operating 1,258 Discount Superstores, Meijer was operating 160, Fred Meyer 133, Kmart 114, and Target 94. This year Wal-Mart plans to open 220 more Supercenters in the U.S.

Because they already have a presence in California, the firms most likely to be opening Discount Superstores here are Wal-Mart, Target, and Kmart. Wal-Mart opened its first supercenter in California, a 225,000 square foot store in La Quinta on March 2, 2004. Two more are expected to open this fall in the cities of Stockton and Hemet.
Due to its bankruptcy, Kmart is not expected to be expanding. In fact, in 2003 it closed its Super Kmart in Oakland and San Jose, along with many more regular Kmart's across California. It no longer operates any Discount Superstores in California, and has not announced plans to open any soon. But given the success of Discount Superstores, it can be expected that once Kmart's financial troubles have been resolved, it may reintroduce these stores into the State.

Target does not yet have any Discount Superstores in California, and has not announced any plans to open any. Although it is currently one of the smaller players nationally in the Discount Superstore arena, it is rapidly increasing its share of the market. Between 1999 and 2002 it tripled its number of Super Targets. Moreover, in California, Target has a large presence — larger than Wal-Mart's. At the end of 2002, Target operated 175 discount stores in California while Wal-Mart only had 133. Considering that most new Discount Superstores are conversions of existing regular discount stores, Target could well become a large operator of Discount Superstores in California.

C. Why Discount Superstores are so successful.

The key to the success of Discount Superstores is the grocery component. American consumers spend more money in grocery stores than in any other type of store. They also go to grocery stores more frequently than they go to any other store, on average visiting a grocery store 2.2 times per week. They spend the next highest amount of money in general merchandise stores. By combining a general merchandise store with a grocery store, the Discount Superstore tries to capture both of these markets. By providing one-stop shopping, the Discount Superstore seeks to cause spillover shopping from the grocery department into the rest of the store, and for the rest of the store thereby to benefit from the greater frequency of visits enjoyed by the grocery department. By exercising economies of scale and utilizing their large bargaining power with suppliers, Discount Superstores seek to offer lower prices.
example, as already mentioned, Wal-Mart’s groceries are estimated to be 20% cheaper than those of the major supermarket chains.26

D. Why some communities are concerned about Discount Superstores.

While most people will agree that lower prices are generally a good thing, the environmental impacts of Discount Superstores have led some communities to question whether they are worth it. These impacts include blight, increased traffic congestion, and increased air pollution.

The potential for blight is caused by the effect Discount Superstores have on local supermarkets. Neighborhood shopping centers are generally anchored by supermarkets. The other stores in the centers depend on the foot traffic generated by the supermarkets. It is estimated that every new Discount Superstore puts two supermarkets out of business.27 And when these supermarkets close, the local shopping centers anchored by these supermarkets suffer, causing blight.28

Discount Superstores can also cause increases in traffic congestion and air pollution. Because of the large amount of space Discount Superstores need, in particular for parking, they are generally located on the outskirts of cities.29 For example, the Wal-Mart Supercenter proposed for Gilroy will cover 17.44 acres.30 When they cause local supermarkets to close, the customers of the former supermarkets have to travel further to do their grocery shopping, thereby increasing traffic and pollution.31 To compound this problem, Discount Superstores attract more people per square foot of floor space than the average grocery store, resulting in even greater traffic impacts.32

Another concern, although not directly a land use matter, is an economic concern. Wal-Mart, currently the only operator of Discount Superstores in California, pays its employees significantly less than chain supermarkets. It has been estimated that a Wal-Mart employee is paid an average of $11.68 less per hour in wages and benefits than an employee of a chain supermarket.33 This works out to about $21,000 less per year.34 One study has estimated that the lower wages that would result from a complete expansion of Discount Superstores into Southern California, would result in grocery workers in the region collectively earning between

28 Supercenters and the Transformation of the Bay Area Grocery Industry, p. 82 (Bay Area Economic Forum, January 2004).
29 Id. at p. 52.
30 Id. at p. 53.
31 Id. at p. 59.
32 Id. at p. 57.
33 Id. at p. 34.
34 Ibid.
$500 million and $1.4 billion less per year.35 This study further calculated that the ripple effect of these lost wages to the regional economy, caused by grocery workers having less money to spend, would be between $1.2 billion and $2.8 billion.36 Moreover, the health insurance offered by Wal-Mart is significantly less generous than that offered by the main supermarket chains, with the result that only 38 percent of Wal-Mart employees are covered by health insurance, while most of the employees of the major chains are covered.37 This combination of low wages and weak medical benefits cause Wal-Mart employees to rely heavily on government aid — food stamps, medicare, and subsidized housing.38 One study estimates that the reliance by Wal-Mart workers on government aid costs California taxpayers $86 million annually.39 If other California retailers adopt Wal-Mart’s wage and benefit standards, it would cost California taxpayers an additional $410 million per year in public assistance to these employees.40

Local governments are often encouraged to approve a Discount Superstore by the hope of increased sales tax revenues. However, these increased revenues often do not materialize, because the sales made by Discount Superstores are usually taken from other stores in the area. Moreover, because groceries are not subject to sales tax, the grocery department of a Discount Superstore does not generate any significant sales tax.41

E. What some local governments have done in response to the possibility that a Discount Superstore may seek to open in their community.

Local governments have taken a variety of measures that try to address concerns about Discount Superstores. One approach is simply to prohibit retail stores over a certain square footage. This was the approach taken by the city of Carmel-by-the-Sea, which prohibits all retail stores over 32,000 square feet.42 This would certainly prohibit Discount Superstores, but they


36Id. at p.63.

37Id. at p.43.


39Id. at p. 6. This same study finds that Wal-Mart employees in California on average use 40 percent more taxpayer-funded healthcare (e.g. MediCal, Healthy Families) than workers at other large California retailers, and use 38 percent more non-healthcare public assistance (e.g. food stamps, subsidized housing, subsidized school lunches) than workers at other large California retailers. Id. at pp. 1, 6-7.

40Id. at p. 7.


42Carmel-by-the-Sea Municipal Code § 17.12.040. The City of San Luis Obispo has taken a similar approach. Its zoning code generally limits retail stores to 45,000 or 60,000 square feet, although a store can go up to 140,000 square feet if it serves the community, requires the large size, and complies with the City’s design guidelines. See San Luis Obispo Municipal Code §§ 17.38.020, 17.40.020, 17.42.020, 17.44.020, and 17.46.020.
also prohibit other large stores that do not necessarily have the same impacts as Discount Superstores.

An approach that more specifically targets Discount Superstores is to prohibit stores over a certain size that devote more than a certain percentage of their floor space to non-taxable goods (i.e. groceries). This is the approach taken by the cities of Martinez and Santa Maria. Martinez prohibits retail stores of more than 90,000 square feet that devote more than 5% of their floor space to non-taxable goods, and Santa Maria prohibits retail stores of more than 90,000 square feet that devote more than 8% of their floor space to non-taxable goods.

But this approach still excludes discount membership clubs such as Wal-Mart’s Sam’s Club and Costco, which sell significant amounts of non-taxable goods, but which do not have the same impacts as Discount Superstores. Because these stores sell in bulk, customers go less frequently and therefore these stores do not generate the trip frequencies of Discount Superstores and the consequent increases in traffic congestion and air pollution. They also do not tend to put local supermarkets out of business, and therefore do not cause the blight attributed to Discount Superstores. For this reason, some cities, when enacting ordinances limiting stores over a certain size that devote more than a certain percentage of their floor space to non-taxable goods, have excluded discount membership clubs from these limitations. The cities of Oakland and Turlock and the County of Contra Costa have taken this approach.

Pending the consideration and adoption of such restrictions, cities may adopt temporary moratoria on Discount Superstores, pursuant to Government Code section 65858, until the city has had the opportunity to formally adopt more permanent restrictions. The City of Oakland took this approach when it adopted a moratorium on the approval of stores of over 100,000 square feet that have more than 10% of their floor space devoted to nontaxable items.

Another viable, but less aggressive, approach is for cities to simply amend their zoning ordinances to make Discount Superstores conditionally permitted uses. Such stores would then have to go through a conditional use permit process, in which a city may decide, on a case-by-case basis, whether to approve or deny such a store. In exercising its discretion, the City would have to analyze the environmental impacts of the store under CEQA, including any potential to cause blight or increase traffic. Indeed, caselaw holds that “blight” is an environmental impact which should be analyzed under CEQA. If a city found that a Discount Superstore would result in blight due to the closure of existing supermarkets, it likely could create a record supporting a denial of a CUP application. Such denial could be predicated upon a finding that the blight was a significant environmental impact, and that there were no “overriding considerations” under CEQA which justified allowing this impact to occur.

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43Martinez Municipal Code § 22.34.220.
45Oakland Municipal Code § 17.10.345; Turlock Municipal Code § 9-1-202; the Contra Costa ordinance was repealed by voter referendum on March 2, 2004.
A similar approach is being taken by the City of Los Angeles. On August 11, 2004, the Los Angeles City Council passed an ordinance that requires a developer of a “superstore”—a big-box store with a floor space of 100,000 square feet of which more than 10 percent is devoted to nontaxable items—to conduct a study of the economic impacts the store would have on the surrounding community, including blight, job displacement, and the effect on existing businesses. This ordinance only applies in the economically vulnerable parts of the City, and membership warehouse clubs are excluded from it.47

Efforts have also been made at the state level to regulate Discount Superstores. On September 22, 1999, Governor Gray Davis vetoed A.B. 84, which would have prohibited retail stores of more than 100,000 square feet that devoted more than 15,000 square feet to non-taxable items. Currently, S.B. 1056 is pending in the senate. If passed, it will require any city or county to conduct an “economic impact report” before approving a “superstore retailer,” which is defined as a store with more than “130,000 square feet of gross buildable area” that generates sales tax, contains more than “20,000 stockkeeping units,” and derives more than 10 percent of its total sales from the sale of nontaxable merchandise.

F. How the operators of Discount Superstores—specifically Wal-Mart—have responded to local attempts to restrict Discount Superstores.

Wal-Mart has aggressively challenged local ordinances that block their plans to open 40 Supercenters in California. Wal-Mart has initiated these challenges both at the ballot box and in court. Where Wal-Mart has believed that the community might be receptive, it has turned to the ballot box, pouring money into referendum campaigns to repeal ordinances limiting Discount Superstores. Where Wal-Mart has determined voters are not likely to be receptive, it has turned to litigation, challenging the ordinances in court on a variety of legal grounds.

In Contra Costa County and the cities of Calexico and San Marcos, Wal-Mart turned to the voters to repeal ordinances that blocked Discount Superstores. Contra Costa had enacted an ordinance that prohibited retail stores of over 90,000 square feet that devoted more than 5% of their floor space to groceries.48 Discount membership clubs were exempted.49 Wal-Mart financed a signature drive and collected enough signatures to put the matter to the voters in a referendum. Wal-Mart spent more than $1,000,000 in support of the referendum, and the opponents spent $500,000 to oppose it.50 On March 2, 2004, the prohibition was overturned by a vote of 53.8%.51 Similarly, in 2002, Wal-Mart successfully financed a ballot initiative to repeal a prohibition on Discount Superstores adopted by the City of Calexico, obtaining a vote of over 70%.52 But in San Marcos, Wal-Mart was not successful, and on March 2, 2004 the voters


49Ibid.

50Ibid.


rejected a referendum financed by Wal-Mart that sought to reverse the city’s prohibition on Discount Superstores. 53

In the City of Inglewood, Wal-Mart took an even more aggressive approach. Learning that Wal-Mart planned to build a Supercenter in their city, in October of 2002 the City Council enacted an emergency ordinance prohibiting retail stores larger than 155,000 square feet that sell more than 20,000 nontaxable items. 54 Wal-Mart threatened to sue the city, and the ordinance was withdrawn. 55 Perceiving that they might have difficulty getting their proposed Supercenter through the planning process, Wal-Mart collected enough signatures to place a measure on the ballot that would allow it to build its supercenter without going through the usual permitting process or environmental review. 56 Wal-Mart spent over $1,000,000 on the campaign, 57 but on April 6, 2004 the voters, by a vote of 61%, rejected the measure. 58

Where it does not believe it can succeed at the ballot box, Wal-Mart has not shied away from filing lawsuits. Wal-Mart has filed lawsuits against the City of Turlock and the County of Alameda, seeking to overturn ordinances restricting Discount Superstores.

Another approach that Wal-Mart is trying in order to get around bans on store size is to build smaller Supercenters. For example, to circumvent a ban on stores over 100,000 square feet, Wal-Mart has opened a Supercenter in Florida that is 99,000 square feet. 59

III. The Legal Issues Arising out of Attempts to Regulate Discount Superstores.

In the litigation that has arisen out of attempts by cities to limit Discount Superstores, various legal arguments have been asserted by the operators of Discount Superstores, to date only Wal-Mart, to challenge the actions cities have taken. In particular, it has been argued that ordinances that limit the maximum size of retail stores or which specifically limit Discount Superstores violate the Equal Protection Clause and the Commerce Clause, violate CEQA, and improperly use land use to regulate competition. Furthermore, Wal-Mart’s attempts to obtain approval for its Supercenters through ballot initiatives raise their own legal questions.

A. Equal Protection.

Wal-Mart has argued in its protest letters to cities and in its litigation that ordinances limiting Discount Superstores violate Wal-Mart’s equal protection rights because there is no rational basis for treating a Discount Superstore differently from other types of retail stores. But, as already described above, there are many rational reasons for making these distinctions, in

53 Ibid.
55 Ibid.
56 Ibid.
particular the negative environmental impacts of increased blight, traffic congestion, and air pollution.

An ordinance restricting Discount Superstores should be upheld against an Equal Protection challenge, so long as it can be shown to have a rational basis. Because such an ordinance does not implicate a fundamental vested right or employ a suspect classification, it would not be subject to strict scrutiny. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”60

Under the rational basis standard, there only has to be a “plausible” reason for the classification,61 and “in reviewing the rationality of the classification, a court may hypothesize legislative purposes.”62 This standard is therefore not a difficult one for a city defending an ordinance limiting Discount Superstores to meet.

What are the rational bases? As discussed above, there is the potential for blight, the potential for increased traffic congestion, and the potential for increased air pollution. Addressing these impacts are certainly legitimate governmental interests. Discount Superstores may try to argue that these are not the real purposes that motivated the city council to enact the ordinance. But whether or not that is true is irrelevant. As the Supreme Court has explained, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”63

Discount Superstores may try to argue that these impacts are not great enough to warrant completely prohibiting Discount Superstores, or that the impacts do not exist, or that they are offset by benefits. However, a court cannot substitute its judgment for that of the city council.64 Even if the court concludes that the purported factual basis for the distinction was wrong, it cannot invalidate the ordinance unless the plaintiff can establish that the city council could not reasonably have believed the necessary facts to be true.65 If the reasonableness of the classification “is at least debatable” then it must be upheld.66 “Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.”67

As evidenced by the footnotes to this paper, there is a wealth of published research describing the environmental impacts of Discount Superstores. It would therefore be very

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61 Ibid.
62 Brandwein v. California Board of Osteopathic Examiners (9th Cir. 1983) 708 F.2d 1466, 1471.
65 Id. at p. 464.
66 Ibid.
67 Ibid.
difficult for a plaintiff to show that the existence of these impacts is not at least debatable, and therefore these classifications should be upheld.

B. Interstate Commerce.

Wal-Mart has argued that ordinances restricting or prohibiting Discount Superstores violate the Commerce Clause of the United States Constitution. It points out that it is an out-of-state business and argues that the reason for adopting such an ordinance is to protect the local supermarkets in the city from having to compete against Wal-Mart. This, it argues, is improper protectionism. This argument, however, can be refuted for several reasons.

First of all, it is irrelevant that a Discount Superstore may be owned or operated by an out-of-state company. The ordinance should be upheld provided, as written, it makes no distinction between local and out-of-state companies. The limitation on Discount Superstores should apply equally to in-state as well as to out-of-state companies.

Second, the purpose of the Commerce Clause is to protect the free flow of commerce. It prohibits the states, and subdivisions of the states, from enacting laws that restrict the free flow of commerce. Ordinances restricting Discount Superstores do not restrict the free flow of commerce. They do not prevent any goods from being sold in the city. Any goods available in a Discount Superstore should still be available for purchase in a regular discount store or supermarket. “[T]he Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”68 Because such an ordinance would not hinder the flow of goods in interstate commerce, it would not violate the Commerce Clause.69

A particularly instructive case is Exxon Corp. v. Governor of Maryland.70 This case involved a Maryland law that prohibited refineries from operating service stations in the state. It was challenged under the Commerce Clause. Because there were no Maryland refineries, the burden of this law fell entirely on out-of-state companies. The plaintiffs, out-of-state refineries that operated low cost service stations, argued that this law violated their rights under the Commerce Clause. But the Supreme Court upheld the law, finding that it would not affect the flow of gasoline into the state and that it did not distinguish between in-state and out-of-state sellers.71 The Court explicitly rejected “appellants’ underlying notion that the Commerce Clause protects the particular market structure or methods of operation in a retail market.”72 This holding should apply equally to a Discount Superstore’s argument that prohibiting or limiting the format of a retail store — the Discount Superstore — violates the Commerce Clause.

68 Id. at p. 474.
69 See id. at pp. 471-72.
70 (1978) 437 U.S. 117.
71 Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 124-27.
72 Id. at p. 127.
C. **CEQA.**

CEQA issues can arise in a couple of different contexts with respect to Discount Superstores. First, as discussed earlier, if a city has discretionary permitting authority over a Discount Superstore, it needs to comply with CEQA before granting a permit to such a store. CEQA review will require an analysis of whether the Discount Superstore’s economic impacts on other local supermarkets may result in indirect environmental impacts, including blight and traffic impacts.\(^{73}\) The existence of any such impacts may warrant a denial of a permit.

Second, of course, cities have to consider what, if any, CEQA review applies to the adoption of an ordinance regulating or prohibiting Discount Superstores. A city may, of course, prepare an initial study, resulting in either a negative declaration or environmental impact report, prior to adopting such an ordinance. However, because such an ordinance merely prohibits a particular type of business (and thus maintains the status quo), a city may well find that the adoption of such an ordinance is not a “project” under CEQA, on the ground that it has no chance of creating any “physical change in the environment.”\(^{74}\) Alternatively, a city might find such an ordinance exempt from CEQA, either on the ground that “it can be seen with certainty that there is no possibility that [the ordinance] may have a significant effect on the environment,”\(^{75}\) or under various other exemptions set forth in the CEQA Guidelines.\(^{76}\) Finally, where a city finds that such an ordinance would help implement its general plan, and where the city has already previously prepared an EIR for its general plan, the city could consider whether the adoption of such an ordinance would require no additional environmental review under section 15183 of the CEQA Guidelines.\(^{77}\) The validity of these various approaches are currently being litigated in a CEQA suit Wal-Mart has filed against the City of Turlock.

D. **Regulating competition with land use.**

Wal-Mart has also challenged ordinances regulating Discount Superstores on the grounds that such ordinances allegedly restrict competition. California cases have generally held that a city may not use its zoning authority for the purpose of regulating competition, or shielding existing businesses from competition.\(^{78}\) On the other hand, zoning ordinances will be upheld if their primary purpose is the regulation of land use, even if they have a secondary impact on

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\(^{74}\)See CEQA Guidelines, § 15378(a).

\(^{75}\)See CEQA Guidelines § 15061(b)(3).

\(^{76}\)See, e.g., CEQA Guidelines §§ 15305 (“minor alterations in land use limitations”), 15308 (“actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment”).

\(^{77}\)See also CEQA Guidelines § 15168(c).

competition. As one court has explained, “so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city’s police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition.”

As one commentator has explained, “[u]nder these principles, zoning with anticompetitive effects is likely to be upheld. For example, a city may restrict commercial zoning of developable land to one part of town to influence the location of future growth. A city may also restrict commercial development in outlying areas to encourage the redevelopment of its downtown.”

It is thus important that, when adopting ordinances regulating or prohibiting Discount Superstores, cities focus on the negative land use impacts (such as blight or traffic) which such stores may have.

E. Regulating land use with ballot initiatives.

The aforementioned ballot measure in Inglewood is an example of how Wal-Mart has attempted to use the initiative process to sidestep local and state permitting requirements. In that matter, Wal-Mart sponsored a ballot measure which, if adopted, would have amended the City’s general plan and zoning ordinances, and which would have adopted a specific plan, to essentially designate a 60-acre parcel of land as a “Heavy Commercial” zone for the development of a large shopping center, including a Wal-Mart Superstore, restaurants, and other stores. The measure would have exempted the development from other planning and zoning controls and would have eliminated any discretionary oversight or authority by the city. As a citizen-sponsored initiative, the measure would have been exempt from environmental review under CEQA, and thus could have proceeded without analysis of traffic and blight-related impacts. The measure further provided that it could not later be amended except by a two-thirds supermajority of the voters.

Because of the measure’s defeat at the polls (with a 61% vote against it), it is unclear whether Wal-Mart or any other Discount Superstore proponents will again try to sponsor such a measure in another community. This particular measure, if adopted, would have raised several interesting legal questions as to its validity. For example, it is doubtful that the supermajority voting requirement would have been found to be legal. Furthermore, to the extent that the initiative actually purported to approve a specific development project, it likely would have been

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82 See CEQA Guidelines § 15378(b)(3).
83 See Cal. Const. art. II, § 10, subd. (a).
found in violation of the general principal that the initiative power may only be used on legislative matters, and not for taking executive or “adjudicatory” actions.84

F. Other potential legal issues.

There are a few other legal issues that might arise in legal challenges to ordinances restricting Discount Superstores.

One argument that often turns up in land use litigation, and which may be asserted by a plaintiff, is that such an ordinance is a taking. This would be a weak argument. Because these ordinances generally do not prohibit other profitable retail uses of property, such as operating discount stores, supermarkets, or other retail stores, it would be very difficult to argue that such an ordinance is a taking.

Another claim that often turns up is that the ordinance violates substantive due process. But such a challenge should fail for the same reason that a challenge under the Equal Protection Clause should fail, because the standard of review is essentially the same. To satisfy substantive due process, an ordinance must have a reasonable relation to a legitimate government purpose.85

The environmental impacts of Discount Superstores that give these ordinances a plausible rational basis under equal protection, also give it a reasonable relationship to a legitimate government purpose for substantive due process.

IV. Conclusion.

If a local community decides that the burdens imposed by a Discount Superstore outweigh the benefits, it can limit or even exclude Discount Superstores from its jurisdiction. And should it choose to do so, there are several different approaches to choose from that are already being utilized by cities and counties around the State. However, it should do so carefully and should build a comprehensive legislative record that shows that there are legitimate reasons for the law.


85 Exxon Corp. v. Governor of Maryland, supra, 437 U.S. 117, 124; see Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. 456, 470 n.12.