Strategy and Timeline for Big Box Ordinance

(A review of Council options for adoption of a Big Box Ordinance which would regulate the size and appearance of a Big Box store.)

RECOMMENDATION:

Council review the timeline and strategy for adoption of a Big-Box Ordinance and provide direction to staff regarding language for such an ordinance.

DISCUSSION:

Background: At the December 12, 2006 City Council meeting, the Council directed staff to return with a strategy, options and timeline for adoption of a “big-box ordinance.” A big-box ordinance basically regulates the size and appearance of big-box stores and the amount of nontaxable (grocery) items the store is permitted to sell. While the development of big-box businesses may provide an economical and timesaving convenience to shoppers and increased tax revenues to cities, if they are not regulated, big-box businesses may have potential negative community impacts such as: urban blight, lower employee wages, the reduction of smaller local businesses and changes to the aesthetics of neighborhoods. The City of Turlock, California, recently was challenged in federal and state court by a legal battle against Wal-Mart Stores, Inc. regarding the city’s big-box ordinance. In recent years, other California cities have also adopted big box ordinances and been challenged in court, including the cities of Bakersfield, Hanford, Gilroy, Anderson and Alameda County. This report reviews the City of Turlock’s legal challenges, other big-box ordinances in San Luis Obispo County, legal issues to consider when crafting an ordinance, options to consider in an ordinance and a proposed timeline for adoption.

The City of Turlock, California, Ordinance

Turlock, a city of 67,876 people located on Highway 99 south of Modesto, has recently gained notoriety for having its big-box ordinance upheld in court. Concerned with the potential impacts to their existing neighborhood centers and the downtown area, in January 2004, the City Council of the City of Turlock unanimously passed an ordinance
that effectively banned new or expanding “Discount Superstores.” Per their ordinance, the definition of a “Discount Superstore” is a “store that is similar to a ‘Discount Store’ … with the exception that they also contain a full service grocery department under the same roof that shares entrances and exits with the discount store area. Such retail stores exceed 100,000 square feet of gross area and devote at least five (5%) percent of the total sales floor area to the sale of non-taxable merchandise.” When the ordinance was passed, Wal-Mart had not yet submitted an application; however it appeared that they had plans to construct a 225,000 square foot supercenter near a smaller existing Wal-Mart already located in Turlock.

The Turlock ordinance addresses the supercenter format (Discount Superstores) and excludes discount clubs, discount stores, shopping centers, and grocery stores from regulation. Each of these uses are clearly defined in the City’s municipal code. Exemptions of this nature allowed the City to approve construction of a Costco after the ordinance went into effect. In April 2006, the California Court of Appeals ruled that Turlock’s ordinance was a legitimate and constitutional exercise of the city’s police (zoning) power because local governments may properly enact such restrictions to prevent the collapse of local businesses which often results in urban blight. Furthermore, the court ruled the ordinance was consistent with the City’s general plan.

In July 2006, the Federal District Court also ruled in Turlock’s favor on a summary judgment motion. The court determined that the ordinance did not violate the Equal Protection Clause under the Federal or State Constitutions, did not violate the Commerce Clause under the Federal Constitution, and the ordinance was not vague as it clearly prohibits a supercenter in Turlock. None of these decisions are being appealed as of this date.

Ordinances from Other Cities in San Luis Obispo County

The County of San Luis Obispo and the cities of Paso Robles, San Luis Obispo and Arroyo Grande have ordinances limiting the size of retail buildings. The City of Santa Maria has also adopted a big-box ordinance.

In Paso Robles, the City’s big-box ordinance is a standard noted in the Zoning Ordinance. It states that for commercial buildings with greater than 90,000 square feet of gross floor area, nontaxable merchandise floor area shall not exceed 8% (7,200 square feet) of the total gross floor area of the building. The ordinance essentially only limits "superstores" selling food items, but it still allows for the construction of larger retail buildings. The Target store located in Paso Robles just remodeled its facility and now includes several grocery items, with the exception of fresh meats and produce.

San Luis Obispo’s big-box ordinance can be found in several sections of the City’s Zoning Regulations (MC 17.16.035), in the descriptions for each zoning district (17.38.020 through 17.46.020), and in the Community Design Guidelines (Section 3.2). Rather than limiting the area to nontaxable goods, San Luis Obispo set an overall limit to the size of large retail stores. Under no circumstances is a building larger than...
140,000 square feet allowed. The Code states that once a retail building exceeds 60,000 square feet, the project must go before the planning commission. The building may be permitted to be larger than 60,000 square feet and up to 140,000 square feet if findings are made that:

1. The proposed use will serve the community, in whole or in significant part, and the nature of the use requires a larger size in order to function.
2. The building in which the use is to be located is designed in discrete elements that respect the scale of development in the surrounding area.
3. The new building is designed in compliance with the City’s design guidelines for large-scale retail projects.

The design guidelines contain a specific section that is dedicated to the design of large retail buildings. The recently constructed Costco project was subject to these guidelines. The guidelines regulate site planning, parking, landscapes, building entrances, exterior materials, design, roof lines, lighting and signage.

The City of Arroyo Grande’s Municipal Code (Section 16.52.220) has a sliding scale for determining the amount of space available for nontaxable merchandise that is based on the overall size of the store. In short, the larger the store is, the lower the percentage of items that may be devoted to nontaxable merchandise. Specifically the Code states that “no new store may be constructed in excess of 90,000 square feet, nor an existing store expanded if the resulting square footage exceeds 90,000 square feet, unless it meets the standards for the sale of nontaxable merchandise set forth below:

1. If total square footage for sales is to exceed 250,000 square feet, no more than 1% of total square footage may be devoted to nontaxable merchandise.
2. If total square footage for sales is to exceed 140,000 square feet, no more than 2% of total square footage may be devoted to nontaxable merchandise.
3. If total square footage for sales is to exceed 90,000 square feet, no more than 3% of total square footage may be devoted to nontaxable merchandise.”

The County of San Luis Obispo also uses a sliding scale. The County limits retail uses of 90,000 square feet to 139,999 square feet to no more than 3% of the floor area being devoted to nontaxable merchandise. For uses of 140,000 to 250,000 square feet, no more than 2% of the floor may be devoted to nontaxable merchandise; and for buildings exceeding 250,000 square feet, only 1% of floor space may be dedicated to nontaxable merchandise. The County also requires a reporting requirement.

The owner(s) of a retail trade use exceeding 90,000 square feet of floor area must annually provide a report to the County’s Department of Planning and Building specifying the square footage of the retail store and the percentage of the floor area the square footage represents that was devoted to the sale of nontaxable merchandise during the previous year. The report must be filed no later than February 28 of the following year.
The cities of Grover Beach, Pismo Beach and Morro Bay do not have an ordinance regulating the size or type of retail buildings.

*Legal Issues Related to Ordinances and Strategies*

Because there is no statewide ordinance in California that regulates supercenters, each city or county must decide if, and in what manner, it will restrict the ability of large scale businesses to establish stores in their area. While several cities have adopted ordinances regulating the size and type of retail stores locating in their community, retail corporations have not remained idle while the laws were being passed. Wal-Mart has been the most aggressive in filing legal actions claiming big-box ordinances target their superstores specifically. Based on the previous experience of other municipalities in California, when a city adopts an ordinance, it should do so anticipating a legal challenge from Wal-Mart. For a big-box ordinance to be effective, it must be able to withstand legal challenges from retailers. In order to create a strong ordinance, lessons from previous legal challenges should be considered.

In its litigation, Wal-Mart has focused primarily on zoning restrictions which limit building size in conjunction with limits on the percentage of nontaxable goods sold or percentage of square footage given over to nontaxable goods. Based on past litigation, Wal-Mart’s legal challenges can be grouped into four main categories: CEQA, discrimination, ambiguity, and process. Each area is examined further below:

1. **CEQA**- In several lawsuits Wal-Mart has alleged that processes outlined in the California Environmental Quality Act (CEQA) were violated. In *Wal-Mart Stores, Inc. v. The County of Alameda*, the company sued based on a claim that the county board should have conducted an environmental review prior to adopting an ordinance. Other cities, including Turlock, also approved ordinances without following the CEQA process. The Court of Appeal has concluded in *Wal-Mart Stores, Inc. v. The City of Turlock* that environmental review under CEQA was not necessary because the zoning amendments in Turlock were consistent with the City’s General Plan and were covered adequately by the prior environmental impact report prepared for the General Plan. The Court also ruled that the enactment of the ordinance was outside CEQA’s substantive requirements because it was not a “project” for purposes of CEQA and various exemptions applied. To take the most conservative approach, staff would recommend that the City undergo the CEQA process prior to adoption of any ordinance.

2. **Discrimination/Equal Protection**- In other lawsuits Wal-Mart has claimed that big-box ordinances unfairly targeted Wal-Mart’s Supercenters because they

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1 Senate Bill 1523 (2006) and Senate Bill 1818 (2006) were drafted by the legislature to provide cities greater power to prevent development of big box retailers. SB 1523 would have required environmental impact reports prior to approving any store larger than 100,000 square feet, and SB 1818 would have allowed cities to recover legal fees when big box retailers litigated to overturn local ordinances. In both instances, the governor vetoed the bills, however, in his message, he stated, “communities have [the right] to decide whether a particular development fits their communities” and “current law already provides a number of mechanisms…which discourage or punish litigants for bringing unnecessary or malicious legal action.”
were the only company locating stores in California that fit the description in the ordinance. This was another claim in *Wal-Mart Stores, Inc. v. The County of Alameda*. In a federal suit, *Wal-Mart Stores, Inc. v. The City of Turlock*, Wal-Mart claimed that the ordinance improperly singled out supercenters for regulation leaving other big-box retail intact. In *Wal-Mart Stores, Inc. v. The City of Turlock*, the Court of Appeals found that a city may exercise its police power to control and organize development within its boundaries as a means of serving the general welfare and that the City made a legitimate policy choice to protect neighborhood grocery stores when it decided to organize development using neighborhood shopping centers dispersed throughout the City. The Ordinance was reasonably related to protecting that development choice. The key findings of the Ordinance were (1) to maintain Turlock’s neighborhood shopping area structures as set forth in the General Plan, (2) to avoid increased traffic impacts and, (3) to prevent blight that the City anticipated a discount store could cause. The City was trying to protect the economic viability of existing commercial districts. A city’s zoning powers are generally divided into two classes (1) those that regulate the height or bulk of physical structure within certain designated districts – in other words, those regulations that have to do with structural and architectural design of the buildings; and (2) those that prescribe the use to which the buildings within certain designated districts may be put. Therefore, a city may regulate big-box retail development on the basis of store size, provided such classification is reasonably related to the public welfare. Protecting existing shopping centers and, therefore, the economic vitality of a City, is within a City’s police powers and protects the public welfare. Because the major shopping centers in Atascadero are anchored by grocery stores, this logic could apply here as well.

3. **Ambiguity**- In *Wal-Mart Stores, Inc. v. The City of Turlock*, Wal-Mart also claimed that the ordinance was poorly drafted and unconstitutionally vague. They argued that definitions such as “Discount Club” included terms such as “many items in large quantities or bulk.” “Many items” was difficult to identify. In the ordinance the City of Atascadero chooses to adopt, definitions should be very clear and understandable.

4. **Process**- Wal-Mart has also sued based on the fact that cities didn’t follow their own processes. In *Wal-Mart Stores, Inc. v. The County of Alameda*, Wal-Mart claimed that the County failed to conduct public hearings and comply with a state-mandated requirement that the County Planning Commission review the ordinance prior to adoption. In adopting a big-box ordinance, the City should be careful to follow all of its legal processes.

**A Review of Ordinance Components**

As previously mentioned, there are several different components to a big-box ordinance. The following table explains each of these items:
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<th>Item</th>
<th>Discussion</th>
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<td>Definitions</td>
<td>Zoning ordinances contain a variety of definitions that determine different types of retail uses. The City’s current zoning ordinance only defines retail stores as either “Food and Beverage” or “general merchandise.” When considering a big-box ordinance, additional definitions will need to be added to the zoning ordinance, particularly for “Discount Superstores” and “Discount Stores” in order to differentiate “Discount Stores” from “Discount Superstores”, General Merchandise” stores, etc. Classifications may also be based on physical area, design or aesthetic, and “stock keeping units.”</td>
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<td>Store Size</td>
<td>In reviewing big-box ordinances, “Discount Superstores” (supercenters) have been defined as ranging anywhere from 90,000 square feet to 250,000 square feet. “Discount Stores” tend to range in size from 40,000 square feet to 90,000 square feet. Stores smaller than 40,000 square feet are usually considered either “General Merchandise” or “Specialty Retail”.</td>
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| Calculation of nontaxable goods | When considering the amount of nontaxable goods that can be sold, there are four options that big-box ordinances consider:  
1. Limiting total sale of nontaxable goods to a percentage of total floor space (Turlock, SLO County cities).  
2. Limiting total sale of nontaxable goods to a percentage of store sales (Sacramento, San Diego).  
3. Limiting total sale of nontaxable goods to the number of nontaxable items (inventory) being sold (Inglewood, San Diego).  
4. Sliding scale that changes the percentage of floor space that may be dedicated to nontaxable goods based on the overall size of the building. |
| Design                   | Special guidelines may be adopted for buildings over a certain size. Guidelines may cover such issues as site planning, parking, landscapes, building entrances, exterior materials, design, roof lines, lighting and signage. |
| Membership/Non-membership | Some big-box ordinances have exempted stores that charge membership fees (i.e. Costco and Sam’s Club) from the provisions of the ordinance. |
Major Decision Points Regarding the Big Box Ordinance

In order to draft a big-box ordinance, staff will need specific direction from the Council. This report has addressed many of the legal issues and options that must be considered when crafting a big-box ordinance. To facilitate discussion and direction to staff, the following questions should be considered:

- Does the Council want to direct staff to draft a big-box ordinance regulating certain retail uses, i.e. supercenters?
  
  YES OR NO

If the direction to staff is to create the ordinance, the next decision involves the size of the store to be regulated.

- What is the square footage threshold a store must cross to be subject to this ordinance?

- Should the ordinance set a maximum size for retail stores or will the ordinance be limited to preventing the amount of nontaxable items a store can sell?
  
  Most cities that have big-box ordinances regulate only the amount of nontaxable merchandise a store can sell if it exceeds a certain size, however the City of San Luis Obispo ordinance states that in no case will a retail building be larger than 140,000 square feet.

- What will be the basis for regulating the sale of nontaxable goods and what will the limit be?
  
  1. Regulate by % of total floor space
  2. Regulate by % of goods sold
  3. Regulate by % of inventory

  Staff believes options 2 and 3 would be difficult to verify and validate.

- Should a sliding scale that reduces the amount of space available to non-taxable goods as the building gets larger be used for different building sizes?

- Should design standards be developed for buildings exceeding a certain size? If so what size? What design items should the ordinance cover?
  
  Parking, landscapes, building entrances, exterior materials, design, roof lines, lighting or signage
Are memberhip warehouses exempted from the ordinance?

YES OR NO

Should the ordinance consider the retailer’s responsibility to the community to maintain a viable site should they vacate the property to move to a different location?

Are there other items not covered in this staff report that the Council would like considered?

Timeline

To guard against potential litigation, the adoption of a big-box ordinance must follow a careful process to ensure that all steps are included. Staff is recommending the following timeline for adoption of the ordinance.

January 23, 2007: Council review of staff report on strategies and options

February 16, 2007: Issue CEQA documentation on proposed ordinance and initiate 30 day review

March 16, 2007: CEQA process completed

March 20, 2007: Ordinance reviewed at a hearing before the planning commission with recommendation to the Council

April 10, 2007: First reading of Ordinance reviewed at a hearing before the City Council

April 24, 2007: 2nd Reading of Ordinance before the City Council

May 24, 2007: Ordinance becomes effective

FISCAL IMPACT:

Fiscal impact is unknown at this time. Legal fees associated with routine planning matters are covered by the basic services provision of the City Attorney contract. However, adoption of a big-box ordinance is considered by the City Attorney’s office to be a non-routine and specialized land-use matter similar to updates to the General Plan, annexations, Williamson Act issues, etc. and will be billed as an additional service. To this point, the legal review received has been covered by the basic services provision, but the drafting of the ordinance will be billed at the hourly rate.
ALTERNATIVES:

1. Direct staff to obtain additional information.
2. Direct staff not to move forward to craft a big-box ordinance.