Agenda

Tacoma Planning Commission

747 Market Street, Room 1036
Tacoma, WA 98402-3793
253-591-5365 (phone) / 253-591-2002 (fax)
www.cityoftacoma.org/planning

(Agenda also posted at: www.cityoftacoma.org/planning > "Planning Commission" > "Agendas-Minutes-Recordings")

MEETING: Regular Meeting and Public Hearing
(Public Hearing occurs at approximately 5:00 p.m.)

TIME: Wednesday, October 5, 2011, 4:00 p.m.

PLACE: Council Chambers, Tacoma Municipal Building, 1st FL
747 Market Street, Tacoma, WA 98402

Change of Location
(NOT in Room 16)

A. CALL TO ORDER

B. QUORUM CALL

C. APPROVAL OF MINUTES – Regular Meeting and Public Hearing of September 7, 2011

D. GENERAL BUSINESS

(4:05 p.m.) **1. 2012 Annual Amendment: #2012-6 Urban Forestry Code Revisions**

Description:	Continue to review proposed changes to the landscaping-related provisions of the Land Use Regulatory Code, focusing on such issues as the Urban Forestry Program, the tree canopy goals, and the current landscaping approach.
Actions Requested:	Discussion; Direction
Support Information:	See "Agenda Item GB-1"
Staff Contact:	Ramie Pierce, 591-2048, rpierce2@cityoftacoma.org Elliott Barnett, 591-5389, eliott.barnett@cityoftacoma.org

(4:45 p.m.) **2. 2012 Annual Amendment: #2012-4 Sign Code Revisions**

Description:	Review the scope of work and main topics relating to proposed code revisions associated with on-site electronic and/or digital signage.
Actions Requested:	Discussion; Direction
Support Information:	See "Agenda Item GB-2"
Staff Contact:	Shirley Schultz, 591-5121, shirley.schultz@cityoftacoma.org

(5:30 p.m.) **3. Large Scale Retail Moratorium**

Description:	Following the public hearing, review the key issues from the public testimony received to date and continue the review of existing policies and regulations applicable to large scale retail uses.
Actions Requested:	Discussion; Direction
Support Information:	See "Agenda Item GB-3"
Staff Contact:	Brian Boudet, 573-2389, bboudet@cityoftacoma.org

E. PUBLIC HEARING

(5:00 p.m.) **1. Large Scale Retail Moratorium**

Description:	Conduct a public hearing on the need for and duration of the moratorium (Ordinance No. 28014 adopted by the City Council on August 30, 2011) concerning the permitting of large scale retail establishments with a floor area greater than 65,000 square feet.
Actions Requested:	Receive testimony; Keep hearing record open until October 7, 2011
Support Information:	See "Agenda Item PH-1"
Staff Contact:	Brian Boudet, 573-2389, bboudet@cityoftacoma.org

F. COMMUNICATION ITEMS

1. Hearing Examiner's Reports and Decisions – *"Agenda Item C-1"*

G. COMMENTS BY LONG-RANGE PLANNING DIVISION

H. COMMENTS BY PLANNING COMMISSION

I. ADJOURNMENT

Minutes

Tacoma Planning Commission

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www.cityoftacoma.org/planning

(For Review/Approval on 10-5-11)

MEETING: Regular Meeting and Public Hearing

TIME: Wednesday, September 7, 2011, 4:00 p.m.

PLACE: Council Chambers, Tacoma Municipal Building, 1st Floor, 747 Market Street, Tacoma, WA 98402

Members Present: Jeremy Doty (Chair), Donald Erickson (Vice-Chair), Peter Elswick, Tina Lee, Erle Thompson

Members Absent: Chris Beale, Sean Gaffney, Ian Morrison, Matthew Nutsch

Staff Present: Donna Stenger, Brian Boudet, Elliott Barnett, Ian Munce, Jana Magoon, Shanta Frantz, Lisa Spadoni, Shirley Schultz, Antonio Vasquez, Lihuang Wung (CED); Ramie Pierce, Lorna Mauren, Mike Carey (Public Works)

Chair Doty called the meeting to order at 4:07 p.m. City Clerk swore in the newly appointed Commissioners Tina Lee and Erle Thompson. A quorum was declared present.

PUBLIC HEARING

1. Medical Cannabis Emergency Moratorium

Chair Doty called the public hearing to order at 4:10 p.m. Donna Stenger, Long Range Planning, provided an overview of the subject. The Medical Cannabis Moratorium, adopted August 2, 2011, prohibits the acceptance of applications for the establishment, location, operation, licensing, permitting, maintenance, or continuation of medical cannabis collective gardens or medical cannabis dispensaries within the City. The moratorium would be in effect for six-months or until February 1, 2012.

Ms. Stenger outlined the procedures used to declare a moratorium and the Commission's responsibilities to conduct a public hearing and to forward back to City Council findings of fact and recommendations. She stated that three individuals submitted written testimony; copies of which were provided to the Planning Commission.

Chair Doty called for testimony. The following individual came forward to testify:

(1) Pennie Smith, 6613 South Proctor Street:
Ms. Smith indicated that she was a member of the South Tacoma Neighborhood Council but was not here representing the Council. She voiced approval of the Moratorium and stated she was all for it because she would like to have more questions answered because she believes that allowing medical marijuana dispensaries as they are currently operating is very destructive for the City and her neighborhood.

With no further speakers coming forward, Chair Doty closed the public hearing at 4:20 p.m.

GENERAL BUSINESS

1. Medical Cannabis Moratorium

Ms. Stenger went over the draft Findings of Fact and Recommendation included in the agenda packet. She noted that there also was a draft letter of recommendation included in the packet. Both documents would need to be revised to reflect the public testimony received.

She explained that according to the direction previously provided by the Commission both the findings and the Commission's letter recommend that the moratorium be longer than six months. State law allows a moratorium to be in place for up to one year if a work plan is developed for the permanent regulations. Ms. Stenger stated that some of the considerations for a longer moratorium are possible legislative changes and the need to collaborate with other City efforts to regulate medical cannabis and the need to consider comments and feedback from the citizen Task Force that will be looking at issues on medical cannabis in a broader perspective.

The Commissioners questioned Ms. Stenger on the state's law allowing the use of marijuana for those patients who have a need for it and how the law addresses acquiring the marijuana. Ms. Stenger said that the law is "silent" on how those patients actually obtain their drugs. It is assumed that the patient either grows the marijuana or has someone grow it for them if they are not able or willing. The Commissioners also asked what the State is doing now about medical cannabis. Ms. Stenger explained the legality of medical marijuana is not the issue for the moratorium but rather it is the development of local regulations as authorized by the State law. She did mention that there could be more guidance from the State legislature this upcoming session. This may be one reason for asking that the moratorium continue longer than six months in order to incorporate any changes that develop with the legislature. The Commissioners asked if the current dispensaries are legal. Ms. Stenger replied that the City's position is that these uses are illegal. A final question was put forth as to how much of this issue is actually a land use issue. Ms. Stenger went over several aspects that tie in to land use concerns, such as the location and size of the uses, odors, and perhaps safety issues. Chair Doty noted that the proposed Task Force is looking at the larger issues. The Commission wanted to know what are other communities are doing. Ms. Stenger stated that the City is researching both Washington cities and cities in sixteen other States that have similar medical cannabis legislation.

The Commissioners expressed their concern that current patients are not adversely affected by the moratorium. The Commissioners unanimously passed the Findings of Fact as amended and that it be forwarded to the City Council.

2. Annual Amendment: #2012-6 Urban Forestry Revisions

Lorna Mauren, Assistant Division Manager for Public Works Environmental Services Science and Engineering Division and manager of the Surface Water Program, introduced the code update project. Ms. Mauren stated that urban forestry is a broad topic with connections to many programs and policies. The impetus for this effort comes from the connection between urban forestry and stormwater objectives and the adoption of the Urban Forest Policy Element last year. The Program has efforts underway on multiple fronts to achieve urban forestry goals, such as education and outreach, city projects, and technical guidance. In addition, the Program is initiating code revisions proposed for private development (through the Land Use Regulatory Code) and for public properties and public rights-of-way (through the future proposal of the creation of Title 18). The focus for the presentation today is on the Land Use Regulatory Code.

Ms. Mauren stated that the Urban Forest Policy Element gives substantial direction pertinent to the Land Use Regulatory Code. It provides policy support for considering a different approach targeting achievement of the 30% canopy cover by 2030 goal. The Element calls for viewing the urban forest as an asset, for linking landscaping requirements to stormwater benefits, and for building flexibility into code requirements.

Elliott Barnett, Associate Planner, stated that there are many other goals pertaining to landscaping that may call for more than just overall canopy coverage. Mr. Barnett stated that some of the key policy themes – in addition to canopy and environmental function – include creating habitat connections; traffic calming and pedestrian friendly streetscapes; urban design; safety; and views. All these policies will guide the project. The Urban Forest Policy Element did emphasize views; however, staff is not proposing to include discussion of regulating views on private property.

Ms. Mauren explained there are many benefits to promoting citywide canopy coverage. The City is currently at 19% canopy coverage. Ms. Mauren stated staff will bring an analysis of current canopy coverage broken out by different types of land uses. This will enable a discussion of how canopy could be broken out by land uses.

The Commission asked whether canopy consists only of trees or if other vegetation also counts. Staff stated that only trees are considered canopy coverage. Mr. Barnett gave an overview of current code for landscaping and reviewed what he called the current “tool box”. He stated that the code is primarily based on zoning districts. The code currently emphasizes streetscape (street trees), softening and breaking up parking lots and building frontages, and buffering between different land uses. Code issues include: some land uses are not addressed; most approaches are prescriptive rather than flexible; mature trees are not recognized; and there are many exemptions – the most notable being single-family land uses. He presented some preliminary benchmarking, noting opportunities to improve how the code supports urban forest health and canopy coverage. He stated that the key focus proposed is to achieve greater canopy and provide more flexibility. He asked the Commission to consider if there are issues that do warrant a more prescriptive approach.

Chair Doty requested that staff provide a rough order of magnitude assessment of what different approaches could achieve in terms of canopy coverage. For instance, how much canopy coverage can be achieved through only street trees? He stated that the Commission needs data on the number of actual properties that will be affected by any proposed canopy requirement. He stated that in his view, putting requirements on private property should be the last resort.

Ms. Mauren stated that the code is only one avenue to get to 30% canopy coverage which staff does not anticipate could achieve the goal by itself. Mr. Barnett stated that the code already places landscaping requirements on private property, and that this is an opportunity to look at how those requirements might be improved in order to achieve canopy objectives.

Vice-Chair Erickson requested more benchmarking looking at peer cities. Specifically, it would be useful to break down how other large cities address landscaping requirements/canopy coverage by different zoning categories. The Commission also requested an explanation of how much 30% canopy coverage translates to in square miles.

Vice-Chair Erickson stated that a prescriptive approach may be called for to achieve a unified street approach for urban design. He asked, if flexibility implies more staff time for review, whether it means a more discretionary approach, and whether it would reduce predictability on outcomes.

The Commission asked how canopy cover is measured. Ramie Pierce, Urban Forester for the City, stated that the individual crown of a tree is what's measured, using LIDAR, which collectively is what makes citywide canopy.

Commissioner Elswick asked if fee in lieu or flexibility would mean that for a project that already has a lot of trees, would the requirement be met elsewhere? Chair Doty stated that fee in lieu is a promising way to get trees on already developed areas where they are lacking. The largest impact we can have is on already developed properties. There are many rights-of-way without trees around the city, but not a lot of undeveloped properties. He speculated whether development could actually get us to the 30%. Staff noted that new development and redevelopment are both part of the discussion. He also stated that the project should look at increasing tree plantings in residential developments because these are the city's largest land use.

Commissioner Thompson asked what is a good tree/not a good tree, and whether that can be part of the approach. He requested a copy of the presentation be provided to the Commission. Ms. Pierce stated that the proposed approach could in some cases decrease the total requirements for landscaping. If a site already has many trees, it may not be required to plant more. The proposal could also lead to a way to give more incentive to retain the mature trees on a site.

Ms. Pierce gave the Commission a brief overview of the business district tree assessment recently completed. She stated that the assessment can be looked at as a sample (but not a random one) of Tacoma's tree canopy. It showed that within the area studied there were many potential locations for planting. Ms. Pierce also stated that the Urban Forestry Program has put its street tree program on hold because many of the trees given out died.

The Commission voiced some concerns for planting the right trees to avoid damage to sidewalks and have proper maintenance. Ms. Pierce explained how the City provides information to the public to support this.

Mr. Barnett stated that the team will come back with benchmarking, data gathering, background on the Urban Forestry Policy and Program, and analysis of how this new proposal would compare with existing approaches.

3. Transfer of Development Rights

Ian Munce, Long Range Planning, presented a condensed version of a presentation concerning the Transfer of Development Rights (TDR) Program that was given to the City Council a month ago. The purpose of this regional program is to transfer the rights from one jurisdiction to another in order to incent development of property and to preserve resource lands. Cities are given grant monies as an incentive to work on developing programs where the goal is to make properties more desirable for development. Mr. Munce went over the list of areas that would benefit by this program.

Mr. Munce talked about the value of property in other municipalities being taken into consideration when working on new inter-city projects. One municipality will pay for development rights in another municipality under the TDR program and this is how certain infrastructure improvements for individual cities may be funded. This whole program is built on the premises that there will be cooperation among cities in the region.

The Commissioners asked how this program would work in a practical sense. Mr. Munce illustrated by giving examples of how the rights are sold and Ms. Stenger explained that that it is really a bank of rights with the ultimate goal of preservation of natural resource land.

Chair Doty asked for clarification of the Commission's role in recommending this TDR Program. Mr. Munce answered that the City Council will be working with "sending areas" and the Planning Commission will make recommendations relative to "receiving areas". The Commission also wanted to know what a reasonable exchange would be. Mr. Munce responded that this information would be forthcoming.

COMMUNICATION ITEMS

Chair Doty acknowledged receipt of the following information:

1. Hearing Examiner's Reports and Decisions.
2. Foss Waterway Development Authority's Invitation to "Revisiting the Foss" Workshop Series on September 27-29, 2011.
3. Comments on Shoreline Master Program Update received after the June 10, 2011 deadline of public comment.
4. Planning Commission Opening – The City Council is seeking interested and qualified citizens to fill a vacant position on the Planning Commission, representing Council District No. 1 (West End and North End), for a term to expire June 30, 2014. Applications must be submitted to the Mayor's Office by September 16, 2011.

COMMENTS BY LONG-RANGE PLANNING DIVISION

Ms. Stenger informed the Commission of the 6-month moratorium adopted by the City Council on August 30, 2011, on the permitting of retail establishments that are greater than 65,000 square feet within the City. The Planning Commission is required to conduct a public hearing and forward its findings of fact and recommendations to the City Council by October 19, 2011, regarding the need for and duration of the emergency moratorium. She said staff will facilitate

the Commission's discussion of the subject at the next meeting on September 21. She asked if the Commission preferred conducting the public hearing on October 5 and making the recommendation on October 19 or having the hearing and recommendation both occur on October 19. The Commission preferred the first option. Chair Doty also indicated that he would have to recuse himself from participating in discussions of this item as Walmart is a client of his firm.

Ms. Stenger announced that the date for the joint study session with the City Council concerning the Commission's recommendations on the Shoreline Master Program Update has been changed from September 20 to September 27, 2011. She said that the City Council would like to hear the rationale of the Commission used to make its recommendations.

The Commissioners shared their opinion about a recent article by Peter Callaghan of The News Tribune that was critical of the Planning Commission's recommendation on public access. The Commissioners indicated that the article was misleading and that there was a significant amount of information that was considered in reaching their final decision.

COMMENTS BY PLANNING COMMISSION

Commissioner Doty introduced and welcomed new Commissioners. The new Commissioners, Earl Thompson and Tina Lee, gave brief biographies and shared what their individual expectations are.

In response to the Commissioners' inquiry, Brian Boudet provided an overview of, and encouraged the Commissioners to participate in, the *Conversations RE: Tacoma* lecture series featuring three sessions in September, October and November, intended to inform, educate and encourage public engagement with urban design issues.

ADJOURNMENT

The meeting adjourned at 6:28 p.m.

Agenda Item GB-1

City of Tacoma
Community and Economic Development Department

TO: Planning Commission

FROM: Donna Stenger, Long-Range Planning Division Manager

SUBJECT: Annual Amendment # 2012-6: Urban Forestry Code Revisions

DATE: September 29, 2011

On October 5th, the Planning Commission will continue its discussion of proposed changes to the landscaping-related provisions of the Land Use Regulatory Code, that are intended to implement recent policy direction on Tacoma's urban forest. Staff from the City's Environmental Services Division will provide additional information building on the Commission's September 7th discussion and providing responses to Commission questions.

The first part of the presentation will provide background on the Urban Forestry Program, its connection to the Surface Water Program and the numerous elements that already exist or are under development and/or consideration to support surface water and urban forestry program objectives. Though the product of our discussions with the Planning Commission will be proposed regulatory code changes, it is important to understand that only a portion of the progress necessary to achieve the 30% canopy coverage goal would result from code requirements. Additional progress would result from the other actions being pursued by the Urban Forestry Program.

The remainder of the presentation will include discussion of tree canopy goals and how they could play out across the range of land uses present in Tacoma. The Commission will have the opportunity to view the City's current canopy coverage applied by land uses and begin a discussion of canopy coverage goal-setting by land use.

Staff is looking forward to a dialog with the Commission on these concepts as we begin to develop a direction for the proposed changes to the Land Use Regulatory Code landscaping provisions. To facilitate the Commission's review and discussion, staff has prepared three attachments:

1. **Tacoma Canopy Cover 101:** Provides background information on tree canopy coverage and analysis of key issues in establishing an approach to achieve Tacoma's 30% canopy coverage goal.

2. **Tacoma Canopy Cover and Goals by Land Use:** This tool is useful in understanding how canopy coverage goal-setting could vary by land use. The table provides a land use breakdown of the city and the current canopy coverage for each land use; a column showing what canopy coverage in public rights-of-way would be necessary to achieve 30% citywide; and, a column with canopy goals for each land use, totaling 30% citywide. At the meeting, the Commission will have the opportunity to try out different goal-setting approaches to see what affect they would have on the citywide total.

3. Tree and Landscaping Manual, City of Portland, Oregon: This example is provided to demonstrate how implementation of proposed code changes could look, including addressing the intention of increasing ease of use and reduction of staff time for review. The Urban Forestry Program is developing an Urban Forest Manual with similar approaches to this example, which would become an integral part of implementing landscaping-related changes to the land use code such as a land-use canopy-based goal approach.

If you have any questions or requests please contact Ramie Pierce at 591-2048 or trees@cityoftacoma.org, or Elliott Barnett at 591-5389 or elliott.barnett@cityoftacoma.org.

Attachments (3)

c: Peter Huffman, Assistant Director

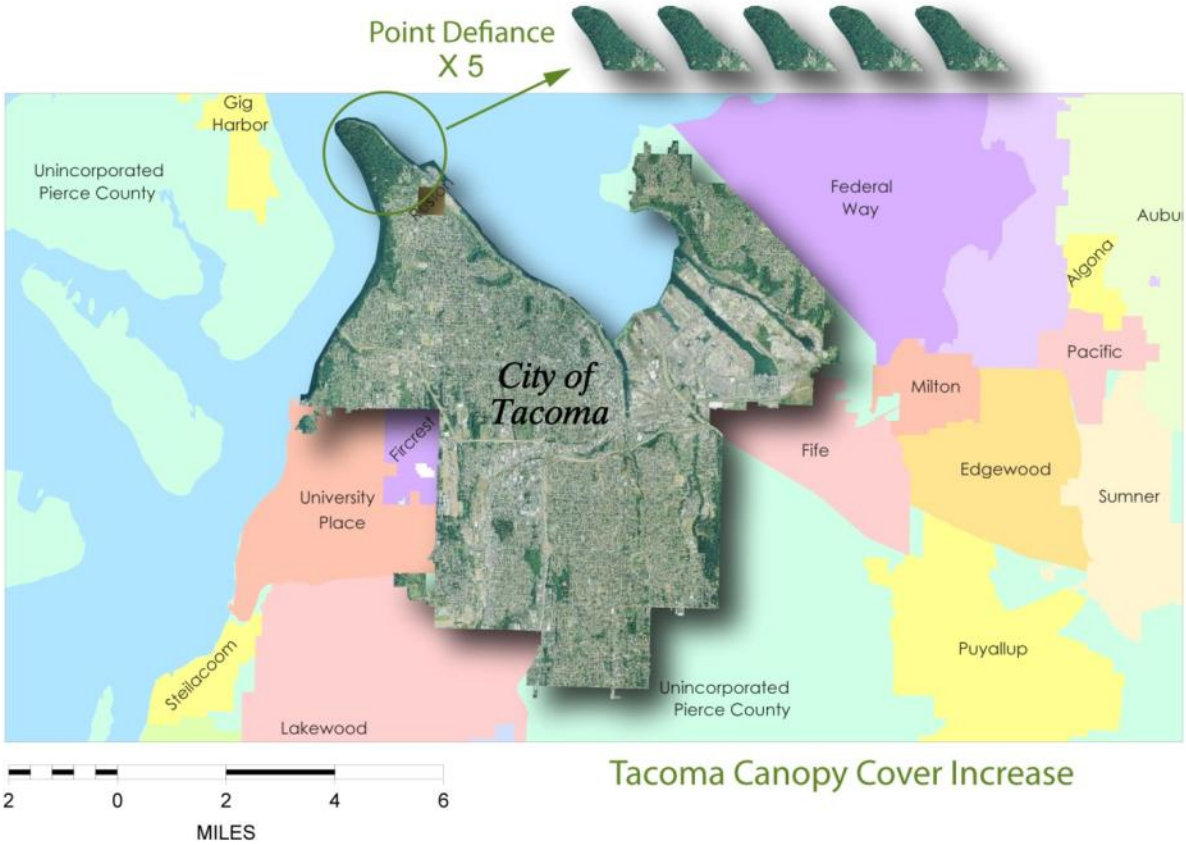
ATTACHMENT #1:
Tacoma Canopy Cover 101

The City of Tacoma's total land area is 49.4 miles^2.

According to the University of Washington's 2011 Tacoma Canopy Cover Assessment using 2009 data, the current canopy coverage is 9.38 miles^2, or 19% of the City.

To achieve the 30% canopy coverage goal for the City of Tacoma, approximately 14.82 miles^2 of land will need to be covered by tree canopy in total. This is an increase of 5.44 miles^2.

This needed increase in canopy cover is an area approximately 5 times the area of Point Defiance Park (1.01 miles^2).



It is important to note that this canopy can occupy the same space as other infrastructure, i.e. sidewalks, buildings, streets, etc. It is not the intent to set aside land specifically for canopy cover increase, but rather to integrate this canopy into the urban fabric.

Business as Usual

The 2011 inventory of selected street trees conducted through the Strategic Urban Forestry Management Plan for the Neighborhood Business Districts (SUFMP-NBD) included over 1,200 trees. Street trees in the public right-of-way and medians were included in the data collection.

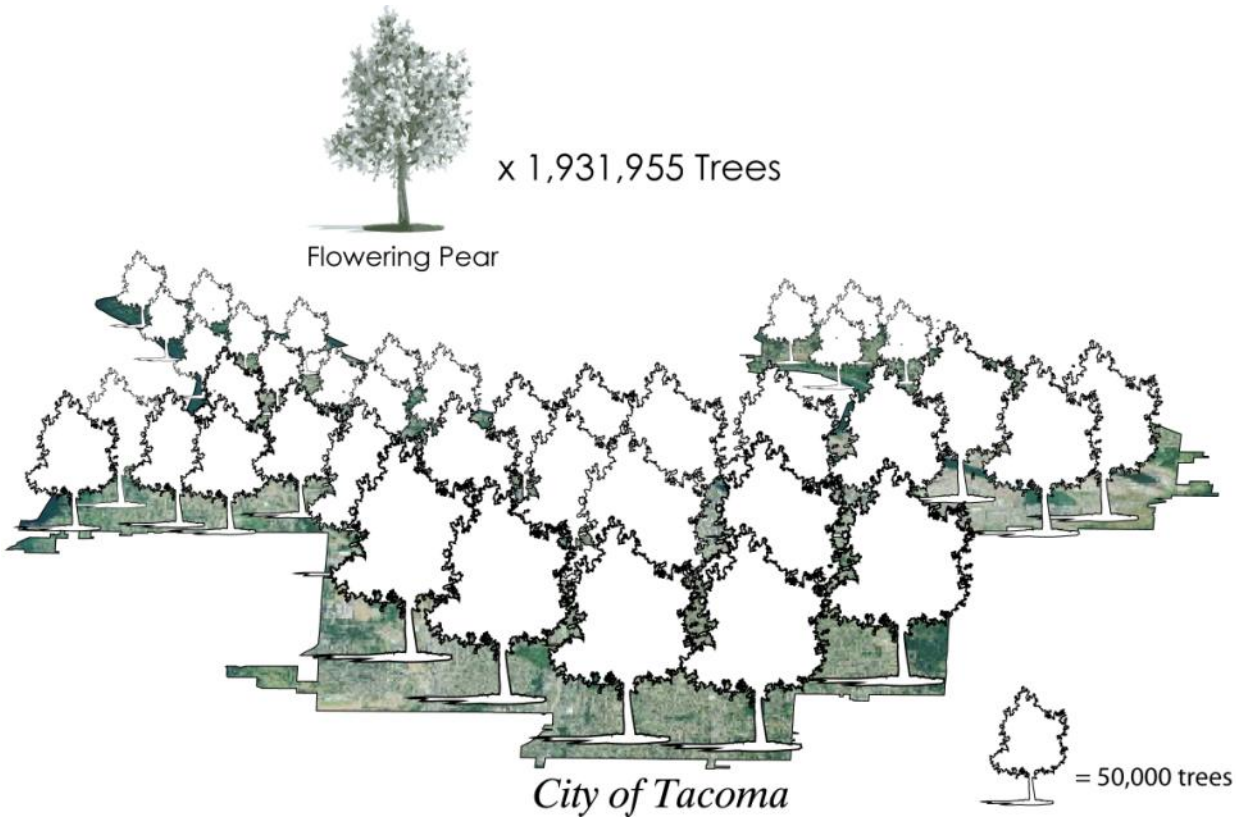
This inventory concluded that over 40% of the tree species located in the neighborhood business districts (NBDs) are represented by only four species. 21% of the NBD tree population is Flowering Pear (*Pyrus calleryana*).

Statistically, the height of Flowering Pear after 20 years of growth is only 30 feet, with a canopy spread of one-third of its height (10 feet diameter or 78.5 feet^2). The 20 year mark is significant, as this is when the tree is known to decline from the narrow crotch angles causing the tree to split (Auburn University Horticulture).

The Insufficiencies of Prescribing Tree Quantity Instead of Canopy Cover Percentage

Although the SUFMP-NBD tree inventory cannot be used explicitly to represent the tree species diversity for the entire City of Tacoma, it does illustrate the potential tree species population if only tree quantity is regulated (as opposed to quality / percentage).

If we were to attempt to reach the canopy cover goal of 30% coverage by only prescribing tree quantity, it would take 1,931,955 Flowering Pear or trees of an equivalent size.



The accuracy of this number is only sufficient if the current population of trees does not decline, and if all of the newly planted trees reach their full potential canopy spread in 20 years.

Can Street Trees Alone Accomplish the 30% Goal?

Rights-of-way in the City of Tacoma are the second largest land use (next to single-family residences) at 12.8 miles^2 or 26% of the City. Currently, the Rights-of-way have a 9.15% canopy cover, or 1.17 miles^2. If we were to increase the canopy cover in the rights-of-way to 100% coverage, we would bring the total City-wide coverage to 22.6 miles^2 or 45.74%.

However…

The current street tree regulations for developments that are not exempt from landscaping requirements in all residential, commercial, x-district, port maritime and industrial districts require 3 trees per 100 feet of site street frontage.

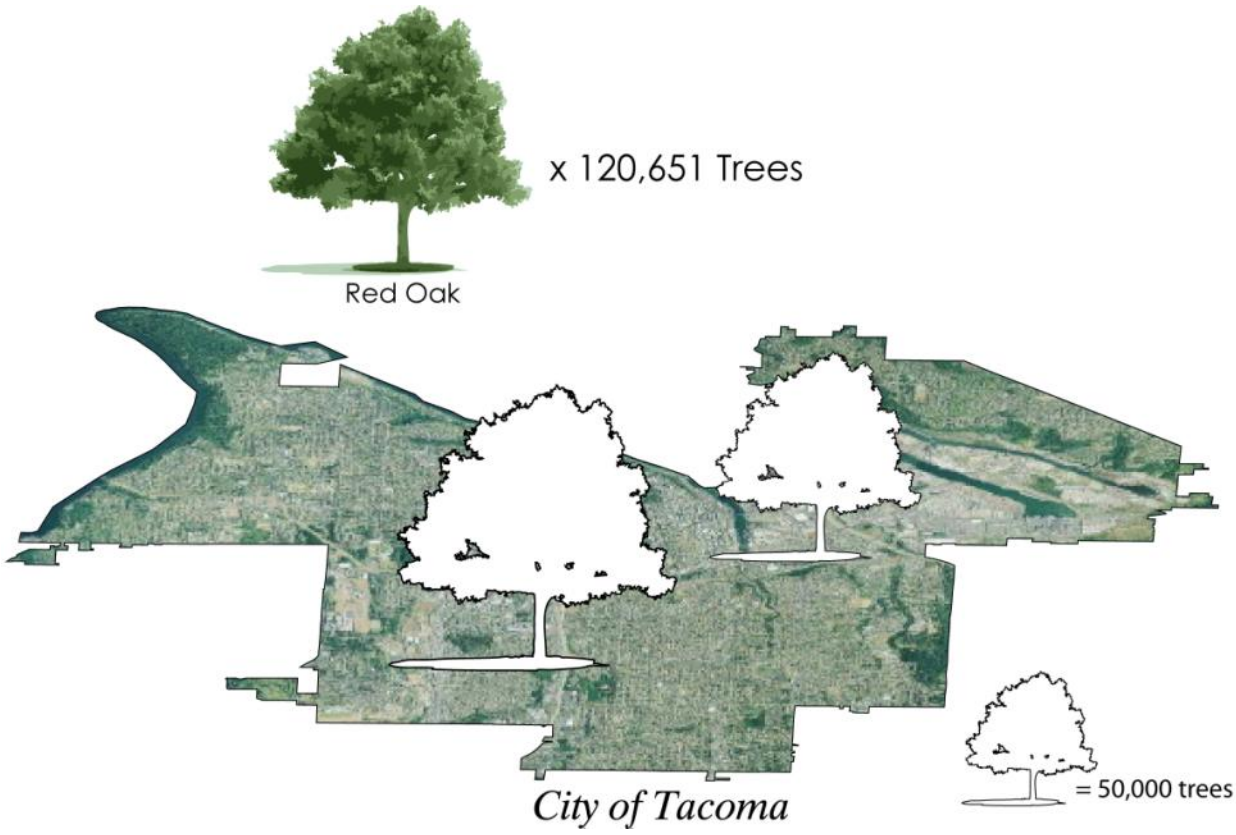
If we were to plant the aforementioned 1,931,955 Flowering Pear or equivalent sized trees strictly in the Rights-of-Way according to the 3 trees per 100 feet of site street frontage requirement, it would take 64,398,512 linear feet of site street frontage (12,196.69 miles). This linier footage is 4.46 times the distance from Seattle, Washington to Miami, Florida.

Incorporating Quality

Insofar, the statistics for new tree planting to reach the 30% tree canopy coverage have been derived from the extreme of only planting the most commonly found tree in the SUFMP-NBD tree inventory. Exploring the other end of the spectrum can give incite as to how the number of trees that need to be planted can be greatly reduced by exploring tree species with larger canopies. It is important to note that larger canopy trees are not desirable or feasible in all planting situations.

Red Oak (*Quercus rubra*) is a commonly used tree in the urban environment, and has a typical mature canopy spread of forty feet in diameter (1,257 feet^2). The Flowering Pear by comparison is only 6.24% the canopy cover of the Red Oak.

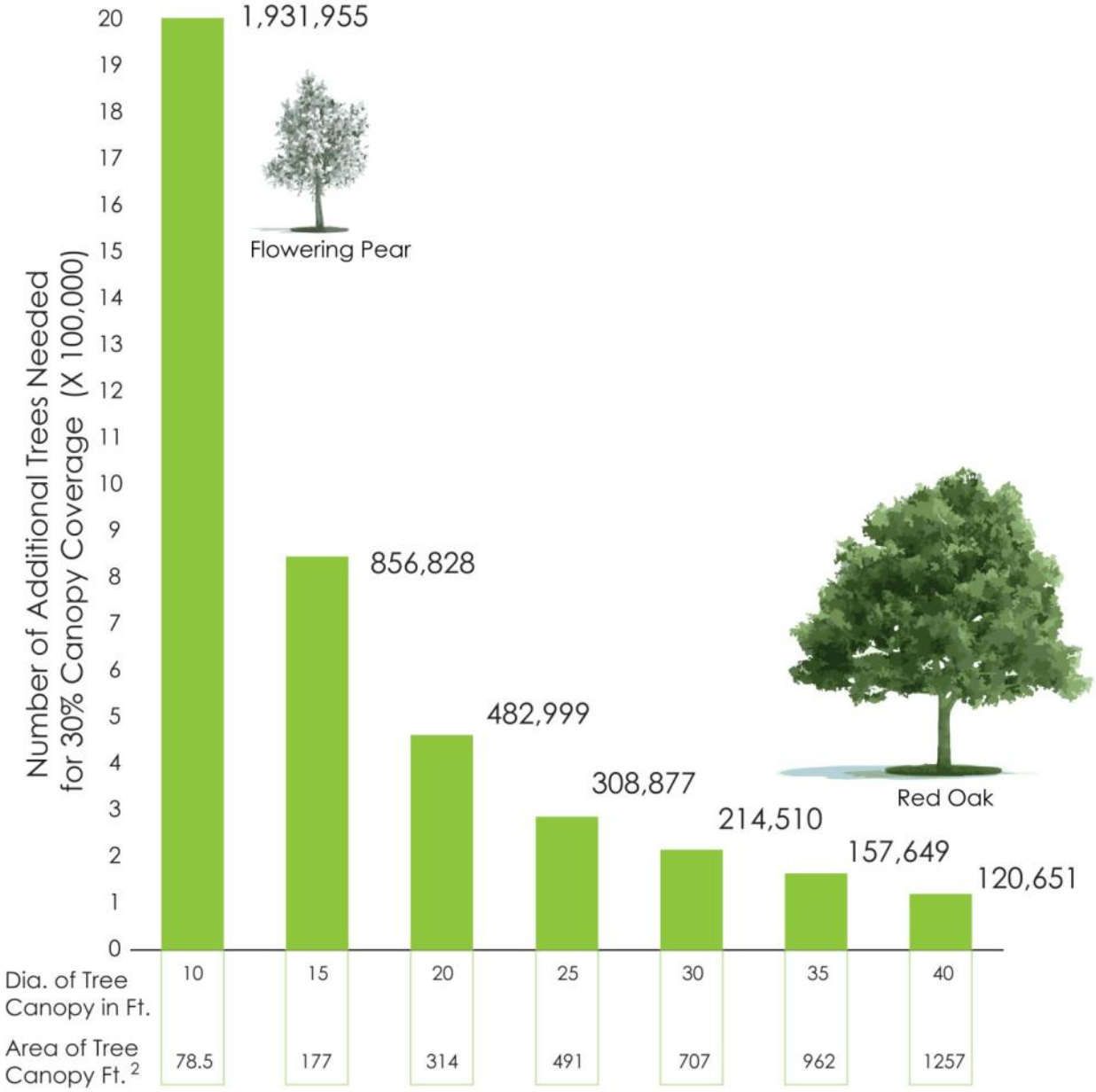
To accomplish the canopy cover goal of 30% coverage by exclusively planting Red Oaks or a species of similar size it would take 120,651 trees.



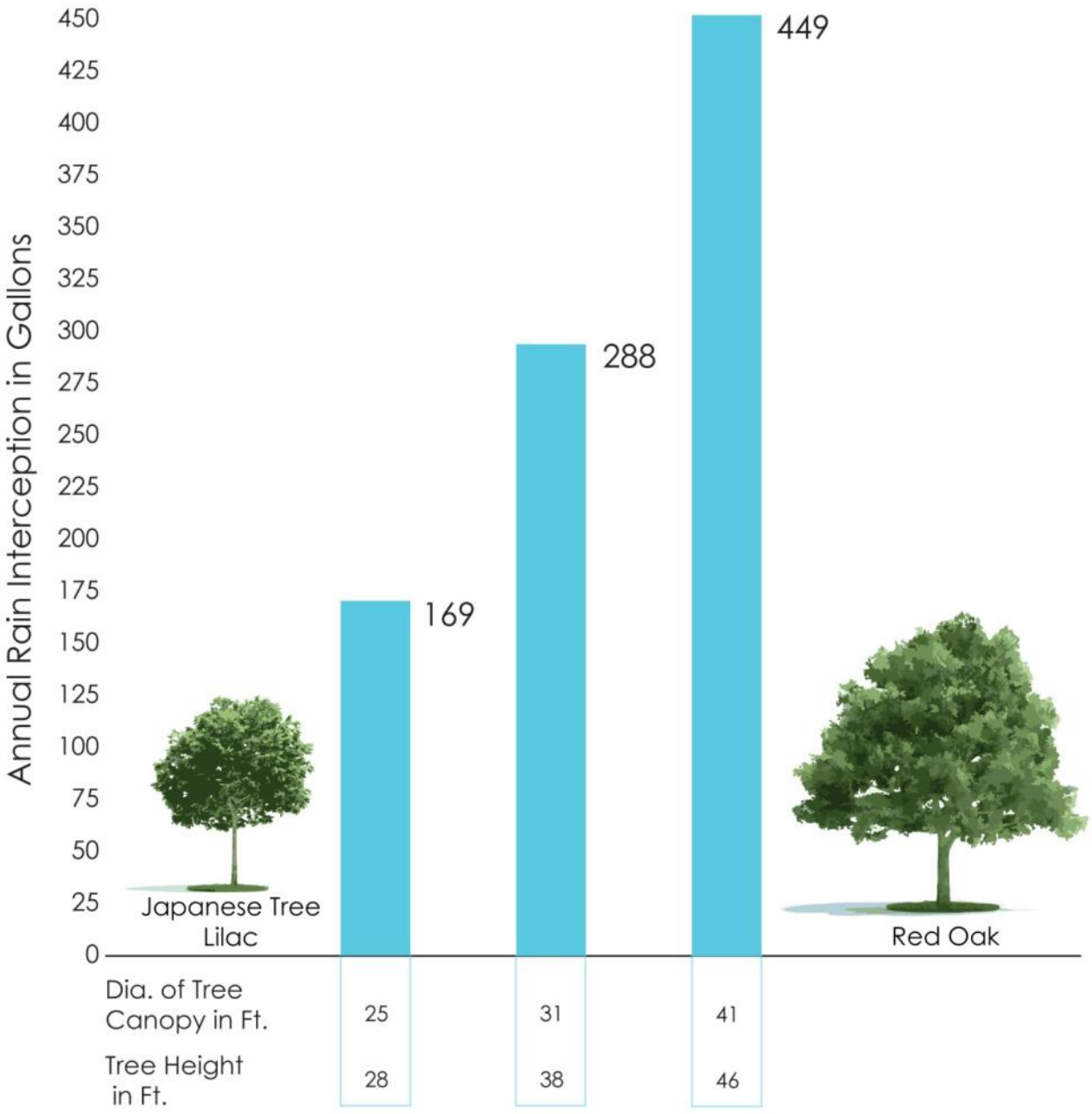
If we were to plant the 120,651 Red Oak or equivalent sized trees only in the Rights-of-Way, according to the 3 trees per 100 feet of site street frontage requirement, it would take 4,021,705 linear feet of site street frontage (761.69 miles). This linier footage is roughly the distance from

Seattle, Washington to Reno, Nevada (752 miles).

Other Typical Urban Tree Planting Statistics



Additional Trees Needed to Reach 30% Canopy Coverage Based on Canopy Size



Annual Rainfall Interception for Small Medium and Large sized Residential Yard Trees 20 Years after Planting

	Diameter of Tree Canopy (Feet)				
	15	**20**	**25**	**30**	**35**
ROW linear miles needed	5,409.27	3,049.24	1,949.98	1,354.23	995.258
Street Tree species	Swamp Magnolia, Hardy Silver Gum, Bald Cypress, Hinoki Cypress, Star Magnolia	Amur Maple, Butterfly Magnolia, Stewartia, Umbrella Pine, Persian Ironwood	Chinese Dogwood, Japanese Snowbell, Dove Tree, Antarctic Beech, Oregon Myrtle	Redbuds, Silk Tree, Italian Alder, Golden Locust, Deodar Cedar	Yellowwood, Red & Scarlet Oaks, Hackberry, Pagoda Tree, Zelkova

Addressing Canopy Cover Percentage

Maintaining a total number of planted trees requirement, based on zoning, is highly variable. The resulting canopy coverage is dependent on species selection, trees health, tree maintenance, and many other factors.

Transitioning to a canopy coverage requirement per land use will result in a much more predictable and measureable canopy cover increase within the City of Tacoma. Canopy cover requirements will also incentivize planting and retaining larger trees through development. Retaining and planting trees with larger canopies will have much greater positive ecological benefits to the City of Tacoma.

ATTACHMENT #2: Tacoma Canopy Cover and Goals by Land Use

Land Use	Sq MI	%of city	Actual Cover (%)	Canopy ROW Goal only	Canopy Cover Goal (%)	Canopy Goal (Sq Mi)
Commercial/Mixed Use (CM)	3.6	7.3%	3.7%	3.7%	15%	0.54
Downtown (DN)	0.5	1.0%	3.1%	3.1%	10%	0.05
Developed Park (DP)	1.9	3.9%	28.7%	28.7%	35%	0.665
Major Institution (MA)	3	6.1%	6.8%	6.8%	20%	0.6
Multi-Family (MF)	2.2	4.4%	19.0%	19.0%	25%	0.55
Manufacturing/Industrial (MI)	5.6	11.4%	3.7%	3.7%	10%	0.56
Parks Natural Area (PN)	4.2	8.5%	74.6%	74.6%	80%	3.36
Single Family (SF)	15.5	31.4%	23.0%	23.0%	35%	5.425
ROW/Non-Parceled Areas	12.8	26.0%	9.2%	50.0%	25%	3.2
	49.94	100%	19%	30%	30%	14.95

City of Portland, Oregon - Bureau of Development Services
1900 SW Fourth Avenue • Portland, Oregon 97201 • 503-823-7300 • www.portlandoregon.gov/bds

Guide to the Manual

The manual consists of several sections:

City of Portland, Oregon - Bureau of Development Services
1900 SW Fourth Avenue • Portland, Oregon 97201 • 503-823-7300 • www.portlandoregon.gov/bds

What Rules Apply?

The landscaping standards that apply to your site depend upon the zoning and the type of development you plan. Each type of development has certain landscaping standards that usually apply. To get started, check the table below for the standards that are most likely to apply to your project:

Caution: this table is intended only to guide you to the standards that apply to most projects. Some projects require special screening, native plantings or other specialized landscaping. In addition, the City's Stormwater Management Manual and Erosion Control Manual have separate landscaping requirements.

Zone and Type of Development	Requirements	Landscaping Standards
Single Dwelling Zones		
1) 1&2 Family	1) Tree preservation and planting, 33.110.282	T1
Multi-Dwelling Zones		
1) 1&2 Family	1) Tree preservation and planting, 33.120.237	T1
2) Multi Family	2) Minimum landscaped area, Table 120-3 and 33.120.235	L1
	Setbacks, Table 120-3 and 33.120.220	L1, L2
	Parking Areas and Driveways, 33.266.130	L2, L3, P1
Commercial Zones		
1) 1&2 Family	1) Tree preservation and planting, 33.130.227	T1
2) All other (multi-family, retail, office, other commercial)	2) Minimum landscaped area, Table 130-3 and 33.130.235	L1
	Setbacks, Table 130-3 and 33.130.215	L1, L2
	Landscaping abutting an R-zoned lot line, Table 130-3 and 33.130.215.B	L3
	Parking Lots, 33.266.130	
	3) Exterior display and storage	L2, L3, P1
Employment and Industrial Zones	1) Minimum landscaped area, Table 140-3 and 33.140.225	L1
	Setbacks, Table 140-3 and 33.140.215	L1, L2
	Landscaping abutting an R-zoned lot line, Table 140-3 and 33.140.215.B	L3
	Parking Lots, 33.266.130	L2, L3, P1
	2) Exterior display and storage landscaping, 33.140.245	

There are several other factors that may affect the rules that apply to your landscaping. For example, special rules apply to work in an environmental zone.

The table below shows where to look for guidance about other landscaping rules:

Development or activity	Find it in Zoning Code	Find it in the manual
Plant and tree selection	33.248.030 Plant Materials	Plant Material Selection and the Suggested Plant Lists
Installation, maintenance and irrigation	33.248.040 Installation and Maintenance	Maintenance, irrigation, protection, etc. Planting information is also presented in the Plant Material Selection and Suggested Plant Lists sections.
Tree protection	33.248.068 Tree Protection Requirements Tree preservation plans are described in 33.248.065 Tree Preservation Plans.	Maintenance , irrigation, protection, etc. Describes the tree protection requirements and alternative tree preservation plans. Standard T1 describes tree preservation plans and illustrates root protection zones and protective fencing.
Tree preservation for Lend Divisions	33.630 Tree Preservation	Not in the Manual
All development in Environmental zones	33.430 Environmental Zones • Columbia South Shore • Cascade Station • Pleasant Valley	Not in the Manual
All development in Greenway zones	33.440 Greenway Zones	Not in the Manual
Tree cutting	In both Title 20 and the Zoning Code.	See the Frequently Asked Questions section in the front of the Manual.
Street trees	Regulated by the Urban Forester. Not in the Zoning Code.	Not in the Manual
Stormwater maintenance	In Title 17 and the Stormwater Management Manual. Not in the Zoning Code	Not in the Manual
Erosion control	In Title 10 and the Erosion Control Manual. Not in the Zoning Code	Not in the Manual

The amount of area that must be landscaped may include a minimum landscaped area, landscaped setbacks or a combination of these. These requirements are found in the Zoning Code in Table 110-3 for Single-Dwelling Zones, Table 120-3 for Multi-Dwelling Zones, Table 130-3 for Commercial Zones, and Table 140-3 for Employment and Industrial Zones.

How to Use the Manual

This manual describes how to landscape areas that are required by the Zoning Code to have trees or other landscaping. It does not include information about street trees, which are regulated by the City's Urban Forestry Division, 503-823-4489.

The manual also does not describe the City's requirements for stormwater management or erosion control. For stormwater management requirements, refer to the *Stormwater Management Manual*, which is available on the Bureau of Environmental Services website at ***www.portlandonline.com/bes***. For erosion control requirements, refer to the *Erosion Control Manual*, located on the Bureau of Development Services website at ***www.portlandonline.com/bds***.

To use the *Tree and Landscaping Manual*, you should know what kind of development you want, where the property is, what zone the property is in (including any overlays or plan districts), and the general layout of the development you propose (i.e., at least a rough site plan).

For all development projects, you should contact the Planning and Zoning staff at 503-823-7256 or come into the Development Services Center at 1900 SW 4th Avenue for help determining the specific zoning regulations for your site and whether landscaping is required.

For all development of new structures or parking facilities, here's a list of the information you should gather about your project:

Site Information	
Location or address:	
Base zone	Overlay zone
Plan Districts	Site Area
Answer the following for all projects other than one and two family residences:	
Required setback	Length of each lot line
Lot line abutting an R-zoned lot (L3 required in C, E, and I zones)	
❑ yes ❑ no Will any setback be 30 feet deep or more? L1, plus extra shrubs if wide	
Minimum landscaped area required (at least L1)	
Requirement for screening abutting an R-zoned lot? (L3)	
Parking Lots (see 33.266.130 in the Zoning Code)	
Number of parking spaces	
Interior landscaping required (if over 10 spaces) @ 45 sq. ft. per space (P1)	
Length of parking lot edges (perimeters, L2 unless abutting R-zoned lot)	
Width of perimeters, ft.	Area of perimeters (length x width), sq. ft.

After you have gathered this information, read in the Manual about the standards that apply (L1, L2, etc.). Then go to the *Landscaping Calculations Worksheet* and *Plant Coverage* pages.

Use the *Landscaping Calculations Worksheet* to calculate how many trees, shrubs, and ground cover plants you will need to fill your landscaped areas.

Some of the calculations are based on numbers of parking spaces, some on square footage, and some on the length of perimeters.

Landscaping Calculations Worksheet

Landscape Area Calculations		
Perimeter length, in feet	Perimeter area, in square feet	L1 area, in square feet

Parking Lot Calculations, where applicable	
Number of parking stalls	Parking stalls with front 2 feet landscaped
Interior landscaped area required in square feet (at 45 sq.ft. per parking stall)	
Parking lot perimeter length, in feet	Parking lot perimeter area, in square feet

Plant Materials Calculations

Trees	**Perimeters (L standards)**			**Parking Lot Interiors**		
	Standard	**Linear feet**	**Number of trees**	**Standard**	**Number of stalls**	**Number of trees**
Large	1 tree per 30 linear feet			1 tree per 4 parking stalls		
Medium	1 tree per 22 linear feet			1 tree per 3 parking stalls		
Small	1 tree per 15 linear feet			1 tree per 2 parking stalls		
TOTALS						

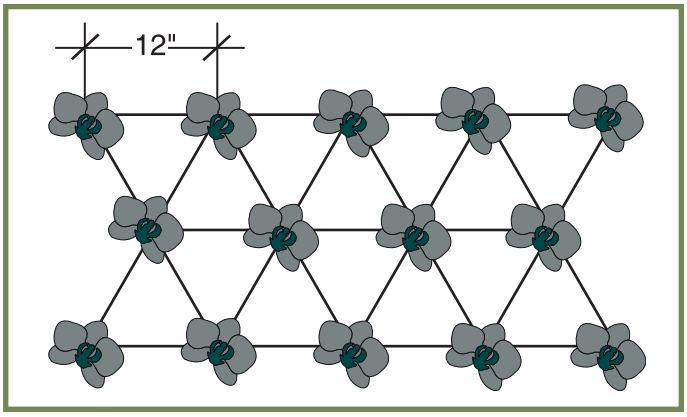
Shrubs	**Perimeters (L standards)**			**Parking Lot Interiors**		
	Standard	**Linear feet**	**Number of shrubs**	**Standard**	**Number of stalls**	**Number of shrubs**
Shrubs	1 shrub per ___ linear feet			1.5 shrubs per parking stall		
	1 shrub per ___ linear feet			1 shrub per stall with 2 front feet landscaped		
TOTALS						

Ground Cover	**Perimeters (L standards)**			**Parking Lot Interiors**		
	Coverage per 100 sq. feet	**Area in sq. feet**	**Number of plants**	**Coverage per 100 sq. feet**	**Area in sq. feet**	**Number of plants**
Plant #1	___ plants			___ plants		
Plant #2	___ plants			___ plants		
Plant #3	___ plants			___ plants		
Plant #4	___ plants			___ plants		
Plant #5	___ plants			___ plants		
Plant #6	___ plants			___ plants		
TOTALS						

Plant Coverage

The landscaping standards require that ground cover plants be planted so that they fill in the landscaped area within three years. The ground cover plant lists include plant spacing recommendations. If you select a plant not on the lists, you must provide the Bureau of Development Services (BDS) with plant spacing information either from published sources, such as the *Sunset Western Garden Book*, from Internet sources, or from cut sheets provided by the nursery. You must identify the source of the information so that BDS can verify it.

Ground cover plants other than turf forming grasses must be planted in triangular spacing, as shown below. In this illustration, the plants are planted on a 12 inch triangular spacing.



To calculate the number of ground cover plants needed to meet the standards, use the table below.

If the spacing for the plant is:	You need this many plants per 100 square feet of area:
6 inches	460
8 inches	260
10 inches	167
1 foot	115
1.5 feet	51
2 feet	29
2.5 feet	19
3 feet	13
4 feet	7
5 feet	5

Agenda Item GB-2

City of Tacoma
Community and Economic Development Department

TO: Planning Commission

FROM: Shirley Schultz, Principal Planner

SUBJECT: 2012 Annual Amendment Application No. 2012-4, Sign Code Revisions

DATE: September 29, 2011

At the meeting of October 5, 2011, staff from the Current Planning Division of the Community and Economic Development Department will provide an overview of concerns and issues pertaining to the proposed amendment to the sign code to address electronic on-premises signs as they emerged from the recent study of digital billboards.

To begin the discussion, staff poses the following questions for the Commission's consideration and discussion.

1. Given that digital billboards have been prohibited by the City Council upon the Planning Commission's recommendation, should digital on-premises signs also be prohibited?
2. Is there a distinction to be made between digital technology and LED signs that are more typically readerboard signs?
3. If digital on-premises signs are allowed, should the standards developed by the Planning Commission for digital billboards be adopted for on-premises signs, or should they be modified? Are they a good starting place for the discussion? For reference, the key points of those regulations were:
   - No flashing signs shall be permitted.
   - All images shall be static; no animation or motion pictures are allowed.
   - The minimum static image time is 60 seconds.
   - The maximum transition time for images is 2 seconds.
   - Brightness, foot-candles. Signs shall not operate at brightness levels of more than 0.3 foot candles above ambient light, as measured at a specified distance, depending on the size of the sign face.
   - Brightness, intensity levels. The digital sign may not display light of excessive intensity or brilliance to cause glare or otherwise impair the vision of the driver. Digital sign light intensity exceeding the following intensity levels (nits) constitutes "excessive intensity or brilliance."

INTENSITY LEVELS (NITS)		
Color	Daytime	Nighttime
Full Color	5,000	125

- Prior to the issuance of a sign permit, the applicant shall provide written certification from the sign manufacturer that the light intensity has been factory pre-set not to exceed 5,000 NITS and that the intensity level is protected from end-user manipulation by password-protected software or other method as deemed appropriate by the City Engineer.
- Each sign must have a light sensing device that will continuously adjust the brightness as ambient light conditions change.
- Each sign must have a "fail safe" that turns the screen to black in the case of malfunction.
- Prior to final inspection approval, the applicant shall provide proof that all lighting levels and specifications in this section have been field-verified by a special inspector.
- Electronic signs shall not be illuminated between the hours of 10:00 p.m. and 5:00 a.m.
- Lighting shall not be directed skyward such that it would create any hazard for aircraft.

4. Should on-premises electronic signs be limited in size? Should this be a flat limit or a percentage of the sign allowance?

5. Should on-premises electronic signs be limited in height? Should they be restricted to wall-mounted and not free-standing?

6. Should dispersal apply, or should there be setbacks from intersections, residential districts, and other sensitive uses?

In addition, staff is providing the following information for your review:

1. Sign Code Revisions - Project Scope
2. Proposed Timeline and Public Participation/Outreach Plan
3. Benchmarking Matrix

If you have any questions, please contact Shirley Schultz at (253) 591-5121 or shirley.schultz@cityoftacoma.org.

Attachments (3)

c. Peter Huffman, Assistant Director

2012 Annual Amendment Application No. 2012-4
Sign Code Amendment

SCOPE OF WORK
OCTOBER 5, 2011

I. Research and Benchmarking

A. *Comprehensive Plan review:* Review all sections of the Comprehensive Plan which talk about aesthetics and pedestrian orientation.

B. *Neighboring communities*: Research and provide summary of other Washington cities and their approach to changing message center and digital signs.

C. *Technical research*: what kinds of changing message signs are available, what kinds are in use, what are the technical capabilities for programming, lighting levels, and other performance standards.

II. Public Participation (*see separate document*)

A. Task Force or Focus Group

B. Community Meeting to present Focus Group Work

III. Regulatory Code Amendments

A. Definition Changes

1. Review definitions of animated sign, changing message center, electrical sign, flashing sign, illuminated sign, public information sign, and readerboard sign.
   a. Conflicts in definitions;
   b. Clarity in definitions; and
   c. Content-based regulation
2. Animation
   a. "Animated Sign" is defined as "A sign that uses movement, by either natural or mechanical means, to depict action or create a special effect or scene".
   b. Animated Signs are allowed in most commercial districts
   c. It is unclear whether electronic animation (i.e., video) falls into this category
3. Flashing
   a. Flashing signs are defined as "An electrical sign or portion which changes light intensity in sudden transitory bursts, but not including signs which appear to chase or flicker and not including signs where the change in light intensity occurs at intervals of more than one second." Limited flashing is allowed in several commercial districts.
   b. It is unclear whether electronic animation is considered in the definition and regulation of flashing sign.
4. Develop additional definitions (after benchmarking) if necessary

B. Performance standards

1. Size limitations for changing message centers
2. Animation limitations
3. Limitations on flashing

4. Brightness/lighting levels
5. Static image time
6. Separation from other signs, other uses, intersections (dispersion)

C. "Clean Up" – Additional changes as identified by staff, such as, clarifying terms, addressing integration of other code sections (such as Shoreline code)

D. Where allowed? Should these types of signs be prohibited in some zones, such as mixed use and/or shoreline districts?

IV. Additional Items as determined by Planning Commission

2012 Annual Amendment Application No. 2012-4
Sign Code Amendment

PUBLIC PARTICIPATION AND TENTATIVE SCHEDULE
OCTOBER 5, 2011

Date	Event
October 5, 2011	Initial presentation to Planning Commission, direction on scope and public participation
October 12	Invitation letter sent to stakeholder group (see list of proposed participants)
October 26	Initial meeting with stakeholder group
November 9	Stakeholder group meeting
November 23 or 30	Stakeholder group meeting
December 7	Report back to Planning Commission
December 8	Community Meeting
December 14	Final Stakeholder group (draft code)
January 4, 2012	Planning Commission – draft code
January 18	Staff report/recommendation
February 1	Planning Commission authorizes proposed amendments for public review and sets a public hearing date
February 8	Distribution of public notice for Planning Commission public hearing
March 7	Planning Commission public hearing on draft amendments
May 22	City Council conducts public hearing on proposed amendments
June 26	City Council – second reading and adoption of amendments
August 1	Effective date of amendments

Note: Planning Commission / City Council Schedule (following February 1, 2012) is abbreviated.

Stakeholder Group Invitees

- Religious institutions
- Tacoma School District, private schools
- TCC, UPS, Bates, UWT, Evergreen
- City of Tacoma Departments: Public Assembly Facilities, Tacoma Fire and Police
- MetroParks
- Sign Company (2)
- Business Districts – designee from Cross-District Association
- Neighborhood Councils – designee from Community Council
- Specific Businesses currently having electronic signs: Red Robin, Gray Lumber, Walgreen's, Sonic, Pro-Max
- Others?

On-Premises Electronic Signs – Planning Commission Presentation

Technical Details, Benchmarking

October 5, 2011

Following is some information about how certain cities in Washington address technical details associated with electronic message signs, animated signs, and digital signs.

Staff analysis:

Of the benchmarked cities, all prohibit animated and flashing signs. The City of Seattle allows some video sign technology, with limited animation interspersed with static images. These signs are limited to specific commercial areas of the city. Other cities restrict changing message centers to "time and date" type signs only.

City	Flashing Signs	Animated/ Video Signs	Static image time	Brightness	Off Time
Tacoma	Limited	In certain districts	Not addressed	Not addressed	Not addressed
Seattle	Prohibited	Limited	Video allowed, 20 seconds	500 nits nighttime	11:00 p.m. to dawn
Spokane	Prohibited	Only in CBD	2 seconds	Not addressed, no glare	Varies by zone
Bonney Lake	Prohibited	Limited	Not addressed	5,000 day, 500 night	Not addressed
Olympia	Prohibited	Only time/temp	Not addressed	No glare, residential buffer	Not addressed
Federal Way	Limited	Prohibited	Not addressed	Wattage limit, no glare	Not addressed
University Place	Not addressed	In certain districts	Not addressed	No glare	Hours of day

Code Language

Seattle Municipal Code:

SMC 23.55.003 Signs prohibited in all zones.

A. The following signs shall be prohibited in all zones:

1. Flashing signs;
2. Signs which rotate or have a rotating or moving part or parts that revolve at a speed in excess of seven (7) revolutions per minute;
7. Signs using a video display method, except as provided in section 23.55.005, Video display methods.

(Ord. 120466 Section 1, 2001; Ord. 112830 Section 10(part), 1986.)

SMC 23.55.005 Video display methods

A. Development standards.

7. Duration: Any portion of the message that uses a video display method shall have a minimum duration of two (2) seconds and a maximum duration of five (5) seconds. Calculation of the duration shall not include the number of frames per second used in a video display method. Calculation of the maximum duration shall include the time used for any other display methods incorporated within that portion of the message displayed using a video display method;

8. Pause Between Video Portions of Message. There shall be twenty (20)seconds of still image or blank screen following every message using a video display method;

10. Between dusk and dawn the video display shall be limited in brightness to no more than five hundred (500) units when measured from the sign's face at its maximum brightness; and

11. Signs using a video display method may be used after dusk only until 11:00 p.m. or, if the advertising is an on-premises message about an event at the site where the sign is located, for up to one (1) hour after said event.

SMC 23.55.016 Light and glare from signs.

A. The source of light for externally illuminated signs shall be shielded so that direct rays from the light are visible only on the lot where the sign is located.

B. The light source for externally illuminated signs, except advertising signs, shall be no farther away from the sign than the height of the sign. (Ord. 112830 Section 10(part), 1986.)

SPOKANE MUNICIPAL CODE

Section 17C.240.070 Prohibitions

The following are prohibited and existing ones must be removed:

A. Signs containing strobe lights.

B. Signs that imitate or resemble official traffic lights, signs or signals or signs that interfere with the effectiveness of any official traffic light, sign, or signal.

C. Flashing signs.

Electronic Changing Message Center Signs: allowed – See Attached Table

BONNEY LAKE MUNICIPAL CODE

15.28.070 Signs prohibited.

The following types of signs are prohibited in all districts:

I. Any sign which constitutes a traffic hazard or detriment to traffic safety by reason of its size, location, movement, coloring, or method of illumination, or by obstructing the vision of drivers, or detracting from the visibility of any official traffic control device by diverting or tending to divert the attention of drivers of moving vehicles from traffic movement on streets, roads, intersections, or access facilities. No sign shall be erected so that it obstructs the vision of pedestrians by

glare or method of illumination or constitutes a hazard to traffic. No sign may use words, phrases, symbols or characters in such a manner as to interfere with, mislead, or confuse traffic;

15.28.115 Animated signs.

A. Any animated sign shall be no more than 30 percent of the total allowable sign face for any sign; provided, that all other requirements in this section are followed.

B. In multi-tenant buildings or building complexes, only freestanding directory signs per BLMC 15.28.110(A)(3) may be animated or electronic message centers, not individual tenant signs. If, within a multi-tenant building or building complex, an individual tenant already has an animated sign or electronic message center, the multi-tenant building or building complex as a whole shall not be allowed to have an additional sign of this type.

C. Maximum brightness levels for electronic signs shall not exceed 5,000 nits when measured from the sign's face at its maximum brightness, during daylight hours, and 500 nits when measured from the sign's face at its maximum brightness between dusk and dawn, i.e., the time of the day between sunrise and sunset.

D. Newly permitted animated signs shall include an ambient light meter and programmable or manual dimming capacity. (Ord. 1351 § 1, 2010; Ord. 1285 § 4, 2008).

15.28.190 Lighting.

Unless otherwise specified by this chapter, all signs may be illuminated. However, no sign regulated by this chapter may utilize:

A. An exposed incandescent lamp with an external reflector and without a sunscreen or comparable diffusion;

B. Any exposed incandescent lamp in excess of 25 watts;

C. Any revolving beacon light;

D. Any spot or flood light system directed toward or shining on vehicular or pedestrian traffic on a street, or adversely affecting surrounding premises or residential structures;

E. Any continuous or sequential flashing operation. (Ord. 1351 § 1, 2010; Ord. 880 § 1, 2001; Ord. 614 § 3.05, 1989. Formerly 15.28.090).

Olympia Municipal Code

18.42.080 Prohibited signs

The following types of signs are prohibited.

A. Animated Signs. Exception: Traditional barber signs and time/temperature signs. (See OMC Sections 18.42.120(G) and 18.42.140(D)).

18.42.120 General Standards for Freestanding Signs

G. Lighting - In the Auto Services Zoning district, signs illuminated directly or indirectly shall not be unreasonably bright or glaring. The placement or location of signs must be placed in a manner so it shall not directly face into an adjacent residential District.

H. Public Service Signs may be included in a use's permitted signage, provided the overall sign size, height and other standards for the underlying zoning district are met. Further, the public service portion of an academic school sign shall not exceed 50% of any sign face and all messages shall remain static for at least five minutes.

I. One Development Identification Electronic Reader Board Sign shall be allowed within the Auto Services District for a single trade organization representing the ownership of 40 acres or more of similar land uses, provided, that all messages shall remain static for at least three minutes.

18.42.140 General Standards for Building Mounted Signs

C. Lighting - In residential zoning districts (defined in sections 18.42.120(H) and 18.42.140(L)) lighting shall not be unreasonably bright or glaring.

D. Public Service signs, such as time and temperature signs and community bulletin boards, are allowed to be incorporated into a use's permitted signage, provided the overall sign size, height and other standards for the underlying zoning district are met.

Federal Way Municipal Code

19.140.130 Prohibited signs.

The following signs or displays are prohibited in all zones within the city. Prohibited signs are subject to removal by the city at the owner's or user's expense pursuant to FWRC 19.140.190:

(2) Animated or moving signs.

(6) Flashing signs, except electronic changeable message signs or changeable copy signs.

(16) Simulations of traffic signs. Any sign using the words "stop," "look," or "danger," or any other words, symbols, or characters in such a manner as to interfere with, mislead, or confuse pedestrian or vehicular traffic.

19.140.170 Construction standards.

(6) *Illumination limitations of electrical signs (does not apply to neon signage).* No sign may contain or utilize any of the following:
- (a) Any exposed incandescent lamp with a wattage in excess of 25 watts.
- (b) Any exposed incandescent lamp with an internal or external reflector.
- (c) Any continuous or sequential flashing device or operation.
- (d) Except for electronic changeable message signs, any incandescent lamp inside an internally lighted sign.
- (e) External light sources directed towards or shining on vehicular or pedestrian traffic or on a street.
- (f) Internally lighted signs using 800-milliamp or larger ballasts if the lamps are spaced closer than 12 inches on center.
- (g) Internally lighted signs using 425-milliamp or larger ballasts if the lamps are spaced closer than six inches on center.
- (h) All illumination for externally illuminated signs must be aimed away from nearby residential uses and oncoming traffic.

University Place Municipal Code

"Animated sign" means a sign using movement or change of lighting, either natural or artificial, to depict action or to create special effects or scenes. All digital signs, except those displaying the time and temperature, are animated signs.

"Changing message sign" means an electronic or mechanical sign, with the ability to change the sign message electronically. Time and temperature signs are not considered changing message signs.

Changing Message signs are limited to 10 feet in height with a 100-foot setback from intersection.

19.55.070 Public Facilities Overlay

C. Signs. Gateway and changing message signs are permitted subject to design and construction standards, general and specific sign requirements, and other requirements of Chapter 19.75 UPMC, notwithstanding any restrictions otherwise prohibiting such signs. For the purposes of this provision, gateway sign shall have the same definition as "city gateway sign." The following restrictions apply to gateway and changing message signs in the public facilities overlay zone:

1. Gateway signs existing as of the effective date of this provision may be maintained or reconstructed. No additional gateway signs are permitted.
2. Changing message signs shall be programmed so that the transmission of changing messages is limited to 5:30 a.m. to 6:30 p.m. during standard time and 5:30 a.m. to 8:30 p.m. during daylight savings time, except when the transmission of emergency messages is determined to be in the public interest.
3. Changing messages shall be limited to text. Messages that include graphics, animation, video clips or other nontext images are prohibited.
4. Changing message signs shall be limited in area to 12 square feet. A changing message sign may be incorporated into an identification sign that includes additional area devoted to static (nonchanging) messages.
5. Changing message signs shall be programmed to adjust illumination levels to reflect ambient light levels and ensure that illumination levels will not create excessive glare that may result in traffic hazards or other public nuisance.

Seattle: http://clerk.seattle.gov/~public/toc/t23.htm
Spokane: http://www.spokanecity.org/services/documents/smc/?Section=17C.240.070
Bonney Lake: http://www.codepublishing.com/wa/bonneylake/
Federal Way: http://www.codepublishing.com/WA/FederalWay/
University Place: http://cityofup.com/Page72.aspx

Additional Information

For more information about digital/electronic sign technology, please visit the following manufacturer websites.

www.stewartsigns.com
www.grandwell.com
www.yesco.com

Agenda Item GB-3

City of Tacoma
Community and Economic Development Department

TO: Planning Commission

FROM: Donna Stenger, Manager, Long-Range Planning Division

SUBJECT: Large Scale Retail Moratorium

DATE: September 28, 2011

At the October 5 meeting the Commission will be conducting its public hearing on the emergency moratorium on large scale retail establishments. Following the hearing, staff will be discussing with the Commission the key issues raised in public testimony received to date. The Commission's findings and recommendations, which will be drafted for consideration at the October 19 meeting, need to address, at a minimum, the need for and appropriate duration of the moratorium. In support of that discussion, staff is providing a copy of a memorandum provided to the City Council on September 22 regarding the moratorium's potential impact on certain projects.

Additionally, the Commission will continue its review of the City's existing policies and regulations applicable to large scale retail uses. Attached for your review are:

- Comprehensive Plan Guidance – A summary of existing plan policies relative to large commercial development and development within commercial and mixed-use areas
- A few articles and papers regarding large scale retail development, from the State's Municipal Research and Services Center (additional information and resources are available at the MRSC website – www.mrsc.org/Subjects/Planning/BigBoxRetail.aspx).

At the meeting staff will also be providing additional information about current development and design standards, including how they have applied to recent developments within the commercial and mixed-use districts where these types of uses are permitted and generally located.

If you have any questions, please contact Brian Boudet at 573-2389 or bboudet@cityoftacoma.org.

Attachments

c: Peter Huffman, Assistant Director

City of Tacoma **Memorandum**

TO: Rey Arellano, Interim City Manager

FROM: Ryan Petty, Director, Community & Economic Development Department

SUBJECT: Report on Projects Potentially Affected by Retail Moratorium

DATE: September 22, 2011

On August 30, 2011 the City Council passed Ordinance No. 28014 declaring an emergency moratorium on the acceptance of development permits associated with the establishment, location, or permitting of retail establishments that exceed 65,000 square feet in the aggregate.

Building and Land Use Services (BLUS) reports that to date the following proposed projects may be affected by the emergency moratorium:

Information Requests:

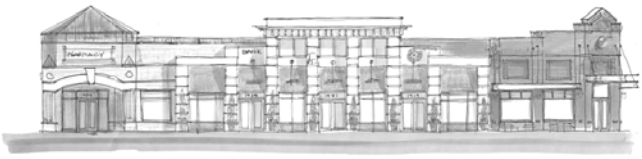
Retail user:	Lowe's Home Improvement
Proposed project:	New building and site development
Project size:	135,000 SF
Location:	9201 Pacific Avenue
Type of request:	Permit Center walk-in, general information request
Date of request:	September 15, 2011

Permit Applications:

Retail User:	Walmart
Proposed project:	New building and site development
Project size:	152,243 SF
Location:	1965 S. Union
Type of application:	Building permit
Date of application:	August 31, 2011

If you or City Council members have any questions about these projects, please contact Charlie Solverson, Building Official, at 591-5017 or at csolverson@cityoftacoma.org.

LARGE SCALE RETAIL MORATORIUM



COMPREHENSIVE PLAN GUIDANCE
October 5, 2011

The following is a sampling of policies and goals from the Comprehensive Plan specifically related to large commercial retail development, including policies from the Generalized Land Use Element (LU) related to the districts and areas in which those types of uses are commonly found. It should be noted that this is only intended to provide a representation of the key policy messages related to this type of development and the areas where it is generally allowed. More detailed information and additional policies can be found throughout the sections indicated, as well as in other elements of the Plan.

COMMERCIAL DEVELOPMENT *(PAGES LU-54 – LU-60)*

General Themes:

- Human-scale, pedestrian access, non-motorized circulation
- Public squares and assembly points for community activities
- Distinctive place based on the combination of history, natural environment, and people
- Range in scale from small neighborhood convenience shops to regional shopping centers

Specific Policies and Goals:

Commercial Development – Goal (LU-54)
To achieve an attractive, convenient and well-balanced system of commercial facilities, which serve the needs of the citizens, are appropriate to their relative service areas and are compatible with adjacent land use.

Location and Accessibility – Intent (LU-54)
Commercial development involves a wide variety of uses and can range in scale from small neighborhood convenience shops to regional shopping centers.

Commercial areas are the activity centers of the community. Commercial areas should be safe, well designed, appropriately scaled, and integrated into the fabric of the community.

Commercial establishments must be properly located and easily accessible for the convenience of their customers. Commercial developments should be located within mixed-use centers, in concentrations within areas of similar character, or in nodes at intersections of major traffic corridors. Such locations should lessen traffic congestion, increase consumer convenience, reduce utilities and services installation and maintenance costs and encourages joint use of parking facilities.

Infill development and intensification of existing commercial areas will aid their continued economic viability. In some limited instances, physical expansion of existing areas may be permitted; however, linear expansion is to be strictly limited.

Commercial development within the mixed-use centers is also guided by policies in Section II specifically addressing the centers. For development within the centers, where center policies are inconsistent with the policies below, center policies take precedence.

Design – Intent (LU-55)
The viability of the city's commercial areas is strengthened by promoting quality design and compatibility with the existing and/or desired character of the area. Their viability is further insured by encouraging compact development, the physical maintenance and rehabilitation of existing commercial developments, and beautification efforts.

Design that promotes pedestrian access is a high priority. This can be accomplished by encouraging developments to orient towards the street, and providing attractive pedestrian access between buildings and the street, between separate buildings on the site, through large parking lots, and to surrounding uses, where desirable. Attractive façades, landscaping, lighting, and other amenities are also important to enhancing the pedestrian environment.

Well-designed vehicular access and parking is needed to ensure the long term health of commercial uses. Such features shall be designed to provide user convenience while minimizing conflicts with bicyclists, transit users, and pedestrians, and minimizing impacts to the visual environment.

Landscaping elements along the edge of the parking lots and within larger parking lots are needed to achieve this goal. Shared use of parking areas is strongly encouraged to encourage compact, efficient commercial centers.

It is intended that the image and appearance along freeway corridors and limited access highways be improved and enhanced by achieving high quality freeway-oriented development and preserving visual interest. Balance needs to be maintained between preserving visual interests with development economics.

Design standards will be used to help ensure that new commercial developments meet these objectives. Such standards will be easy to use and help to encourage desired forms of development. Design standards may be supplemented with design guidelines for special areas and/or situations. Design guidelines will provide greater flexibility and detail in how commercial developments can meet design objectives.

MEDIUM INTENSITY COMMERCIAL AREAS *(PAGES LU-58 – LU-59)*

General Themes:

- May contain a mix of retail, office, commercial, multi-family, and light industrial uses
- Includes both concentrated areas of large commercial development with community-wide significance and older, smaller-scale districts that focus more on services for surrounding neighborhoods
- Encourage locations near residential areas and the development of residential uses within these traditionally commercial districts
- Should be located along significant transportation corridors, such as major arterials and freeways, and be designed to include multi-modal connections

- Vegetative buffers and other forms of screening are used to prevent negative impacts to surrounding residential areas

Specific Policies and Goals:

Medium Intensity – Intent (LU-58)
Medium intensity commercial developments supply everyday goods and services for several surrounding neighborhoods and are of community-wide significance. New commercial development should be directed primarily toward mixed-use centers which consist of a clustered grouping of stores and businesses with multi-modal transportation access. This arrangement encourages multi-purpose trips and increases customer convenience.

Planned business parks are a relatively new type of concentrated commercial development. Because of their relatively nuisance-free nature, planned business parks may be compatible with adjacent lower intensity residential areas provided the character of the area is maintained.

Older commercial development is usually found in small-scale linear districts. These districts generally consist of a continuous row of commercial establishments along key arterial streets, which were historically used as principal entry routes to the downtown business area. This type of commercial development does not have the drawing power of a major retail store, but provides convenience and services to surrounding neighborhoods. Parking is provided on street and in small lots, generally located behind or to the side of the commercial building. Upper stories were often used for housing in the past and such use is desirable for the future.

Medium intensity commercial developments require access to higher volume arterial streets that are capable of carrying the traffic that is generated by these developments. These developments should be located within easy access to the residential communities that they serve. Methods to minimize adverse effects on adjacent, less intensive land uses and transportation levels of service are needed. This can be accomplished by encouraging shared parking arrangements, providing buffers, using design standards and encouraging public transit use.

Medium Intensity Commercial Development – Policies (LU-59)

LU-CDMI-1 Concentrated Centers of Development
Encourage medium intensity commercial developments to locate in concentrations to maximize the use of land, promote the efficient use of public services and facilities and to minimize adverse influences on surrounding properties.

LU-CDMI-2 Locate Near Residential Areas
Medium intensity commercial development should be conveniently located near the residential areas that they serve.

LU-CDMI-3 Arterial Street Location
Medium intensity commercial developments should be situated on either principal or minor arterial streets or at the intersection of two arterial streets having adequate capacity.

LU-CDMI-4 Linear Commercial Expansion
Strictly limit the linear expansion of development.

LU-CDMI-5 Freeway-Oriented Commercial Development
Locate freeway-oriented commercial facilities at locations convenient to the freeway user provided the facilities do not impede nor impair traffic.

LU-CDMI-6 Office, Medical Institutional Uses
Allow moderately scaled office, medical and institutional complexes within medium intensity areas, provided adverse effects on surrounding areas are minimized.

LU-CDMI-13 Encourage Residential Development
Encourage residential development to locate within medium intensity commercial areas.

MIXED-USE CENTERS *(PAGES LU-20 – LU-39)*

General Themes:

- Compact, self-sufficient areas with high density and a well-integrated variety of uses
- Emphasis on public transit access to services and facilities
- Create comfortable and safe walking districts that are transit-supportive
- Shopping and services near home and work and employment opportunities for living near work
- Walkable, comfortable, and accessible public spaces
- Strong neighborhood identity, enhancement of existing assets, support of neighborhood businesses
- Increased vegetation and greenery for effective buffers and scale transitions
- Retain major employers, support small business and achieve development feasibility

Specific Policies and Goals:

Mixed-Use Centers – Goal (LU-20)
To achieve concentrated centers of development with appropriate multimodal transportation facilities, services and linkages that promote a balanced pattern of growth and development, reduce sprawl, foster economies in the provision of public utilities and services, and yield energy savings.

Mixed-Use Centers – Policies (LU-21/22)

LU-MU-1 Pedestrian and Bicycle Support
Situate and orient developments, locate building entrances and design building façades to enhance the convenience and desirability of walking and bicycling.

LU-MU-2 Variety of Development
Encourage as broad and as balanced a range of development as possible including shopping, housing, offices, restaurants, hotels, recreational facilities, entertainment, public facilities and others, to meet the needs of all segments of the community, especially youth, seniors, the disabled, and families.

LU-MU-3 Mixed-use Development
Encourage integration of different land uses within the same building or site in order to maximize efficient land use, foster a variety of developments, and support multimodal mobility.

LU-MU-4 Development Bonuses and Incentives
Provide a range of development incentives and bonuses in order to encourage specific types of development as well as public benefits. Incentives may include reduced parking requirements, fee waivers, height increases, density bonuses, property tax exemptions, capital improvements, and other techniques.

Compact Development – Intent (LU-22)
To encourage walking and cycling, mixed-use centers will be compact to allow people to comfortably walk between destinations within the center. Comfortable walking distances are generally considered

800 to 1200 feet. Achieving compactness will hinge on the ability to concentrate development. Encouraging more development while maintaining compactness will contribute to densification and intensification of the center. Greater densities and intensities support efficient public transit. Investment in maintenance and improvement of infrastructure and services is needed to support intensification of uses.

The designated boundaries of the mixed-use centers shown on the Generalized Land Use Plan Map reflect a desired development vision to be achieved over time. It is intended that mixed-use development and redevelopment occur within the core areas of the centers first. These core areas shall be regulated by zoning, which permits a wide mix of uses and contains provisions for supporting greater pedestrian and transit orientation. Incentives may also be appropriate for encouraging the type of development desired for these areas. Expansion of the core areas and zoning reclassification to mixed-use zoning will be strictly controlled and can not occur unless it is demonstrated that the existing core area has achieved or nearly achieved its development capacity. Expansion of the core area boundaries will be limited; therefore, development should occur predominately upward not outward. Adjustments to the designated center boundaries are intended to be very limited. Defined boundaries are needed to assure certainty for those property owners located within and adjacent to a designated center. It is intended that the designated mixed-use center boundaries and implementing zoning be reviewed and amended or affirmed as part of neighborhood planning efforts.

Parking – Intent (LU-23)
Development within the mixed-use centers will need to be conservative in its use of surface area, especially for such uses as parking areas. Transitions from center development to surrounding areas will need to be carefully designed to reduce impacts on less intensive land uses.

Large parking areas disrupt the continuity of the streetscape and development pattern, and provide formidable barriers to pedestrian movement. Joint use of parking areas and parking under or within structures should be encouraged to efficiently use available land and allow additional compact development. Parking structures are a good way to achieve compact development; however, these structures need special design considerations to avoid blank walls and conflict of entrances or exits with pedestrian walkways.

Design – Intent (LU-26)
Design will play an important role in achieving successful, compact, dense development in Mixed-Use Centers. Good design will contribute to building a sense of community and neighborhood livability. Attention to both the existing and desired context will be critical in these centers. Thoughtful and context sensitive design will produce development that is compatible with surrounding development whether the site is on the edge of a Mixed-Use Center and adjacent to a single family area or along a designated pedestrian street in the middle of a center. Buildings within the centers will use forms that are attractive at all perceivable ranges. Development at the edge of centers will utilize a combination of landscaping, building location and orientation, and building design to lessen negative impacts on adjacent uses.

Due to the concentrated nature of development in these centers, it is essential that new development be friendly to the pedestrian. To achieve inviting and walkable centers, new developments will be oriented to the street, feature wide and attractive sidewalks with street trees, lighting, and other amenities, and interesting building façades with plenty of transparency and distinctive details. Larger developments will provide an internal pedestrian network that will provide connections between buildings, to the street, and to adjacent uses, where practical. Design that encourages bicycle usage will

also be increasingly important in the future. These features will also improve access to transit in the centers by its residents, workers, and visitors.

Public plazas and open spaces are also very important to the character and livability of these centers. It is intended that these centers accommodate a variety of publicly accessible spaces from centralized plaza spaces, to small courtyards, and passive green spaces. Such spaces are most successful when they are integrated with the surrounding development. Integration enhances the desirability of both the development and the open space, ultimately making both safer and more accessible.
Other design elements that are key to retaining and enhancing the livability of the Mixed-Use Centers include a mixture of uses (including a diversity of housing types and retail uses), design continuity (emphasized through common streetscape design elements that are distinctive for each center), solar access (particularly for residential uses), durability (use of quality materials that will last and reduce long term maintenance costs), sustainable design (emphasizing a variety of landscaping components and increased energy efficiency of developments), and provisions for private open space for residential uses (through a combination of yard space, balconies, shared courtyards, and rooftop decks).
In order to accomplish these objectives, a combination of design standards and guidelines are to be used. Design standards that are clear and easy to use and interpret will be used by all new development. Design guidelines are a tool that may be used in special circumstances to help achieve Mixed-Use Center design goals in a way that allows some flexibility.

URBAN CENTERS – TACOMA MALL AREA *(PAGES LU-35 – LU-37)*

General Themes:

- Transition to pedestrian-oriented urban neighborhood with considerably less surface parking
- Dense concentration of urban development
- Activity is greater than in most areas of the city
- Area of regional attraction
- Focus for both the local and regional transit systems and nearby freeway access
- Provision of parking on surface lots and within structures
- Internal streets and pathways provide connections among developments

Specific Policies and Goals:

Urban Center – Intent (LU-35)
Although not as dense as downtown, the urban center is to be a highly dense concentration of all types of urban development thus establishing it as an attraction for the region and city. Efficient transportation links to the regional and local transit systems as well as to the freeway and major city arterials are necessary to support the anticipated development. Sufficient parking also will be necessary and should be provided primarily within structures and in limited surface lots. Pathways are important within the center to provide adequate access for pedestrians to travel safely and easily among the developments within the center. This center type was further defined in the 2007 mixed-use center analysis in order to better direct design and development character and application of development bonuses and incentives.

The urban center is a designated growth center for the Central Puget Sound Region and is intended to accommodate regional population and employment growth. It is recognized that this area presently is developed with large shopping malls, supportive commercial uses, some office development and a mix

of residential uses. It is anticipated that, over time, the urban center will redevelop to resemble environments normally associated with downtown areas of mid-sized cities. This will involve development of better circulation links, orientation of buildings to street fronts rather than parking areas and the integration of high density residential uses.

Employment density is expected to be about 25 employees per gross acre of the urban center.

Urban Center – Policies (LU-36/37)

LU-MUUC-5 Street Networks
Identify and address existing deficiencies in the street, sidewalk, and trail/bicycle path network of urban centers; the average block size should be no more than 300 feet to ensure a finer grain network of streets and routes for pedestrian/bicycle access when redeveloped.

LU-MUUC-7 Compact Form
Establish and maintain a compact size and walkable urban form for urban centers.

LU-MUUC-8 Mix of Uses
Promote an enhanced mix of complementary land uses in urban centers that promotes pedestrian activity and provides housing, employment, services, and amenities to persons living and/or working in the center or nearby.

LU-MUUC-9 Single Commercial Use Limit
Establish a maximum building size for commercial use buildings, and require commercial buildings above that size to have multiple stories and include residential uses at a minimum density that helps to meet Regional Growth Center criteria.

LU-MUUC-10 Tacoma Mall Subarea Planning
Prepare a subarea plan for the Tacoma Mall urban center that accomplishes the following objectives:

- Meets the Regional Growth Center criteria for targeted activity levels for employment and housing;
- Establishes the desired urban form, building, and related site design standards;
- Defines average block size, future "complete streets," the public street network, and on-site streets ("Complete streets" include safe facilities for pedestrians, bicycles and transit in addition to vehicles.);
- Further defines the appropriate mix and scale of land uses;
- More specifically defines market potential;
- Defines center nodes and public spaces and the relationship of these components to transit; and
- Plans for other aspects of phased redevelopment to achieve the Regional Growth Center criteria.

LU-MUUC-11 Site Plan Review Process for Urban Centers
Establish a binding site plan review process to apply to infill, development and redevelopment of site and buildings meeting certain criteria, to encourage the urban center to transition over time to a finer-grained, pedestrian-oriented mixed-use urban neighborhood with considerably less area devoted to surface parking. The binding site plan review process should apply to all new development and to renovations equal to 50 percent or more of existing building value.

- Large sites: Require master planning for sites of five acres or greater or buildings of 45,000 square feet or greater, with a maximum block size of 360' x 360', and phased planning for vehicle and non-motorized circulation, a mix of uses, and structured parking.
- Medium sites: Require a site plan for sites of one to five acres or buildings of 20,000 to 45,000 square feet, which defines pedestrian circulation, vehicle circulation, and building and parking placement.
- Small sites: Sites less than one acre or buildings less than 20,000 square feet should not be subject to site plan requirements.

COMMUNITY CENTERS *(PAGES LU-37 – LU-38)*

General Themes:

- Focus for larger scale commercial development
- Attractions that draw people from throughout the city
- Promote more residential development infill around existing shopping centers
- Directly accessible by arterials and local transit
- Continue to provide parking, preferably within structures

Specific Policies and Goals:

Community Centers – Intent (LU-37)

The community center is to be a concentration of commercial and residential development. Most designated community centers are established commercial shopping areas; therefore, it will be especially important to strongly encourage residential development. Although residential development will increase within the center, larger scale commercial development will continue to be a main focus. For this reason, it will be necessary to continue to provide adequate automobile parking, preferably within structures. The community center should provide a focal point for many nearby neighborhoods and may often include a unique attraction that will occasionally draw visitors from throughout the rest of the city. To support this draw, access must be provided to arterials and to the local transit system and sufficient parking must be provided. Oftentimes, the community center will be a major transfer center on the local transit network. As with other centers, pedestrian accessibility also should be emphasized within the community center.

Development within community centers will be of smaller scale and less dense than developments within the downtown and urban center but still will be greater than found in areas surrounding the center. As part of the 2007 mixed-use center analysis, Community Centers were further defined into two typologies – Urban Crossroads and Employment Centers – as a means to characterize the centers according to urban form, existing assets, future desired character and vision, desired land use mix, and phasing of development, and to identify appropriate development bonuses and incentives.

Urban Crossroads are community centers that consist primarily of commercial development focused at intersections of major arterials or highways. These are areas where a greater mix of uses, including significantly more residential uses, is desired.

Employment Centers contain one or more major institutions surrounded by ancillary and support services. These areas will likely continue to be a focal point for employment; however, a greater mix of uses is desired.

Community Center – Policies (LU-36/37)

LU-MUCC-1 Public Transit Support

Integrate major collection points for local public transit within designated community centers.

LU-MUCC-2 Variety of Development

Build on existing assets and strongly direct housing and other types of non-commercial development into community centers in order to diversify and achieve a balance of uses with existing commercial and institutional development.

LU-MUCC-3 Site Plan Review Process for Community Centers

Establish a binding site plan review process to apply to infill, development and redevelopment of site and buildings meeting certain criteria, to encourage the community centers to transition over time to a finer-grained, pedestrian-oriented mix of uses with considerably less area devoted to surface parking. The binding site plan review process should apply to all new development and to renovations equal to 50 percent or more of existing building value.

- Large sites: Require master planning for sites of five acres or greater or buildings of 45,000 square feet or greater, with a maximum block size of 360' x 360', and phased planning for vehicle and non-motorized circulation, a mix of uses, and structured parking.
- Medium sites: Require a site plan for sites of one to five acres or buildings of 20,000 to 45,000 square feet, which defines pedestrian circulation, vehicle circulation, and building and parking placement.
- Small sites: Sites less than one acre or buildings less than 20,000 sq. ft. should not be subject to site plan requirements.

ARCHITECTURAL RECORD

Big-Box Stores Slim Down for Urban Settings

May 29, 2008

By C.J. Hughes

Attribute it to empty-nest syndrome, falling crime rates, or rising gas prices: suburbanites are downsizing to apartments and condos located near theaters and cafes on walkable downtown blocks in San Diego, Milwaukee, Atlanta, and other cities nationwide.

Big-box retailers are in hot pursuit, eager to grow beyond their longtime suburban locations to tap these emerging markets. But the traditionally sprawling floor plates of these stores aren't a good fit for densely settled urban areas. So, architects are laying them out more up-and-down than left-to-right—with more floors, less parking, fewer signs, and more glass facades—even if that means breaking with the look that once helped define the store's brand. "Big-box retailers across the country are becoming substantially more flexible about what kind of box they can use," says John Bemis, an Atlanta-based director of Jones Lang LaSalle Retail, a national real estate firm.

A decade ago, one percent of big-box stores were in cities, but today that figure is up to five percent—about 90 current stores, with more planned—Bemis says, "and future growth will be exponential from here on in." Going vertical means making do with less square footage. For example, Circuit City's new "The City" format, designed in-house, shrinks its size by 42 percent, to 20,000 square feet from 34,000 square feet; 18 were open by March, says Jim Babb, a company spokesman.

Photos courtesy Target Corporation

In urban settings, big-box retailers are building slimmer stores with multiple levels, which can put off customers used to shopping with carts. Architects for Target faced that problem with its store in Glendale, California, which at three stories is the chain's tallest (above). Their solution was to reconfigure the escalator banks. There are still traditional sets of moving stairs for people, but next to them runs a special dedicated lift system for carts (top).

Making sure that size reductions don't result in the loss of too many signature interior design details can be a tough task for architects. Eric Lagerberg, a principal of Callison, the Seattle-based firm, recently completed a prototype for Cabela's, the outdoors outfitter, whose new 85,000-square-foot two-level stores will measure less than half of their 200,000-square-foot one-level forerunners. However, the prototype retains Cabela's distinct Adirondack-cabin mien. Interior ponds, now smaller, will be consolidated into one corner; taxidermy pieces will glower closer to the front door. Though they're shedding muntins, windows will still have heavy wood frames, and entry gables will replace porte-cocheres. "I had to decide what was important and how important was it," Lagerberg says. "There still needs to be continuity across the whole."

Even if a store looks the part, though, its multiple levels can put off customers used to shopping with carts, retailers say. Architects for Target faced that problem at the department store's year-old outpost in Glendale, California, which at three stories is the chain's tallest. Their solution was to reconfigure the escalator banks in the 180,000-square-foot facility, which formerly housed a Robinsons-May department store. There are still traditional sets of moving stairs for people, but next to them runs a special dedicated lift system for carts. Also, store officials point out, the russet-colored glass-block-detailed building also benefits from parking-garage entrances on two floors, which helps funnel customers to the store's upper reaches, says Eames Gilmore, an in-house architect. "We needed to make sure the entrances were intuitive," he said.

Luring people to the store can be made easier if it's not set back from the street, so as to better catch their eyes, says John Clifford, a principal at the firm GreenbergFarrow. With that in mind, Clifford is eliminating a plaza outside an Atlanta office tower in order to extend the building's two-story ground-level retail berth toward a major thoroughfare. The design, which enlarges the retail space from 20,000 square feet to 50,000 square feet, also calls for a 40-foot glass facade, he says. Those features should help the owner attract a big-box tenant, which would replace the shoeshine business and dry cleaners currently inside, Clifford adds.

Not every big-box is seeking out cities. Ikea, the Swedish furnishings store, for instance, has largely avoided urban areas, viewing on-site parking as fundamental to its business plan. Even its new outpost in Red Hook, Brooklyn—its first New York City store, and another GreenbergFarrow project—manages to squeeze in a parking lot. "The idea is you buy a chair, carry it out, put it in your car, drive it home, and put it together yourself," Clifford says. "That's why we can sell it to you for $14."

MICHIGAN LAND USE INSTITUTE

Bold Solutions for Michigan's People & Places

COMMENTARY

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The Incredible Shrinking Box

Retailers shape stores to fit urban settings

By David Goldberg

Great Lakes Bulletin News Service

www.fruitvalevillage.net

Oakland, Calif., revived its Fruitvale district by converting part of a large transit station parking lot into a creatively designed collection of retail stores, offices, and mixed-income housing.

In the last few years, a veritable stampede of Americans has returned to city and older suburban neighborhoods, seeking shorter commutes and fun things to do. But they still end up spending Saturdays in the place they tried to leave behind: the newer suburbs.

It turns out that buying a week's groceries at low prices means schlepping out to where the grocery giants can plant their preferred, massive footprints. The same goes for hardware, building supplies, or household sundries: City folks must que up on suburban expressway exit ramps to buy what they need. That is because, for years, the less-than-preferred demographics and physical constraints of inner-city neighborhoods kept retailers away. Even the older suburbs saw their small strip centers fade as the big chains chased affluence out to the next cornfield.

Now, as close-in areas draw new residents, a new generation of mixed-use, higher quality shopping environments is emerging. From Atlanta, where one of the largest redevelopment projects in the city's history will bring IKEA and a host of other retailers downtown; to Chicago, with the first multi-story Home Depot; to Washington, D.C. and its retail renaissance, major retailers are discovering old and new urban neighborhoods in a major way.

Pushing the change are savvy local government officials who realize that, for urban and inner suburban neighborhoods, attracting major retail stores and mixing them correctly with residential development revitalizes communities. And some retailers are responding by locating their businesses within those communities, not just at the end of expressway ramps.

Such newfound flexibility has implications for cities around Michigan that are trying to either revitalize or protect their downtowns. In order to provide the true walkability that urban dwellers crave, cities as different as Detroit, Grand Rapids, Ann Arbor, Troy, Flint, and Traverse City need many more practical, downtown grocery, hardware, household, and clothing stores.

But the rising interest among chain stores in downtown retail could influence the growing resistance to big-box stores in rural areas, too. For example, after a recent court decision in their favor, a group of residents and elected officials in Acme Township, located just east of Traverse City, are working to convince Meijer, Inc. to drop its proposal for building another cookie-cutter, 232,000 sq. ft. store in the middle of a large field and instead build a two-story outlet, with a parking deck, in the middle of a "new urbanist" town center long envisioned by their township's master plan for a site across the street. The center would include hundreds of houses, apartments, and condominiums, plus other stores, offices, and a park.

Surprising Signals

One of the strongest signals yet of how fundamental the shift in "big-box only" retail doctrine may be came at the International Council of Shopping Centers last December. Robert Stoker, senior real estate manager for Wal-Mart Stores, Inc., declared, "We've reached a stage where we can be flexible. We no longer have to build a gray-blue battleship box."

Mr. Stoker cited several examples of the world's largest retailer bending its once-rigid design formula to fit into existing neighborhoods, new mixed use developments, and even a high-rise. For the retail development world, it was as though the pope had changed the words in the Lord's Prayer.

Wal-Mart is not alone in its new willingness to adapt to more urban environments after long refusing to veer from a formula that has held since the 1960s: A single-story building on a major arterial road surrounded by asphalt.

"In 1960, if you had 200,000 square feet of retail, it would have a footprint of about one acre in a multi-story building," said Ed McMahon, a senior fellow at the Urban Land Institute who has written several articles on commercial design trends. "Until very recently, that same 200,000 feet would be in one story and cover three to four acres, fronted by 20 acres of parking."

Another large retailer, Target Corporation, was among the earliest to employ a more compact model. The company's flagship store in Minneapolis has four stories, and the chain has two-story stores with parking structures in Atlanta, Gaithersburg, Md., and other places. Home Depot recently opened a three-story store in downtown Chicago. Wal-Mart has a two-story outlet in a mixed-use setting in Long Beach, Calif., and will soon occupy two floors of a mixed-use high-rise in Rego, N.Y.

Mixed-use urban projects are popping up all over, said Cindy Stewart, ICSC's director of local government relations. "You still see lifestyle and power centers, but retailers going after that urban market are going into projects that also have housing, because there's such a strong need for both."

Why It Works

While building in neighborhoods requires rethinking architecture, footprint size, and loading dock placements and adding masked parking decks, Mr. McMahon said it can be worth it: Urban stores often out-perform their suburban counterparts. Increasingly, retailers are recognizing what he calls the place-making dividend: "People will stay longer and spend more money in places that actually earn their affection. Strip shopping centers are retail for the last century, and mixed use is the retail environment for this century."

Ms. Stewart cited two reasons why big boxes are reshaping themselves into downtown-ready formats.

"The suburbs are saturated," she said, "and developers and retailers are looking for new markets, and those really are old markets that may be undergoing a rebirth. And when you go out to the green space there are a lot of growth management laws in place that make those projects more difficult to do."

She added that the fastest-growing sectors of her retail association's membership are local governments and community organizations working on commercial restoration. Some larger cities and older suburbs are redeveloping strip corridors not just as a place to shop, but as a place to be: Mixed use, walkable neighborhoods with a Main Street feel — precisely what Acme's master plan calls for.

Residents of Michigan's inner cities, inner-ring suburbs, and exurbs could learn from recent community-retailer collaborations on new, successful store designs.

Rebounding in Washington

One such partnership is in Washington, D.C., where the mayor and a local business partnership established the Washington, DC Marketing Center to lure skeptical retailers into the city's rebounding neighborhoods.

"We compiled all the retail opportunities into a single resource," said Michael Stevens, the center's CEO, "and posted them on our Web site. We know the demographics and traffic counts."

Extensive research revealed that the neighborhood has a tremendous amount of buying power, thousands more households than the Census counted, and far more disposable income than anyone imagined. Yet the area was annually sending about $424 million, two third of it buying power, to stores elsewhere. So the city assembled a deal to build Tivoli Square, a project with a Giant Foods store — an urban rarity at 53,000 square feet — a restored Tivoli

Theater, 25,000 sq. ft. of shops, and 28,000 sq. ft. of upstairs office space.

Tivoli Square has triggered the largest retail project in the District, called D.C. USA, which will mix regional and national retailers with restaurants and a health club.

Oakland's Transit Village
An Oakland, Calif., project is repairing the damage done to the Fruitvale district by years of sprawling suburban development.

"Fruitvale had become a very unattractive neighborhood and it was just filthy dirty," said Arabella Martinez, the former head of the district's Spanish-speaking Unity Council, a non-profit promoting Latino opportunity throughout the Bay Area.

The boulevard was dilapidated; the nearby BART rail station, surrounded by acres of parking, was unconnected to the commercial district. The council rallied the community to develop, on its own, a "transit village" in BART's parking lot. The group reasoned that shops and restaurants serving both the neighborhood and commuters would link the commercial district to the station and provide a community gathering spot. It added housing and planned offices to bring more jobs. Today, with construction almost complete, the area is transformed.

"You see tremendous numbers of people shopping, and you don't see all the security bars on the storefronts," Ms. Martinez said. "The district went from a vacancy rate of about 40 percent in 1990 to 1 percent now. All evidence is that the strategy to focus on the retail worked. I'm living my dream."

New Life for St. Louis Park
While the Oakland and Washington projects point the way for possible projects in Detroit or Grand Rapids, a successful effort in Minnesota could guide places like Troy, or even tiny Acme. Both lack a downtown and face threats from ongoing sprawl.

By the early 1990s, St. Louis Park's main commercial strip had declined to a collection of pawnshops, check-cashing storefronts, and struggling retailers. Officials decided it was high time for a downtown.

"People really wanted to have a place in their community where they could go and just hang out, a real town center," said Richard McLaughlin, the architect and town planner who conducted public workshops that planned a shopping district and housing surrounding a town green. The city hired TOLD Development Company, which, paying close attention to the retail atmosphere, broke ground in 2001 on 100,000 square feet of retail space and 660 housing units. The firm's principal, Bob Cunningham, said the plan paid off.

"What's really attracting people to live there is the mix of retail, because that enhances their lives," Mr. Cunningham said, adding that residential occupancy rates have never dropped below about 94 percent.

The mix includes a daycare center, Pier One Imports, restaurants, Panera Bread, Starbucks Corporation, and locally owned boutiques, as well as a farmers market and public events that transformed the 600-foot long town green, connected to 30-acre Wolfe Park, into a town focal point.

The town helped the project by building smaller, shared-use parking structures, and revising its tax code to capitalize on rising property values to finance the city's investments in the town green and streetscapes. Mr. Cunningham said that financing was the trickiest part: "Lenders are still either apartment, condo, or retail lenders. Most don't do mixed use. But this is a product type whose time has come."

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National Center for Policy Analysis

BRIEF ANALYSIS
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Thinking Outside The "Big Box"

by Pamela Villarreal

Neighborhoods, city councils and the media are debating whether to welcome or discourage big-box retailers. While Wal-Mart comes to mind, big-box retailers are defined as any free-standing store greater than 50,000 square feet, and most big-box stores now range in size from 90,000 to 200,000 square feet. Critics claim that large retailers crowd out mom-and-pop competitors and replace them with windowless warehouses filled with minimum wage workers. Big-box retailers promise economic benefits such as sales tax revenues, jobs, competitive wages and low prices. But do they deliver? Empirical evidence shows that they have provided numerous benefits.

The Development of Big-Box Stores. Over the past 50 years, increasing mobility has made it possible for people to shop greater distances from where they live or work. The increased competition for customers necessitated larger stores. David Boyd of Denison University argues that changing regulations also facilitated the spread of large retailers. Until the federal Consumer Goods Pricing Act of 1975, manufacturers could establish minimum prices at which their products must be sold by retailers. Such resale price maintenance severely limited price competition. The current law, however, allows mass merchandisers to provide manufacturers' products at a lower price.

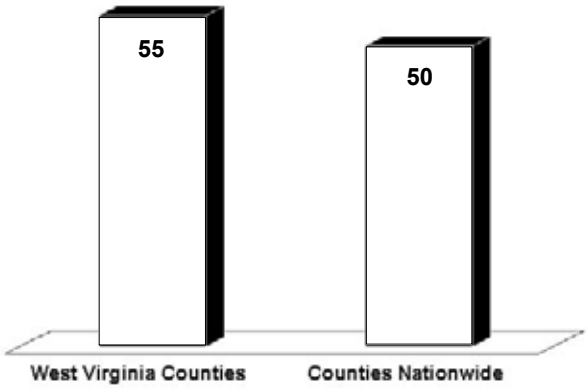
Big-Box Benefit: Increased Local Sales. Kenneth Stone of Iowa State University found that retail sales dollars from adjacent counties are lost to counties with big-box stores. In a study on the impact of Menards home improvement stores on Iowa counties, Stone concluded:

- Counties with Menards stores averaged about $21 million more in sales six years after the store opened compared to adjacent counties.
- Adjacent counties lost about $5 million in sales, on the average, indicating that consumers were crossing county lines to shop at Menards.

Stone also found the effect of Wal-Mart supercenters in Mississippi was similar. Furthermore, he discovered that some stores not in direct competition with Wal-Mart, such as high-end furniture stores, experienced greater sales due to the increase in shoppers attracted to the nearby Wal-Mart.

FIGURE I

New Jobs in Wal-Mart Counties
(net permanent gain in retail jobs)



Sources: Michael J. Hicks, et al., "The Regional Impact of Wal-Mart Entrance: A Panel Study of the Retail Trade Sector in West Virginia," *The Review of Regional Studies*, Vol. 31, No. 3, 2001, and Emek Basker, "Job Creation or Destruction? Labor-Market Effects of Wal-Mart Expansion," *Review of Economics and Statistics*, February 2005.

Big-Box Benefit: More Jobs. Critics assume that the greater competitive edge of big-box retailers comes from their ability to hire fewer workers and pay them less. However, empirical evidence has not found this to be true.

- Marshall University professor Michael Hicks found that West Virginia counties with Wal-Mart stores experienced a permanent net gain of about 55 retail jobs, on the average.
- A University of Missouri study of 1,749 counties nationwide showed that Wal-Mart counties experienced a permanent net gain of 50 retail jobs. (See Figure I.)
- Bates College researchers Brian Ketchum and James Hughes showed that Wal-Mart host counties in Maine experienced a net gain in weekly retail wages of $8.24 relative to non-Wal-Mart counties. While this is not statistically significant, it confirms that Wal-Mart did not lower retail wages.

The West Virginia study also revealed that Wal-Mart host counties experienced an average net increase of

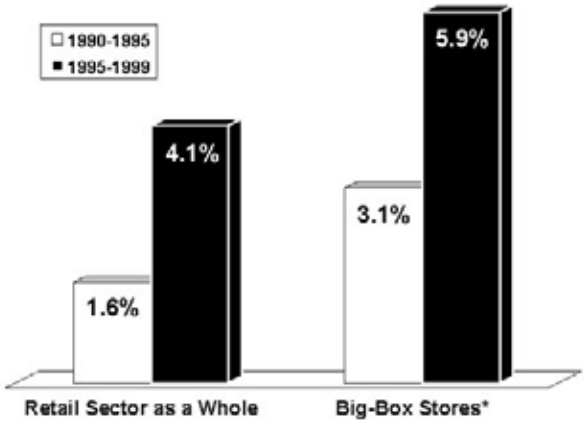
five new retail firms. Researchers refer to this as the "travel substitution effect": shoppers who previously drove to larger urban areas now have the incentive to shop in their own town, prompting new firms to cluster around big boxes.

Big-Box Benefit: Increased Productivity. Nationwide, big-box retailers have increased labor productivity, as measured by retail sales per employee:

- Between 1990 and 1999, much of the productivity growth in general merchandise stores was attributed to larger stores and greater use of "point of sale" technology, such as scanners. (See Figure II.)
- From 1995 to 1999, labor productivity grew 2.3 percent annually, compared to only 1 percent annually between 1987 and 1995.
- One quarter of the 1.3 percentage point increase in productivity came from the retail sector, and one-sixth of this was mainly due to Wal-Mart.

FIGURE II

Retail Labor Productivity Growth, 1990-1999



Source: "Labor Productivity in the Retail Trade Industry, 1987-99," *Monthly Labor Review*, December 2001.

* "General merchandise" category including department stores, discount department stores, superstores and hypermarts, and dollar stores.

Since Wal-Mart began the push toward efficient distribution, other stores have copied its practices. Big-box retailers have an efficiency advantage: larger stores can house a greater selection of goods, encouraging more purchases by consumers and more sales per square foot, which enables them to reap economies of scale.

Big-Box Benefit: Lower Prices. Although big-box stores create a highly competitive environment that can crowd out smaller stores, they also reduce prices. Analyzing 102 urban, suburban and rural areas nationwide (with and without Wal-Mart supercenters), a study from the University of Texas at Dallas recently found the presence of a supercenter was associated with a 1.36 point decline in the Consumer Price Index (CPI) for groceries, even when controlling for local differences in the cost-of-living.

Moreover, a recent study from the National Bureau of Economic Research reveals the CPI does not completely reflect price changes when big-box stores such as Wal-Mart replace other stores. In other words, if a new Wal-Mart replaces a competitor, the Bureau of Labor Statistics survey is not adjusted to reflect the lower prices of the new store. This phenomenon is known as "consumer substitution bias" in the CPI. It results in an overstatement of the grocery inflation rate by about 15 percent annually.

The evidence that big-box retailers bring lower prices is not surprising. The cost of re-stocking goods is lower in large stores that use advanced technology, such as optical scanners, in their distribution systems. They pass these cost savings on to consumers.

Conclusion. Undoubtedly, as retail evolves and reduces market inefficiencies, small retailers will be affected. But evolving industries are nothing new; transportation, health care and other industries look far different than they did even a few decades ago. The efficiencies and market benefits brought by big box retailers should not be ignored in community debate.

Pamela Villarreal is a research associate with the National Center for Policy Analysis.

City of
OLYMPIA

900 Plum Street, P.O. Box 1967, Olympia, WA 98507-1967

MEMORANDUM

To: Olympia City Council

From: Bob C. Sterbank, City Attorney

Date: April 27, 2006

Re: Municipal Authority To Regulate Business Based on "Corporate Citizenship" and Local Economic Impacts

Introduction

Commencing forty years ago, the United States experienced a groundswell of interest in legislation to vindicate public concerns of the time. The most obvious manifestation of this interest was in legislation having to do with civil and voting rights and public accommodations. The tide of reform sparked a renewed concern for the "public interest". In Washington, the result was new legislation in such areas as public record disclosure, open public meetings, campaign finance disclosure, and environmental regulation.

A new wave of interest in reform legislation has recently arisen. It centers on concerns that some types of land uses and businesses overburden communities while not carrying their full share of the civic load. Problems raised extend from classic land use/zoning issues, to fears of overburdened infrastructure, to worry about big box white elephant structures poorly adapted to reuse, to inadequate employee benefits and wages resulting in a transfer of the cost of doing business to government.

Concerns relating to land use regulation, design, and physical infrastructure are relatively "familiar" and have or can be addressed in state legislation (e.g. authorizing impact fees for transportation, schools, and parks) or local zoning codes. See http://www.mrsc.org/Subjects/Planning/BigBoxRetail.aspx#top (Municipal Research & Services Center (MRSC) paper reporting how some Washington jurisdictions have addressed such matters). Further concerns, extending to economic and social welfare questions, have typically been considered the province of statewide legislation. (For example, they are not addressed to any significant degree in the MRSC paper.) Recently, though, such concerns have prompted discussion about the necessity and legality of municipal intervention.

The City Council was previously requested to consider such legislation, and in turn requested that legal staff analyze a variety of legal issues to assist the Council in determining whether adoption of such legislation was advisable. Listed below are the specific issues upon which members of the City Council requested analysis, broken down into two categories: those items that can most likely be addressed through traditional land use/zoning measures; and those that most likely require some "other" sort of regulation by an entity other than the City of Olympia:

Land use-based restrictions on "Big-Box" and/or "Formula" Retail:

- Community Impacts Review
  - Process
  - Land Use/Environmental (e.g., stormwater impacts, parking, traffic, height, lighting, noise);
  - Other Municipal Services (police, fire, utilities)
- Regulation of "Formula" Businesses and "Big Boxes"
- Ban on "Mirrored" Structures (no "splitting" of big-box to avoid cap)
- Re-Occupancy of Large Space Vacated by Big-Box Retail/Performance Bond
- Design Standards
- Pedestrian Orientation

Regulating Corporate Responsibility – (Beyond Land Use/Zoning Concepts)

- Labor/Living Wage/Local Hiring
- Impacts on Locally Owned Small Business
- Health Care Responsibility and Plans (avoiding impacts on local healthcare system)
- Dollars Reinvested in Community (including local charitable donations)
- Local Connection to Community (same as local hiring/reinvestment)

The latter set of issues is addressed primarily through an analysis of the "Community Values Act," proposed by the Alliance for Democracy.

This is a sprawling topic which cannot be definitively addressed in one paper. The problems raised extend across a spectrum of economic, land use, environmental, labor, and social welfare concerns. In addition, the issues raised implicate a host of issues best discussed among Council and legal counsel under the protection of the attorney-client privilege. The analysis here is therefore intended to present primarily an overview of legal issues relating to municipal regulation of large scale retail uses and of business/corporate citizenship in general, to assist the public in understanding the parameters on Council action, and to do so in a way that preserves the attorney-client privilege for previous and future discussions among the City Council members, the City Attorney and City legal staff, and/or outside counsel.

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A. Community Impacts Review Process

- Land Use/Environmental (e.g., stormwater impacts, parking, traffic, height, lighting, noise);
- Other Municipal Services (police, fire, utilities)

1. Municipal Regulation In General -- Cities May Exercise Legislative Powers Which Do Not Conflict With State Law

The Washington Constitution provides cities broad legislative and police powers to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. This constitutional grant of power is reinforced by state statute. Per RCW 35A.11.020 ("Powers vested in legislative bodies of noncharter and charter code cities."), a non-charter code city has:

> "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. ...
>
> In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title. ...

See *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560, 29 P.3d 709 (2001) (first class city may legislate concerning any local subject matter as long as it is not preempted by state law, unless the state law allows for concurrent jurisdiction.). "Where state law does not preempt an area, there is room for cities to exercise concurrent jurisdiction, so long as the local regulation does not conflict with existing state law." 1A Wash. Prac. § 60.5. Concurrent jurisdiction is presumed unless shown otherwise. *Id.*, *citing Baker v. Snohomish County Dep't of Planning & Commun. Development*, 68 Wn. App. 581, 841 P.2d 1321 (1992), *rev. denied,* 121 Wn.2d 1027 (1993). To be inconsistent, the ordinance (1) must conflict with some general law, (2) be an unreasonable exercise of the jurisdiction's police power, or (3), have a subject matter that is not local. *Weden v. San Juan County*, 135 Wn.2d 678, 692-93, 958 P.2d 273 (1998) recon. denied (1998); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

2. **Zoning Regulations: Conditional/Special Use Review Process**

Cities, including non-charter code cities, have the power to create a category of land use permit referred to as "special" or "conditional" use permits. See, e.g., RCW 35A.63.100 (2), 35A.63.110(3) This category can include any type of land use, which may only be permitted where it has been appropriately conditioned with measures aimed at ensuring its compatibility with the surrounding zoning district, and its conformance to other standards set forth in the zoning ordinance to protect public health, safety and welfare. *State ex rel. Standard Mining & Development Corp. v. City of Auburn,* 82 Wn.2d 321, 510 P.2d 647 (1973).

Under the equal protection and due process clauses of the Federal Constitution and class legislation provision of State Constitution, zoning regulations must be uniform and equal in operation and effect, must contain reasonable classifications, and cannot be enacted on the sole basis that certain individuals desire them. *State ex rel. Smilanich v. McCollum (1963) 62 Wash.2d 602, 384 P.2d 358. See Parkridge v. Seattle*, 89 Wn2d 454, 573 P.2d 359 (1978) ("The State Environmental Policy Act of 1971 and the other statutes and ordinances administered by the building department serve legitimate functions, none of which is intended for use by a governmental agency to block the construction of projects, merely because they are unpopular."); *Maranatha Mining v. Pierce County,,*59 Wn.App. 795, 805, 801 P.2d 985 (Div. 2 1990) (Council may not disregard the record and base its decision on community displeasure; its decision must be " backed by policies and standards as the law requires.").

3. **Impact Fees**

Generally speaking, state law preempts the field of taxation in the area of development:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.

RCW 82.20.020. This statute "requires strict compliance with its terms." *Isla Verde Int'l. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755, 49 P.3d 867 (2002) (en banc), *recon. denied* (citations omitted).

However, the statute allows certain exceptions, for example, for parks, voluntary agreements, transportation impacts and school impacts. RCW 82.02.050 - .090. (SEPA – discussed below -- allows for impact mitigation fees as well, however, "a person required to pay an impact fee for system improvements pursuant to RCW 82.02.050 through 82.02.090 shall not be required to pay a fee pursuant to RCW 43.21C.060 for those same system improvements." RCW 43.21C.065.

In a very recent decision involving Olympia, the Washington Supreme Court, reversing the Court of Appeals, held that the Nollan/Dolan "nexus" and "rough proportionality" determinations required for a local government to avoid a federal "takings" claim when it requires the dedication of real property as a condition of development approval, does not apply to GMA impact fees imposed by the City under RCW 82.02.050 - .090 (e.g., for parks, transportation, schools, fire stations, etc. identified in the local capital facilities plan required pursuant to the Growth Management Act). *City of Oympia v. Drebick*, No. 75270-2 (Supreme Court 1/19/06). The Court upheld Olympia's methodology for calculating transportation impact fees based on: the establishment of a reasonable service area; identification of the public facilities therein that would require improvement over a span of six years; and preparation of a fee schedule taking into the account the type and size of the development seeking approval as well as the type of public facility being funded.

However, none of the various limited exceptions to preemption under RCW 82.02.020 which allow impact fees are suited to addressing large scale retail / corporate "citizenship" concerns. Depending on the particular case, they are likely of assistance in more conventional areas such as transportation improvements necessitated by large scale retail development.

4. <u>Washington's State Environmental Policy Act (SEPA)</u>

Like many states, Washington has enacted a "little NEPA" law that mirrors the federal National Environmental Policy Act ("NEPA") and requires disclosure and study of environmental impacts for both public and, in some cases, private projects. Washington's law, the State Environmental Policy Act, or "SEPA," is found in state statutes at RCW 43.21C. SEPA may sometimes also be brought to bear when there is a potential for secondary or cumulative impact of a proposed project on the surrounding region.

For example, a large scale retail business may be established outside a town's boundaries, but some of its impacts may likely be felt within that town. It has long been established under Washington environmental and land use law that the "host" jurisdiction must consider the total impacts of such a use, including those falling on adjoining jurisdictions. *SAVE v. Bothell*, 89 Wn2d 862, 576 P.2d 401 (1978) ("Bothell may not act in disregard of the effects outside its boundaries. Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve the welfare of the entire affected community. If it does not do so it acts in an arbitrary and capricious manner."). A California appellate court recently articulated an analogous but broader principle (potentially encompassing economic impacts) under the California Environmental Quality Act ("CEQA"), which is analogous in some respects to Washington's SEPA. It held in *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1213-20 (2004), that CEQA required a discussion of cumulative impact caused by a project and other retail development in the area surrounding the project site. The court identified impacts caused by inter-store competition, traffic, and ambient air quality as potential cumulative impacts. *Id.* at 1215-16. It required an

analysis of the cumulative impact "resulting from construction and operation of the proposed shopping center in conjunction with all other past, present or reasonably foreseeable retail projects that are or will be located within the proposed project's market area." *Id.* at 1218-19.

However, Washington SEPA's utility in addressing impacts beyond "classic" land use concerns is likely more limited, in light of the manner in which the courts have interpreted it. Unlike in some other states that have addressed large-scale retail under the rubric of environmental review, in Washington "purely economic interests are not within the zone of interests protected by SEPA." *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000), *citing Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52-53, 882 P.2d 807 (1994). This rule was established initially in a case involving the City of Olympia, Concerned Olympia Residents for the Environment ("CORE") v. City of Olympia, 33 Wn.App. 677, 567 P.2d 790 (Div. II 1983). In that case, a group attempted to block the construction of a new wing at St. Peter's Hospital. One of the group's leaders asserted that the new wing would damage him because he had a contract to sell his property on Olympia's west side to another hospital company, and he would be economically damaged because St. Peter's construction could cause his sale to fall through. The Court of Appeals gave what it termed "short shrift" to this argument, noting that "that type of harm to economic interests is not even arguably within the zone of interests" protected by SEPA. So, on the one hand, economic competition, and the risk that new development will drive existing stores out of business, is not an environmental impact that requires review or mitigation under SEPA. On the other hand, for example, if the effect of economic competition will be urban blight, then review under SEPA is called for. The key is a direct nexus to an impact on the *physical* environment. *West 514, Inc v. The County of Spokane*, 53 Wn. App. 838, 770 P.2d 1065 (Div.3 1989), *review denied*, 113 Wn.2d 1005 (1989), *citing* RCW 43.21C.030 (2), WAC 197-11-444(2).

While SEPA and its implementing regulations make it clear that welfare, social, economic and other considerations are not within its scope, they do allow municipalities to combine required SEPA analyses with other analyses or documents. See WAC 197-11-448. These other analyses or documents could presumably be required by the City under its permitting authority. However, these other analyses or documents could not themselves provide the basis for exercise of "substantive SEPA authority," that is, conditioning or denying a proposal based on environmental impacts and SEPA policies established to mitigate them. That is because even SEPA's substantive authority is limited to mitigating the environmental impacts that are within the scope of the statute and, as noted, purely economic and socio-economic impacts are not within the zone of interests protected by SEPA.

5. <u>Washington's Growth Management Act</u>

Among the purposes of Washington's Growth Management Act ("GMA") is to "[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner" and to "[r]educe the inappropriate conversion of

undeveloped land into sprawling, low-density development." RCW 36.70A.020 (1), (2). The GMA has six mandatory elements, including land use, housing, capital facilities, utilities, rural and transportation. RCW 36.70A.070. Economic development is listed as a planning goal, but is not a required element. Per WAC 365-195-070(2), "[w]hether the jurisdiction elects to develop a separate economic development element or not, desired levels of job growth, and of commercial and industrial expansion should be identified and supporting strategies should be integrated with the land use, housing, utilities transportation, and other features of the comprehensive plan."

Participation by a City in the formulation of a county's GMA plan and policies as well of the City's own GMA plan and development regulations provide an opportunity to establish performance standards and permitting requirements which may address some concerns engendered by large scale retail and other business forms, in the context of scale and design as well as adverse impacts on the community infrastructure and economy. By the same token, some might argue that the failure to address such matters in the adoption of plans and regulations could reduce such opportunities.

B. <u>Generalized Design Standards / Pedestrian Orientation</u>

Several communities have instituted design standards for large retail establishments. Common regulations address color, exterior building materials, and design of the building façade (including frontage lengths, heights, etc.). Such design ordinances are allowed in Washington, but are subject to significant limitations. In *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (Div.1 1993), the Court of Appeals observed:

> the issue of whether a community can exert control over design issues based solely on accepted community aesthetic values is far from "settled" in Washington case law. The possibility certainly has not been foreclosed by our Supreme Court. *See Polygon Corp. v. Seattle*, 90 Wn.2d 59, 70, 578 P.2d 1309 (1978) ("While this court has not held that aesthetic factors alone will support an exercise of the police power, such considerations taken together with other factors can support such action."). *See also Duckworth v. Bonney Lake*, 91 Wn.2d 19, 30, 586 P.2d 860 (1978) ("While we have indicated that aesthetic considerations alone may not support invocation of the police powers ..." Emphasis added.).
> Clearly, however, aesthetic standards are an appropriate component of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street".

Id. at 82. *Anderson* voided on vagueness grounds the City of Issaquah's building design code because it did not apprise applicants or design professionals of what was required. For example, the code admonished that new development "should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of 'appropriate proportions', its colors should be 'harmonious' and seldom 'bright' or 'brilliant'..." resulting in an ad hoc approval process as applicant and city authorities differed on how to implement such standards. *Id* at 75, 83 (citations omitted).

The City of Sequim has a comprehensive set of standards that address aesthetic character, site design, and relationship of large scale retail to the surrounding area. Their purpose is to "provide guidance for the site and structural development of large retail establishments in order to maintain the rural agricultural heritage of the City of Sequim." *Design Guidelines for the City of Sequim*, at http://www.ci.sequim.wa.us/planning/designguidelines/ index. cfm. The Sequim guidelines make a point of referring to the admonition in Sequim's Comprehensive Plan that "the City shall support existing businesses and shall seek to attract new businesses and industries which promote and protect the environment and strengthen and diversify the economic base, expand and enhance the tax base, improve wage and salary levels, increase the variety of job opportunities and utilize the resident labor force." However, they do not otherwise go beyond typical concerns about design, use, and maintenance (the farthest they go is to require "community" spaces for particular types of large retail developments and to impose maintenance requirements, presumably for sites where a use has been discontinued).

To the extent that concerns about aesthetic and design issues are to be addressed, it is likely that a well-crafted set of regulations – sufficiently specific and keyed to planning/environmental as well as aesthetic concerns – would pass judicial muster in Washington.

C. Specific Land Use Regulation of "Chains", Franchise, or "Formula" Businesses

Although some impetus for additional regulation of businesses or uses arises from concern about impacts deriving from their scale, another impetus is a perceived deleterious effect of "formula" or "franchise" establishments, regardless of size. These are viewed, for example, as having less "stake" in the community, as competing unfairly with home-grown endeavors, and/or as making little or a negative contribution to a community's character. Some communities have therefore begun regulating "formula" businesses or franchises, or those required by contractual or other arrangement to maintain similar services, merchandise, trademarks, logos, service marks, symbols, décor, architecture, layout, uniform or other standardized feature. Some regulations address all businesses (Bristol, RI; Calistoga, CA; Coronado, CA; San Francisco, CA), while others have focused on "formula" restaurants (Bainbridge Island, WA; Carmel, CA; Pacific Grove, CA; Sanibel, FL; Solvang, CA; and York, ME). Some areas have capped the number of formula businesses permitted (Arcata, CA), while others have written ordinances to

regulate specific areas within a community (Bristol, RI; Port Jefferson NY). See http://www.newrules.org/retail/formula.html (providing a listing of such ordinances).

There is apparently only one case upholding the constitutionality of restrictions on formula retail stores and it is unpublished, which limits its precedential value. *See Coronadans Organized For Retail Enhancement v. City of Coronado*, 2003 Cal. App. Unpub. LEXIS 5769 (Cal. App. Div. 4 2003). The case focused on the adoption by the City of Coronado, California of an ordinance requiring "formula retail" businesses to obtain a "major special use permit" and limiting the size and space such a business could occupy. Without much analysis, the California Court of Appeals upheld the law against challenges that it violated the Commerce Clause (treating interstate businesses differently than intrastate or local businesses) and the Equal Protection clause (excluding nonresident businesses from opening or expanding in the city). Its status as an unpublished decision and its dearth of analysis means that it would provide little assistance in defense of a similar claim in Washington (see below).

Regulations have also been upheld that focus on the size of a proposed establishment rather than on whether it is part of a "chain" or displays standardized logos. See *Wal-Mart Stores, Inc. v. Hood River County*, LUBA No. 2004-021 (Jul. 16, 2004), *aff'd without opinion*, 195 Ore. App. 762, 100 P.3d 218 (2004), *rev. denied*, 338 Ore. 17, 107 P.3d 27 (2005) (rejection of 186,685 square foot proposal under standards requiring it to be "compatible" with buildings in the surrounding area where next largest building was the existing 72,000 square feet Wal-Mart); *Home Depot U.S.A. v. City of Portland*, 169 Or. App. 599, 10 P.3d 316 (2000), *review denied*, 331 Or. 583, 19 P.3d 355 (2001) (upholding Portland zoning ordinance limiting "large format retail uses" above 60,000 square feet in certain "industrial" and "employment" districts, but not in "commercial" districts); *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*, 997 F.Supp. 340 (E.D.N.Y. 1998). (size restrictions in "Superstore Law" do not violate substantive due process rights); *Loreto Develop. Co., Inc. v. Village of Chardon*, 119 Ohio App.3d 524, 695 N.E.2d 1151 (1996) (upholding size restrictions limiting retail to no more than 10,000 square feet and 10 employees).

The success of such regulations in Washington, if directly challenged, is uncertain. On one side of the spectrum, it is likely that, absent other factors, regulations which fell equally on local and interstate businesses and simply addressed size (and what size was appropriate in which zone) would be upheld. However, regulations which, for example, purported to place greater burdens on businesses solely because of their display of uniform trademarks would likely be challenged as discriminatory and violative of free speech rights, and there is little Washington case law available to assist in the defense of such claims.

On occasion, a developer seeking to challenge a city's land use regulation has alleged an anti-competitive activity in violation of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988). *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1120 (10th Cir. 1991). In general, the Sherman

Act does not apply to anticompetitive restraints imposed by the state "as an act of government." *Parker v.* Brown, 317 U.S. 341, 352 (1943). This immunity does not apply directly to local governments, but a municipal government's "restriction of competition may sometimes be an authorized implementation of state policy." *City of Columbia*, 499 U.S. at 370. "[I]t is enough... if suppression of competition is the foreseeable result of what the statute authorizes... The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 373 (citation omitted). *See* Jonathan Moore Peterson, *Taming the SprawlMart: Using an Antitrust Arsenal to Further Historic Preservation Goals*, 27 Urb. Law. 333, 367-80 (1995) (discussing implications of anti-trust immunity for communities seeking to regulate big-box stores).

D. Ban on "Mirrored" Structures (no "splitting" of big-box to avoid cap)

If the City were to consider adopting regulations that would prohibit large scale retail operations (i.e., "big boxes") based strictly on size, it would be prudent to include a provision that would similarly prohibit attempts by retailers to get around the square footage cap by building more than one (slightly) smaller structures on a particular site that would serve the same retail operation.

E. Re-Occupancy of Large Space Vacated by Big-Box Retail / Requirement for Performance Bond

Vacancies and abandoned sites have been reported as major side effects of large scale retail development. See *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1210 (2004) (citing studies on the effect of such vacancies).

Restrictive covenants in leases for such stores excluding certain types of businesses from re-use may exacerbate the problem. See *Tippecanoe Assoc. II, LLC v. Kimco Lafayette 671 Inc.*, 829 N.E.2d 512 (Ind. S. Ct. 2005) (overturning restrictive covenant on site vacated by Target). Some communities have responded by encouraging or requiring a bond to cover the future cost of demolition and restoration, if needed, and by encouraging or requiring the omission of restrictive covenants from leases. Bonding in various contexts (e.g. for installation of particular improvements, landscaping) is a common practice in Washington as elsewhere. Legislation extending it to future "maintenance" and demolition or re-use should also be possible. Limitations on potential types of future re-use may be more problematic, infringing on the "bundle of rights" to which property owners are entitled under Washington law. See *Manufactured Housing v. Washington, 142 Wn2d 347,13P3d 183 (2000).*

However, RCW §35.80A.010 *et seq.* suggests another possible means of addressing the effects of abandoned large scale retail sites. Under this statute, a

> "blight on the surrounding neighborhood" is any property, dwelling, building, or structure that meets any two of the following factors: (1) If a dwelling, building, or structure exists on the property, the dwelling, building, or structure has not been lawfully occupied for a period of one year or more; (2) the property, dwelling, building, or structure constitutes a threat to the public health, safety, or welfare as determined by the executive authority of the county, city, or town, or the designee of the executive authority; or (3) the property, dwelling, building, or structure is or has been associated with illegal drug activity during the previous twelve months.

RCW 35.80A.010. In addition, Washington's Community Renewal Law, RCW 35.81.010 *et seq.*, expressly grants municipalities various authorities to renew the community once the municipality officially determines there is a "blighted area":

> "Blighted area" means an area which, by reason of the substantial physical dilapidation, deterioration, defective construction, material, and arrangement and/or age or obsolescence of buildings or improvements, whether residential or nonresidential, inadequate provision for ventilation, light, proper sanitary facilities, or open spaces as determined by competent appraisers on the basis of an examination of the building standards of the municipality; inappropriate uses of land or buildings; existence of overcrowding of buildings or structures; defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility or usefulness; excessive land coverage; unsanitary or unsafe conditions; deterioration of site; existence of hazardous soils, substances, or materials; diversity of ownership; tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; improper subdivision or obsolete platting; existence of persistent and high levels of unemployment or poverty within the area; or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime; substantially impairs or arrests the sound growth of the municipality or its environs, or retards the provision of housing accommodations; constitutes an economic or social liability; and/or is detrimental, or constitutes a menace, to the public health, safety, welfare, or morals in its present condition and use.

RCW 35.81.015(2). *See also Miller v. Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963) (upholding constitutionality of predecessor law). Under this Law, municipalities have the power to adopt, approve, or modify:

> (c) plans for carrying out a program of voluntary or compulsory repair and rehabilitation of buildings and improvements, (d) plans for the enforcement of

> state and local laws, codes, and regulations relating to the use of land and the use and occupancy of buildings and improvements and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements, (e) appraisals, title searches, surveys, studies, and other preliminary plans and work necessary to prepare for the undertaking of community renewal projects... The municipality is authorized to develop, test, and report methods and techniques, and carry out demonstrations and other activities, for the prevention and the elimination of blight, for job creation or retention activities, and to apply for, accept, and utilize grants of, funds from the federal government for such purposes.

RCW 35.81.070(9) (c)-(e).

While requiring more affirmative effort on the part of a municipality than would be necessary were an agreement and bond in place in advance governing the disposition of a vacant large scale retail site, these statutes may provide tools in cases where the effects of abandonment on the surrounding community are significant.

II. Municipal Regulation of Corporate Responsibility – Beyond Land Use/Zoning Concepts

The Council has also inquired about the body of knowledge and authority respecting municipal attempts to regulate business according to certain social goals, and to address legal issues surrounding various types of legislation the City might consider adopting if it wished to venture into this predominantly uncharted regulatory territory to protect community interests. This memo does so in the context of the "Community Values Ordinance" proposed by the Alliance for Democracy, as well as addressing the specific list of questions posed by Council members.

The "Community Values Ordinance" purports to establish a business licensing scheme that relies upon an annual "Community Values Report Card," on which retailers would be given points for "good citizenship" and demerits for not-so-good citizenship. Some examples of good "citizenship" would be: keeping profits in the local community (e.g., local hiring, donations to local charities); a corporate history of paying decent wages, providing good health benefits, and supporting unionization; and compliance with environmental laws. Conversely, examples of bad "citizenship" would include: negative impacts on local small business; past violations of anti-discrimination laws; a corporate history of discouraging unionization, and/or failing to pay a "living" wage; and any violation of environmental laws.

A. Constitutional Context in Which Any Proposed Mechanism Must be Scrutinized

As discussed above, Washington's regime of statutes, land use regulations, and impact fees lends itself relatively well, but not perfectly, to addressing land use --and reuse --concerns. There are additionally some avenues for limited entry into the social welfare/economic regulatory arena, particularly with regard to wages and working conditions. However, there are both substantial legal hurdles and significant practical questions inherent in a municipal attempt to establish and enforce a regime regulating on a broader basis "good citizenship" on the part of a segment of the business community.

The legal hurdles largely derive from the network of constitutional protections for due process, property, and free speech rights which attach to the conduct of business and use of property. These are described below, before we address the specifics of the "Community Values Act," to provide a frame of reference in which to gauge the viability of various proposals which may be brought forward.

1. Federal and State Restrictions on Takings of Private Property

a. Federal Law

The Fifth Amendment provides that private property cannot be taken for public use without just compensation. *See* U.S. Const. Amend. V. This amendment applies to the states through the Fourteenth Amendment. A taking can be an appropriation or physical taking, *i.e.*, where the City takes physical title to property, or physically occupies it. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). A taking can also be regulatory, *i.e*, where regulation denies all economically beneficial or productive use of land, or unreasonably interferes with reasonable and distinct investment-backed expectations. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). "[A] state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Id.*, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Where dedication of real property is required as a condition of development approval, there must be a "nexus" between the impacts of development and the dedication, and the dedication must be a "roughly proportional" to the impacts *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Dolan*, the Court held that the City of Tigard, Oregon's requirement that a landowner give up part of her property for flood abatement and a pedestrian path was not proportional to the impact of the development.

b. Washington Takings Law

Washington's Constitution states that "No private property shall be taken or damaged for public or private use without just compensation having been first made..." Wash. Const. Art 1, § 16. The Washington Supreme Court has held that this provision "is significantly different from its United States constitutional counterpart, and in some ways provides greater protection." *Eggleston v. Pierce County*, 148 Wn.2d 760, 766, 64 P.3d 618 (2003) (en banc), *citing Manufactured Housing Communities v. State*, 142 Wn.2d 347, 18 P.3d 183 (2000).

However, as noted above, the Washington Supreme Court recently held that the Nollan/Dolan "nexus" analysis did not apply to development impact fees for transportation, schools, parks, etc., imposed – per an established methodology --by the City pursuant to RCW 82.02.050 - .090.

2. Equal Protection

The Fourteenth Amendment's Equal Protection Clause requires fairness in the application of governmental regulation. Three standards of review are used in equal protection cases: strict, intermediate, and rational scrutiny. Suspect classification (such as race) and fundamental constitutional interests (such as free speech) invoke strict scrutiny review of a land-use decision; such decisions must be justified by a compelling governmental interest and be the least restrictive means possible. Discrimination based on a particular characteristic like age or gender is reviewed with intermediate or mid-level scrutiny; the regulation must be substantially related to an important governmental interest.

In general, land use claims are subjected to rational basis review in which the court asks the following question: can the legislation meet any constitutional goal and is there any rational basis for the regulation? In the absence of a suspect class or fundamental right, "the general rule is that legislation is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). However, it should be borne in mind that free speech is considered a fundamental right, a factor which may bear on regulations seeking to bar businesses from announcing their franchise origins or affiliations.

Washington's Equal Protection Clause is found in Wash. Const. Art I, § 12 and is construed substantially identically to the 14th Amendment. *Equitable Shipyard, Inc. v. State*, 93 Wn.2d 465, 476, 611 P.2d 396 (1980). Under this provision, "[t]he administration of an otherwise valid law can result in an equal protection violation if the law is administered in a way that unjustly discriminates against similarly situated people." *Holbrook, Inc. v. Clark County*, 112 Wn. App. 354, 367, 49 P.3d 142 (Div.2 2002) (citations omitted). This depends on the standard of review: strict scrutiny is applied if there is infringement of a fundamental right or involvement of a suspect class; otherwise, rational basis review is used. *Id.* at 368. Rational basis review requires a court to determine:

(1) whether the governmental action applies alike to all members within the designated class;

(2) whether there are reasonable grounds to distinguish between those within and those without the class; and

(3) whether the classification has a rational relationship to the purpose of the legislation.

Id., citing Convention Ctr. Coalition v. City of Seattle, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986).

3. Privileges and Immunities

The federal privileges and immunities clause provides in relevant part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state... deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. The Washington Constitution also has a specific privileges and immunities clause. Article I, § 12 states that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. art. 1, § 12. This provision is analyzed separately and independently from analysis under the U.S. Constitution. *See Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 816, 83 P.3d 419 (2004) (applying *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) : "After considering the *Gunwall* factors, we conclude that article I, section 12 of the Washington State Constitution provides a basis for constitutional challenge independent from the equal protection clause of the United States Constitution.").

For a violation of a State constitutional provision to occur, "the law, or its application, must confer a privilege to a class of citizens." *Grant County Fire Protection Dist.*, 150 Wn.2d at 812. Such privileges are "fundamental rights which belong to the citizens of the state by reason of such citizenship," including "the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property" and so on. *Id.* at 813.

4. Washington Constitutional Prohibition Against "Special Legislation"

The Washington Constitution also prohibits "private or special laws... for granting corporate powers or privileges." Wash. Const. Art. II, § 28. This "subdivision relates to powers conferred on municipal as well as private corporations." *Island County v. State*, 135 Wn.2d 141, 148 (1998), *citing Terry v. King County*, 43 Wn. 61, 86 P. 210 (1906); *Miller v. City of Pasco*, 50 Wn.2d 229, 235, 310 P.2d 863 (1957). According to the Washington Supreme Court,

> A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class

> consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions.

Island County, 135 Wn.2d at 149 (citation omitted). In *Island County*, the Washington Supreme Court held that a state statute creating "community councils" for unincorporated islands with more than 30,000 people was "special legislation" and violated the Washington constitution. The Court held that the state had provided no rational reason to differentiate between different classes of island residents.

5. Due Process: Procedural and Substantive

a. Procedural Due Process

Both the U.S. and Washington constitutions prohibit denial of any person "due process of law." Basic procedural due process requires notice "reasonably calculated to inform persons who might want to be heard of the nature of the matter." 17 Wash. Prac. Series § 4.7, Denial of Due Process, at 184 (2d Ed. 2004). Hearings are often required; failure to hold a statutorily mandated hearing is a "fatal defect." *See, e.g., Lund v. City of Tumwater*, 2 Wn. App. 750, 472 P.2d 550 (1974) *review denied*, 78 Wn.2d 995 (1970). The hearing must be fair, the decision makers must enter written findings of fact and conclusions of law, and a verbatim transcript must be made. 17 Wash. Prac. Series § 4.7, Denial of Due Process (2nd Ed. 2004). A municipality can run afoul of procedural due process by failing to follow proper procedures (e.g., proper notice, public hearing) in implementing land use laws and regulations. These requirements should not be directly implicated in addressing issues concerning large scale retail and corporate responsibility.

b. Substantive Due Process & Section 1983 Claims

The Substantive Due Process Clause of the U.S. Constitution's Fourteenth Amendment (as well as the Fifth Amendment) prohibits government action that deprives "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Substantive due process "refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs." *Armendariz v. Penman*, 31 F.3d 860, 867 (9th Cir. 1994), *reh'g, vacated in part on other grounds*, 75 F.3d 1311 (1996) (en banc).

Establishing a violation of due process entails a two part test. First, a plaintiff "must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, *citing Euclid v. Ambler*, 272 U.S. 365, 395 (1926) (other citations omitted). Second, a court must examine "such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm." *Armendariz*, 31 F.3d at 867, *citing Sinaloa Lake Owners Ass'n v. Simi Valley,* 882 F.2d 1398, 1409 (9th Cir.1989), *cert. denied,* 494 U.S. 1016 (1990).

The Washington courts' view of substantive due process is different from the federal approach and less forgiving to municipalities. A land use regulation does not violate substantive due process "where (1) the regulation aims to achieve a legitimate public purpose; (2) the means adopted are reasonably necessary to achieve that purpose; and (3) the regulation is not unduly burdensome on the property owner." *Isla Verde Int'l. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 766, 49 P.3d 867 (2002) (en banc), *recon. denied* (citation omitted).

In *Guimont v. Clarke*, 121 Wn2d 586, 854 P.2d 1 (1993), the Washington Supreme Court struck down as unduly oppressive a law imposing relocation costs on mobile home park owners. The Court, repeating a formulation from an earlier precedent, pointedly noted that the costs involved were "more properly the burden of society as a whole..." It is this type of analysis which could be brought to bear on municipal attempts to regulate corporate citizenship through imposition of new costs or substantive requirements.

Subsequently, in *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998) (en banc), the Washington Supreme Court, in ruling for the frustrated land use applicant, held that the developer had a "constitutionally cognizable property right" in the grading permit it sought and that Spokane's conduct in attempting to frustrate its issuance "rings of deprivation of property through arbitrary interference with that process lawfully due." *Id.*

6. <u>Commerce and Dormant Commerce Clause</u>

The Commerce Clause grants Congress the power to "regulate commerce... among the several states." In upholding a San Francisco ordinance requiring contractors to provide benefits for registered domestic partners, the Ninth Circuit delineated a "two tiered approach" for challenges to local regulations under the Commerce Clause:

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2001) (citations omitted). The court found that "employers are 'subject to' the Ordinance only as to employees that have direct contact with the City" and that "the Ordinance will affect an out-of-state entity only after that entity has affirmatively chosen to subject itself to the Ordinance by contracting with the City." 253 F.3d at 469. *See also S.D. Myers, Inc. v. City and County of San Francisco*, 336 F.3d 1174 (9th Cir. 2003), *cert. denied,* 541 U.S. 936 (2004).

The court noted that "[i]mpact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause." 253 F.3d at 467, *citing White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 210 (1983). *See also* Joseph M. Manicki, *S.D. Myers v. San Francisco: Satisfactory C's on the Domestic Partnership Benefits Report Card - The Constitutionality of Contingent City Contracts Under the Commerce Clause*, 11 Law & Sex. 243 (2002).

In denying a facial challenge under the first tier, the Ninth Circuit noted that the challenger must meet a high burden of proof: it must "establish that no set of circumstances exists under which the [Ordinance] would be valid." 253 F.3d at 467. In the San Francisco case, the ordinance in question "contain[ed] no language explicitly or implicitly targeting either out-of-state entities or entities engaged in interstate commerce." *Id.* at 468.

The second tier affects an ordinance "as applied" under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* balancing test, "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved." 253 F.3d at 467, *citing Pike*, 397 U.S. at 142. The "burdens on interstate commerce of a statute will outweigh the benefits if the asserted benefits of the statute are in fact illusory." 253 F.3d at 471 (citation omitted).

The courts have held that taxes which subject transient businesses (whose actual costs to local communities are arguably more readily identifiable than for permanent non-local businesses) to higher business licensing fees are unconstitutional under the Commerce Clause. In *Homier Distributing Co. v. Staley*, the plaintiff, a distributor of hardware based in Indiana, held temporary sales 2 or 3 times a year in Pulaski, Arkansas. *Homier Distributing Co. v. Staley*, 371 F.Supp.2d 1006(2003) (*Accord Homier Distributing Co. v. City of Albany*, 90 N.Y.2d 153, 681 N.E.2d 390 (1997)). The County charged Homier a higher rate for a business license as a transient business. Although this fee could apply to any transient business, in practice it was only applied to out-of-state businesses. The Court, applying strict scrutiny, held that the fee was invalid under the Dormant Commerce Clause. A tax meets this test when the discriminatory element can be justified as a "compensatory tax." A local law will be declared invalid "on the theory that local economic protectionism is incompatible with the maintenance of a single national economic unit. *Id.* at 1011-1012.

Courts have similarly held that if local retailers receive favorable treatment under the law, no matter how even-handed it may appear on its face, the law is invalid for discriminating against out-of-state interests. The Court, following the New York court in *City of Albany*, held that the inquiry should take the form of a comparison between transient retailers and local established retailers to determine whether the Commerce Clause was implicated. *Id.* at 1012. Even though the statute was a law of general applicability, the court "observed [that] an ordinance is no less discriminatory merely because in-state interests are also burdened by the

regulation." *Id.* The Court concluded that without proof that the city had no alternative means to advance legitimate local interest, the law was invalid. *Id.* at 1013.

Thus, regulatory ordinances must be tailored with care to avoid violating these standards as well as the substantive due process strictures above. In particular, it would be critical to ensure that any ordinance is not facially discriminatory against out of state interests, nor that it had an undue discriminatory purpose. See Shoemaker, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 Duke L.J. 891, 910-12 (1999) (discussing whether Vermont's land use regulatory laws pass muster under these standards).

B. Municipal Regulation of Corporations and Other Businesses

1. General

In Washington, companies are incorporated and generally governed under state law. *See generally*, *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 479 P.2d 47 (1971) (corporate organization is a state matter; local ordinances cannot validly interfere with uniform operation of state enactments). Under these laws, a corporation may engage in any lawful business unless limited by its articles of incorporation. *See, e.g.*, RCW 23B.03.020 (1).

As noted above, local governments may enact ordinances prohibiting the same acts "prohibited by state law so long as the state enactment was not intended to be exclusive and the city ordinance does not conflict with the general law of the state." *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 353, 75 P.3d 1003 (Div. 2 2003), *review denied*, 151 Wn.2d 1029 (2004), 94 P.3d 960, *citing* Wash. Const. art. XI, § 11; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992). Put another way, "where state law does not preempt an area, there is room for cities to exercise concurrent jurisdiction, so long as the local regulation does not conflict with existing state law." 1A Wash. Prac. § 60.5. Furthermore, concurrent jurisdiction is presumed unless shown otherwise. *Id.*, *citing Baker v. Snohomish County Dep't of Planning & Commun. Development*, 68 Wn. App. 581, 841 P.2d 1321 (1992), *rev. denied,* 121 Wn.2d 1027 (1993). To be inconsistent, the ordinance (1) must conflict with some general law, (2) be an unreasonable exercise of the jurisdiction's police power, or (3), have a subject matter that is not local. *Weden v. San Juan County*, 135 Wn.2d 678, 692-93, 958 P.2d 273 (1998) recon. denied (1998); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

A city has the power to "regulate the carrying on within its corporate limits of all occupations which are of such a nature as to affect the public health or the good order of said city, or to disturb the public peace, and which are not prohibited by law, and to provide for the punishment of all persons violating such regulations, and of all persons who knowingly permit the same to be violated in any building or upon any premises owned or controlled by them." See, e.g., RCW 35.22.280(33). In *Heesan*, supra, the Washington Court of Appeals upheld the City

of Lakewood's right to regulate an adult cabaret business, which the City had deemed a likely public nuisance. *Heesan Corp. v. City of Lakewood*, 118 Wn. App.341, 353, 75 P.3d 1003 (Div. 2 2003), *rev. denied*, 151 Wn.2d 1029, 94 P.3d 960 (2004).

2. Washington's *Bittner* Decision: Regulation Through Licensing

Washington cities may also regulate corporations through licensing requirements. See, e.g., RCW 35.22.280(32). A city's authority to regulate through licensing varies, "depending upon the type of activity or business enterprise involved." *City of Seattle v. Bittner*, 81 Wn.2d 747, 751, 505 P.2d 126 (1973) (en banc). In *Bittner*, the Washington Supreme Court identified three business categories subject to varying degrees of licensing regulation: (1) "those that are pursued by private means on private property," (2) "those which involve some social or economic evil, such as gambling or liquor traffic, or which may, under certain circumstances, become a nuisance or hazard to the public health and safety"; and (3) "those which involve the use of public property such as streets or parks." *Id.* In overturning a city's licensing requirement that movie theatre operators be of "good moral character," the Court held that:

> [A]n ordinance regulating the right to engage in a lawful occupation or business must bear a rational relationship to a valid governmental purpose... Accordingly, standards for excluding persons from engaging in such commercial activities must bear some reasonable relations to their qualifications to engage in those activities.

Id. at 758 (citation omitted). Even where cities may otherwise use licensing requirements to mandate corporate behavior, such requirements must not interfere with state law. *See Diamond Parking*, 78 Wn.2d at 784. In *Diamond Parking*, a City of Seattle ordinance required licenses for parking garages and prevented transfer or assignment of such licenses except in specific circumstances. *Id.* at 779. After three parking garage companies merged, Seattle sought to collect license fees from two of the former garage sites. *Id.* The Court held that this ordinance effectively prohibited the corporate merger and was irreconcilable with state law granting all rights, privileges, and franchises to a successor company. *Id.* at 779-80, *citing* RCW 23.01.490, 23A.20.060 (predecessor to RCW Title 23B).

3. *Bittner* as applied to the "Community Values Act"

While the *Bittner* analysis likely leaves room to regulate businesses stereotypically viewed as tinged with vice, it suggests that the Washington courts would scrutinize carefully – even critically – an attempt to regulate through licensing a "conventional" land use or business conducted on private property based on the identity and track record (corporate or otherwise) of the applicant/operator. Identification of social ills associated with a particular operator might provide an arguable basis for such regulation, but would inevitably be subject to challenge. Further, such attempts at regulation would be amenable to simple evasions, by creation of new

corporate forms or entities whose affiliation with prior companies' business practices could be obscured.

Although a requirement for business "report cards" – e.g. disclosures of labor practices, wage and benefit standards, and the like – might be viewed as less burdensome than actual regulations, it would also be subject to analogous problems. For example, an attempt to require such reporting for businesses above a certain size or which are operated by out-of-state entities would be subject to attack as unduly burdensome and/or discriminatory. And, the same potential for evasion would apply through the creation of new corporate forms and/or employment arrangements. Likely, the complex scheme of reporting an economic differentiation which underlies the proposed ordinance would not pass muster. This is particularly the case where the ordinance proposes that a vested and approved land use could be disallowed and excluded depending on a "report card" generated after the establishment of the use.

C. Business Regulation Based On "Local Connection To Community": Local Ownership; Local Hiring; Local Re-Investment of Profits; Contribution to Local Charities

As noted above, businesses which are not associated with what have been traditionally viewed as social ills (e.g., gambling, liquor, adult entertainment) and which "are pursued by private means on private property" are not typically viewed as subject to municipal regulation beyond basic licensing. Thus, a municipality's attempts to regulate – even through a seemingly innocuous "licensing via report card" scheme -- would incur close scrutiny – and most likely fail -- under *Bittner*, even if social ills (and perhaps even calculable social costs) associated with a particular type of retail operation could be specifically identified.

Serious definitional problems also arise in an attempt to rate businesses based on their "connection to the local community." For example, many terms found in the "Community Values Act" (e.g., "local community", "local business", "local employee", and "locally operated business") raise questions on both a practical and legal level. While a city may impose residency requirements in some circumstances for its own personnel, imposing such requirements on private businesses, even through a report card or rating system is another matter entirely impinging on the businesses' rights as well as those of the employees. Further, the "accounting" associated with meeting these definitions would represent daunting tasks for even the most well-funded jurisdiction, as well as raising legal definitional questions. Is a business "owned and operated in Thurston County" if the business is sold to someone who lives in Tacoma, but continues in operation in every respect as before?

The proposed rating system would also have the effect of substantially narrowing the pool of qualified buyers for a "local business." Restrictions on a business owner's ability to sell his operation (including his business property) would very likely be viewed by the courts as violating substantive due process. Such was the case in *Guimont v. Clark*, *supra*, where the

Court found a tenant relocation requirement unduly burdensome on owners of mobile home parks, where such relocation costs were "more properly the burden of society as a whole..." The three-prong test the courts apply is: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Id.*

The proposed "Community Values Act" also contains the phrase: "Keeping or reinvesting profits into the community," although the phrase has not yet been defined. Assuming that it were amenable to specification, it would raise significant questions as to whether the city's licensing and land use authority can extend to management of investment of corporate profits. Where there is a nexus (for example doing business with the city) or where some general authority is exercised (for example, to set work place conditions or minimum wage requirements), the city may properly exercise authority. However, conditioning the conduct of business within the city on a satisfactory record of reinvestment of profits establishes a licensing requirement unsupported by any authority in state law or the Washington constitution.

To the extent the Community Values Act expressly purports to regulate businesses based on the extent to which they were "locally" owned and to which they re-invested any profits back into the "local" community, it is unlikely to survive challenges based on substantive due process, commerce clause, equal protection and possibly other constitutional grounds.

D. Business Regulation Based On Living Wage, Labor Standards

As discussed below, some communities have experimented with living wage laws, with varying degrees of success. The proposed "Community Values" ordinance contains a sweeping "Labor standards and living wage standards" provision (Section 8), however, which goes far beyond simply establishing a minimum wage that applies to those companies contracting with the city. Although it does not purport to establish a new, higher minimum wage, or make "local hiring" compulsory, it establishes a long list of factors based on which demerits are imposed, including where a corporation (among other things): violates employment laws (twice); fails to offer employees "adequate medical benefits" or pay them a "living wage"; or even offers for sale a yet-to-be-determined percentage of goods produced outside the U.S. at wages below the current U.S. living wage (to be "determined based on standards set by the Economic Development Council of Thurston County"). These "demerits" would work against a business's ability to locate in the City, initially, or to continue its operations, once established.

It is unlikely that a court would agree that a business, regardless of size, would be subject to demerit for twice violating particular laws. Further, it is unlikely that a court would find that a city had the authority, or what authority the city had was exercised consistent with substantive due process, to require that producers outside of the U.S. pay "the equivalent of a U.S. living wage," particularly where such matters are the subject of international agreements and treaties which are the purview of the Federal Government.

Similarly, the suggestion that "demerits" be awarded for "any steps towards suppressing or discouraging attempts by employees to unionize..." would likely not pass muster. This area is highly regulated by the Federal Government. Under certain circumstances, employers are permitted to discourage attempts by employees to unionize. Penalizing a business for doing that which is legal and legally sanctioned under Federal Law would run afoul of preemption and substantive due process principles. Further, a ban on discouraging union organization would run afoul of free speech protections under both the State and Federal Constitutions.

Some cities across the country *have* experimented with "living wage" laws. These may apply only to those who are employed by contractors doing business with the municipality, may extend to businesses receiving assistance in some form from a city, or *may* reach as far as to attempt to set standards regardless of a nexus to City business.
For example, the City of Berkeley, California has adopted an ordinance requiring employers who simultaneously receive financial benefit from the city (e.g. contract awardees, lessees of City property, City financial aid recipients) and meet certain criteria (number of employees, annual revenues) to pay employees a city-mandated "living wage" and provide minimum vacation and sick leave. In what came to be called the "Marina Amendment" Berkeley extended these requirements to all employers on City-held public trust tidelands at a marina. *Rui One*, 371 F.3d at 1145. A tidelands lessee, Rui One Corp., which held a lease which predated both the Ordinance and its Marina Amendment sued, alleging various constitutional violations (e.g. that the living wage ordinance and Marina Amendment violated Contract, Equal Protection, and Due Process constitutional protections). The federal district court and the United States Court of Appeals for the Ninth Circuit both ruled for the City. *See Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1143-44 (9th Cir. 2004) (*citing* Berkeley Municipal Code ("BMC") 13.27.030), cert. denied, 125 S.Ct. 895 (2005).

In particular, the Ninth Circuit rejected the claim that the legislation impermissibly tampered with the terms of the plaintiff's lease agreement with the City and specifically upheld as reasonable Berkeley's regulations designed to require tenants "to contribute to the welfare of the surrounding community":

> It is more than reasonable that the City should expect Marina businesses, which receive so many benefits from the City in the form of improvements and lack of competition due to the development moratorium, and which operate on land held in the public trust, to contribute to the welfare of the surrounding community and not to exacerbate its problems.

Id. at 1156. The court also rejected due process claims in upholding the ordinance. *Id.* at 1157-58.

The City and County of San Francisco, which are also located in the Ninth Circuit (as is Washington), have also adopted legislation requiring city contractors to supply non-

discriminatory benefits and wages to registered domestic partners. But see *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So.2d 1098, 2002-0091 (La. 2002) (overturning City of New Orleans ordinance establishing minimum wage on grounds that state law prohibiting municipalities from setting minimum wages took precedence over city's home rule status).

Case law suggests that a "living wage" type mechanism, at least one which regulated those doing business in some form with a city, could be implemented in Washington, assuming that it did not conflict with overarching state law requirements for competitive bidding or similar concerns. For example, the Washington Supreme Court has upheld a state law granting preference to ferry boats built by in-state shipbuilding firms. *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 476 (1980) ("government, like private individuals and businesses, 'enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases' *citing Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)); *Heim v. McCall*, 239 U.S. 175, 191, (1915)). See Gavin L. Phillips, *Validity, Construction, And Effect Of State And Local Laws Requiring Governmental Units To Give "Purchase Preference" To Goods Manufactured Or Services Performed In State*, 84 A.L.R.4th 419 (1991 & Supp. 2003).

In fact, the City of Bellingham has enacted a "living wage" law requiring contractors and sub-contractors working with the city to pay $10/hour for employees who receive health benefits and $11.50 for those without benefits in 2002). *See* City of Bellingham Municipal Code 14.18.020 *et seq.*

However, Bellingham's ordinance may not define the limits of municipal power in this field: Washington's wage laws may permit a more generalized city regulation. As is common, Washington's Minimum Wage Act, RCW Ch.49.46, sets a minimum standard for wages and working conditions for all employees in the state. Amended by Initiative 688 in 1998, the Act indexes the minimum wage to the inflation index to provide for cost of living increases. RCW 49.46.020. However, unlike other states that have prohibited differing local regulations, Washington expressly does not preempt a more favorable federal, state, or local law or ordinance, but instead has announced that our minimum wage law:

> establishes a minimum standard for wages and working conditions of all employees in this state, unless exempted herefrom, and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder. Any standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such

> other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.

RCW 49.46.120 (emphasis added); *see* 1B Wash. Prac. Series § 61.15, Wages-Minimum Wage.

The State of New Mexico has a similar Minimum Wage Act. NMSA 1978, Sections 50-4-19 to -30 (1955, as amended through 2003). The New Mexico Court of Appeals recently interpreted this minimum wage as "an hourly wage floor" for all workers in the State, and held that the City of Santa Fe was not precluded from adopting a local ordinance that establishes a minimum wage higher than that imposed by the Minimum Wage Act. *New Mexicans for Free Enterprise v. City of Santa Fe*, N.M. Ct. App., No. 25,073, November 29, 2005. The Court further held that the City could limit the application of such minimum wage ordinance to local businesses that employed 25 or more workers.

In the *Santa Fe* case, Santa Fe business owners challenged the city ordinance that required for-profit and licensed not-for-profit employers with 25 or more employees to pay a minimum wage higher than federal or state requirements. The plaintiffs argued, among other things, that the ordinance was a violation of municipal powers, as well as violating equal protection and eminent domain principles.

The court's decision focused on the discussions of regulation of civil relationships and possible equal protection issues. In holding that the ordinance was not an impermissible regulation of civil relationships, the court stated that wages were sufficiently tied to public welfare as to come within the permitted scope of municipal regulation (p. 20(30)[1]).[2] The court found that, because the ordinance "merely complements a statute instead of being antagonistic to it," it does not conflict with the state Minimum Wage Act. P. 24(43). The court further dismissed concerns over non-uniformity of the law (i.e., interference with other local laws), saying such concerns would not materialize given that the ordinance only applies to businesses that seek to be registered or licensed in the City and in light of the publicity the law had garnered. P. 21(36).

The court's equal protection discussion, based on plaintiffs' assertion that the 25 employee cutoff was arbitrary, followed rational basis review. The court examined the city council record and concluded that the 25 employee cutoff was the result of legitimate policymaking because the council reviewed the effect at different cut off points and determined this point fulfilled their goal without reaching more businesses than necessary, and legitimately protected small businesses that are more limited in their ability "to leverage large expense increases." P. 31(50). The court further noted that plaintiffs had not met their burden of demonstrating the flaws in the classification, and that the City did not have to justify its policy

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[1] Numbers in parenthesis are paragraph numbers.
[2] Citing *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004).

choice ("no justification is required for social and economic legislation as long as the classification is rationally related to a legitimate government purpose.") P. 31 (49).

The court also addressed plaintiff's eminent domain argument and found that the ordinance was not a taking under the Fifth Amendment because:

> The wage regulation here does not appear to be a "restriction on the use of private property" because Plaintiffs can continue to use their businesses as they wish. In addition, the wage rate in contracts for labor is generally not considered a vested property right of the employer. *See E.Spire Commc'ns, Inc.*, 269 F. Supp. 2d at 1325-26 (holding that a utility had no vested property right to a particular regulatory rate and even if it did, its contracts were clearly subject to additional regulation); *see also McGrew*, 85 P.2d at 610 (holding that an employer has no vested right in the labor of his workers). However, even if the ordinance did restrict the use of private property, it is reasonably related to a proper purpose and does not deprive the business owner of substantially all of the beneficial use of his property, given the absence of any severe, retroactive liability. *E. Enters.*, 524 U.S. at 500

P. 36 (53).

The current disposition by the New Mexico Court of Appeals of the challenged Santa Fe ordinance is an indication – but no assurance – that a minimum wage ordinance adopted by the City of Olympia might be upheld on similar grounds. Based on the Santa Fe case, the question of whether such an ordinance would be upheld if it were applied only to very large employers (e.g., with over 5,000 employees) apparently would depend on how much support there is in the City's record justifying the "protection" of smaller employers (e.g., even those that employ 1,000 to 4,000 workers).

For additional background, in 1996, the Washington Supreme Court upheld application of the State's discrimination statute to *only those businesses with eight or more employees*. *Griffin v. Eller*, 130 Wash.2d 58, 922 P.2d 788 (1996). In that case, the plaintiff challenged the constitutionality of the statute's exemption for smaller businesses under the privileges and immunities clause of the State Constitution. *Id.* at 61. However, plaintiff did not seek an analysis independent of the federal Constitution, including the less deferential standard of review applicable to such an analysis under the State Constitution. *Id.* at 64-65.

In upholding the statute's constitutionality the Court held that the rational basis test was the proper standard of review since the statute was aimed at protecting small businesses which are not a "suspect or semi-suspect" class. *Id.* at 65. Rational basis review requires that the Court determine: (1) whether the law applies equally to all members within the designated class; (2) that reasonable grounds exist to distinguish between those within and those without the class; and (3) whether the classification is rationally related to the legitimate governmental purpose in adopting the legislation. In applying the first and second prongs, the Court noted plaintiff's

assertion that the statute treated small employers differently than large ones, but held that the Legislature may constitutionally approach the problem of employment discrimination one step at a time:

> It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

Id. at 66, *quoting O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 124, 821 P.2d 44 (1991). Thus, the Court determined that large and small employers are two separate classes, and that reasonable grounds exist for distinguishing between these classes, in light of relieving small employers' regulatory burdens. The court also cited a survey of legislation from all states and found that many have similar regulations that make a distinction based on employer size. Moreover, it noted that none of these regulations had been invalidated on equal protection grounds. *Id.* The Court concluded the second prong was met and said "if the legislature is entitled to relieve small employers of a statutory or regulatory burden, it must draw the line somewhere." *Id.* at 66.

In focusing on the third prong of the test, the Court examined the legislative intent and the scope of the challenged exemption. The Court first looked at the reason for the exemption and determined that the Legislature was advancing legitimate state purposes by conserving limited state resources and protecting small businesses from private litigation expense, and other regulatory burdens. *Id.* at 67. In holding that the small business exemption was rationally related to this legitimate purpose, the Court specifically cited the State's "substantial interest" in the well-being of small business with regard to the state economy, tax-base, and opportunities for employment.

The Court also quoted a commentator on the subject who noted that in adopting similar legislation:

> [T]he framers were interested primarily in attacking protracted, large-scale discrimination by important employers and strong unions. Their aim was not so much to redress each discrete instance of individual discrimination as to eliminate the egregious and continued discriminatory practices of economically powerful organizations. Thus they could afford to exempt the small employer.

Id. at 67, n.1.[3] To this end, the Court noted, the legislature could weigh the burden of regulatory costs on small business against the number of people actually affected by the statute. *Id.* at 68. The Court found that approximately 75 percent of business establishments in Washington have fewer than nine employees; however, they employ only about 17.5 percent of the private employee work force. It would therefore be reasonable to conclude that burdening many employers to benefit few employees was not, on balance, of sufficient public benefit to offset the

[3] Micheal C. Tobriner, *California FEPC*, 16 Hastings L.J. 333, 342 (1965).

burden. *Id.* Having determined that all three prongs of the test were met, the Court upheld the constitutionality of the anti-discrimination statute, including its small business exemption.

In summary, although adoption of a straightforward minimum wage ordinance by a Washington city would stand a good chance of being upheld under a constitutional analysis, a challenge might surface in efforts to support limiting its application to very large businesses. The small business exemptions that have been upheld in Washington as well as many other jurisdictions have typically described small businesses (deserving of protection) as those with fewer that 25 employees. However, to the extent that the classification can be supported by the "step by step eradication of evil" theory – which has been approved by the Courts – such an ordinance might be upheld.

On the other hand, overlays of complication, such as a formula imposing demerits based on wages paid by a corporation "to all U.S. hourly wage employees", might change the equation. Such overlays arguably put one city in the business of attempting to regulate corporate practices outside of its borders (and, potentially, outside of Washington) and therefore diminish the legal viability of a minimum wage ordinance.

E. Health Care Responsibility and Plans (avoiding impacts on local healthcare system)

1. Possible Pre-emption By ERISA

As noted above, the proposed ordinance would impose demerits on businesses that fail to offer employees "adequate medical benefits." While a city's requirement of a medical benefits package might be more colorable as related to wage concerns within the municipality, this would require a definition of the standard for adequacy before its legality could be fully assessed.

In addition, a municipal regulatory scheme that imposes requirements for certain health benefits may face possible pre-emption by ERISA, the federal Employee Retirement Income Security Act. ERISA governs many aspects of public and private interstate employment plans including health care and pension plans. Title I of ERISA imposes a wide range of fiduciary, disclosure and reporting requirements on fiduciaries of pension and welfare benefit plans and on others having dealings with these plans. These provisions set a minimum floor for such benefits and preempt many similar state laws.[4]

The goal of ERISA is to provide some uniformity in administration of benefits. Because the text of ERISA's preemption provision is broad, courts have held that it cannot be read

[4] 29 U.S.C. § 1144(a). Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

literally and they have developed a test to determine when a state law is "related to any employee benefit plan described in section 1003(a) of this title." 29 S.C. § 1144(a). Since 1995, the Supreme Court has broadened its view of the "related to" component of the ERISA preemption test, giving states, at least, considerably more latitude in regulating matters that may affect ERISA covered-employee benefit plans.

Courts have held that a state law is "related to" a benefit plan if it "(1) has a connection with or (2) a reference to such a plan." *Carpenter Local Union No. 26 v. U.S. Fidelity & Guaranty Co.*, 215 F.3d 136, 140 (1st Cir. 2000) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 324, 117 S.Ct. 832 (1997)). A state law that satisfies either prong is preempted. *Id.* The first prong, "has connection with" entails an examination of Congress's objectives in enacting ERISA and determining what sort of laws were intended to be preempted. Because Congress was concerned that there should be uniformity in ERISA application, "state laws which furnish alternative enforcement mechanisms threaten the uniformity that congress labored to achieve and thus are preempted by ERISA." *Id.* at 141. In *Carpenters Local*, the Supreme Court upheld a statute requiring contractors on public projects to post a bond covering labor and materials that "touched upon enforcement but [has] no real bearing on the intricate web of relationships among the principle players." *Id.* In contrast, the Court in *Egelhoff v. Egelhoff* found that the Washington State statute that automatically revoked a spouse as beneficiary upon dissolution, did have a connection with ERISA because "[t]he statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 121 S.Ct. 1322(2001). The Court explained that "all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 150, 121 S.Ct. 1322(2001)(quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

The second prong of the "related to" test, the "reference to," inquiry "will result in preemption '[w]here a State's law acts immediately and exclusively upon ERISA plans...or where the existence of ERISA plans is essential to the law's operation.'" *Carpenters Local* 215 F.3d at 143 (quoting *Dillingham*, 519 U.S. at 325). This analysis is to take place "in light of the *actual operation* of the challenged state statute." *Id* at 144 (Italics in original). Because the statute in *Carpenters Local* neither singled out ERISA coverage nor required those plans for its operation, the Court found that the prong was not met. *Id.* at 145. The Supreme Court held that the reference need be patent before this prong would be met. *Dillingham* 519 U.S. at 324.

The City's proposed legislation purports only to regulate employers – not benefit plans -- rating the employers on how much they spend on employee health benefits. The fact that the ordinance would not interfere in the administration of benefit plans makes it less likely that a court would deem it preempted by ERISA. However, the effect of the regulation would be to place business licenses themselves in jeopardy, rather than imposing a "compensatory"

assessment on these businesses directly related to the resulting costs to the community (which costs would presumably have to be specifically identified). This would continue to subject the health benefits provisions to close scrutiny under the other constitutional issues, presented above.

2. Effect of State Legislation Requiring Minimum Corporate Expenditure For Employee Health Benefits

In addition, depending on what the Washington State legislature does in the coming years, such regulation could be preempted by state law. The State of Maryland, for example, recently adopted legislation that imposes an assessment on certain employers who do not spend a specified percentage of total wages on "health insurance costs."[5] Under Maryland's Fair Share Health Care Fund Act, for-profit employers of over 10,000 that do not spend at least 8% of total wages on health insurance costs in the state are required to pay the Fair Share Health Care Fund ('Fund") an assessment equal to the difference between the amount spent and the applicable percentage. The purpose of the Fund is to support the operations of the Maryland Medical Assistance Program ("Medicaid").

The Washington legislature considered a similar bill during its preview session.[6] As explained above, local governments may enact ordinances prohibiting the same acts "prohibited by state law so long as the state enactment was not intended to be exclusive and the city ordinance does not conflict with the general law of the state." *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 353, 75 P.3d 1003 (Div. 2 2003), *review denied*, 151 Wn.2d 1029 (2004), 94 P.3d 960, *citing* Wash. Const. art. XI, § 11; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992). If a future State Legislature passes legislation creating a charge on employers for failing to provide adequate health benefits, such a state law could preempt a local ordinance that further regulates corporate expenditure on health benefits. Preemption might be less likely where a municipality could demonstrate specific healthcare costs it would bear, apart from the State's, due to an employer's failure to provide adequate employee health benefits.

F. Impacts on Locally Owned/Operated Small Businesses

To the extent the City's proposed regulatory scheme would be based on a corporation's impacts on "locally owned or operated small businesses, the City would likely run into some challenging definitional problems. The terms "locally owned" and/or "locally operated" and "small" would have to be defined, and, depending on those definitions, the regulations could

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[5] "Health insurance costs" include an "payments for medical care, prescription drugs, vision care, medical savings accounts, and any other costs to provide health benefits" as defined by the Internal Revenue Code.

[6] Substitute Senate Bill 6356 and Substitute House Bill 2517 proposed that for-profit employers employing more than 5000 persons spend 9 percent of their payroll on health care services expenditures or pay Labor & Industries an amount equal to the difference between what they have actually paid for health care expenditures and the 9 percent. For non-profit and governmental employers the required expenditure on health care services was 7 percent of their payroll. Payments would have been deposited into the Health Services Account.

have some unintended consequences – even on some locally owned or operated "larger" businesses.

There would be the potential for antitrust considerations, as well. As discussed above in the land use discussion, unless the local regulation can be considered an "authorized implementation of state policy," the City's attempts to regulate would not fall under the immunity clause of the Sherman Act. *City of Columbia*, 499 U.S. at 370. On the other hand, the *Columbia* Court further held that, for a local regulation to be immune under the Sherman Act, "[I]t is enough... if suppression of competition is the foreseeable result of what the statute authorizes... The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 373.

G. Environmental Record

Subsection A, B, and C of this section of the proposed ordinance variously penalize businesses for environmental violations. While Washington jurisdictions can impose restrictions on properties which are subject to outstanding violations, (e.g. no grant of new permits for properties on which outstanding violations exist), the importation of violations elsewhere as a basis for excluding a business from a Washington municipality is an untested and arguably untenable concept. Again, as analyzed above, there is legal authority for Washington municipalities to regulate business which involve areas typically viewed as affected with implications of vice or threats to public safety. Importing the fact that a large corporation was prosecuted for an environmental violation in, New York or California as a basis for a disability in Olympia, Washington, would likely be viewed as beyond the municipality's authority and unduly oppressive in a substantive due process analysis.

Subsections D and E of this section propose to grant "merit" points to certain practices involving business facility structure, plantings, and assurances of restoration in the event of business abandonment of the site. These provisions are generally within the scope of the city's authority if adopted as stand-alone regulations (subject of course to the particular wording). Assuming, then, that a "report card" system were to be implemented, these provisions in some form would likely be legally colorable. However, to the extent the city used them as having merit, it would be advisable to consider adopting them as stand-alone regulations.

H. Reestablishing The Town Square and Community Building

This provision embodies concepts which may be legally colorable in another form outside of the "Report Card" context. For example, jurisdictions often provide square footage bonuses or other zoning allowances for provision of needed public facilities and such mechanisms could be adapted for the goals discussed here. Further, Washington Case Law already suggests in some circumstances that "private" business facilities may be open to public activities (e.g. in signature gathering for Initiative Petitions). However, making an existing

business's ability to continue to utilize its property dependent, at least in part, on whether it can offer such concessions would likely not pass constitutional muster.

I. Procedures Under The Community Values Act (Application Process; Ramification for Non-Compliance; Fees)

The provisions in this section carry over the infirmities noted above, including those relating to the "accounting" inherent in administering such a complex "report card" system. Further, the attempt to shift the costs for administration of such a system to the individual applicant business (with nonpayment resulting in a prohibition on locating a business within the city) is more likely to draw a legal challenge on its own rather than solving the "accounting " problem. Setting a particularly licensing fee is clearly within the city's purview (assuming that the licensing scheme proposed here passed muster otherwise, which is another question). And, fees based on the amount of time necessary to process an application do have a precedent in building a land use permit processing ordinances in which hourly rates are often charged for staff review.

However, a municipality establishing application and business license filing requirements with the potential for bulk analogous to elaborate SEC annual corporate disclosures can expect to face a challenge under RCW 82.02.020, *supra*, or similar principles. While this provision permits a municipality to recover reasonable administrative costs in the form of licensing fees, a court could well find a line crossed into "indirect tax" territory where the burden became so great, replacing a typical basic licensing scheme for doing business in the city.

J. Definitional Problems With Proposed Legislation

As noted throughout the foregoing analysis, to avoid constitutional challenges for vagueness as well as the potential for unintended consequences, any definitions included in legislation proposed to regulate based on "corporate citizenship" and local economic impacts would have to be painstakingly reworked. Even then, it would be difficult to avoid unintended consequences stemming from real-world application of the proposed licensing scheme. The following comments are intended to highlight a few of the fundamental problems inherent in the current definitions:

Corporation: The definition of "corporation" is problematic here particularly in light of the frank statement that the purpose of the definition is to have one "such large enough to not impact local independent businesses but small enough as to capture McDonalds and other large food chains and large retailers like Target and Old Navy and Wal-Mart". As a practical matter, adoption of an ordinance whose legislative history will now include such a statement of discriminatory intent is starting with one (significant) strike against it. It is unlikely that a court will be willing to overlook such legislative history, if asked to consider the legality of this ordinance. Further, the suggestion that "a locally owned or operated franchise" will be brought within the definition based on "figures from sales on all business outlets for that corporation

within the U.S." is patiently infirm as a matter of drafting and as a matter of law. The effect would be to penalize small business that choose to establish themselves by associating with larger concerns (franchising entities) strictly on the basis of their association, even if their individual impacts and practices are no different. What legal distinction can be offered between a McDonalds franchised hamburger outlet and a "local" brand, particularly if both are under "local" ownership? Further, the definition of "corporation" here would seem to inherently penalize "local independent businesses" which become successful. Is the concept that size alone is a determinate of impact, even apart from land use impacts? Further, although this may not be of primary concern, the definition would seem to encompass internet outlets and businesses which arguably have no local impact, land use or otherwise, but which may fall within the dollar size specification.

Corporate History: This definition is both broad and incomplete. It appears to encompass "all governmental enforcement actions or civil or criminal legal actions brought against the corporation" without regard to whether they resulted in convictions, adverse judgments, etc. Further, it does not define "enforcement actions". Does this include civil lawsuits brought against the business on any matter (contract enforcement? real property transactions? routine auto accidents?)? The definition also is arguably overbroad and oppressive, triggering substantive due process protections under, *inter alia*, the Washington constitution. Requiring a twenty year history of all such actions to obtain a business permit, particularly when (as will inevitably be argued) corporate management, practices, boards, forms can change over the years would appear to step beyond the rational in terms of a legitimate governmental purpose.

Local Community, *Local Business*, *Local Employee*, *Locally Operated Business*: All of these definition terms raise similar questions on both a practical and legal level. While a city may impose residency requirements in some circumstances for its own personnel, imposing such requirements on private businesses, even through a report card or rating system is another matter entirely impinging on the businesses rights as well as those of the employees. Further, the "accounting" associated with meeting these definitions would represent daunting tasks for even the most well-funded jurisdiction, as well as raising legal definitional questions. Is a business "owned and operated in Thurston County" if the business is sold to someone who lives in Tacoma, but continues it operation in every respect as before?

Parent/Subsidiary Corporation: These definitions represent an attempt to address use of varied corporate ownerships. However, without substantial refinement, they would be ineffective for their intended purpose. For example, there is no specification of what "50% of the Applicant corporation" means. Many corporations have different classes of shares some of which relate to ownership and some of which relate to control. Other forms could be utilized as well to defeat what is apparently the intended purpose of this definition. As a practical matter, the ability of any ordinance to effectively address such issues would be limited, particularly in a municipal context where there is not (presumably) substantial staff to research and monitor such matters. Finally, as a purely legal matter, it is questionable whether the city may attempt to regulate or guide forms of corporate ownership which are otherwise sanctioned in state law.

Race to the bottom: This definition appears to embody an economic theory rather than a legally cognizable concept. As such, it is questionable whether it is appropriately placed in an ordinance which will be subject to judicial review.

Violating or violation: This definition, as with the definition of "corporate history" above sweeps broadly into areas which have no clear connection to the "ills" which the legislative purposes call out (as broad as they are). For example, the inclusion of not only criminal convictions and civil verdicts, but enforcement actions which merely allege violations and lawsuits where violations are alleged but the corporation settles with no admission of violation—all on a worldwide basis—arguably violates substantive due process and other strictures. Further, a city would be hard-pressed to cite a basis that was not "oppressive" for requiring a "report card" that includes the fact that a lawsuit for trade practices violations was settled without an admission of liability or, for an automobile accident, or for any number of other myriad legal events which can occur in the conduct of a business. Even a requirement focusing on actual convictions does not necessarily pass muster depending on the nature and era of the conviction. Finally, to the extent that reporting such information on a "report card" could have adverse affect on the business, this requirement would appear to discourage settlements of disputed matters—a result which could be construed by some as contrary to the public interest.

ADDITIONAL INFORMATION

There is a great deal of information available about regulating corporate behavior and/or the development of large scale retail. Several sources are listed below for reference.

A. General Overviews of Large Scale Retail

a. Washington's Municipal Research and Services Center (MRSC) has compiled a list of resources; *see* http://www.mrsc.org/Subjects/Planning/BigBoxRetail.aspx.

b. Symposium 2005: The Big Box Challenge, 6 Vt. J. Envtl L. 6 (2005) (this entire journal is dedicated to the issue of large-scale retail).

c. Kathleen Codey, Note and Comment: Convenience and Lower Prices, But At What Cost? Watching Closely as Discount Superstores Creep into Manhattan, 13 J.L. & Pol'y 249 (2005).

d. Land Use Clinic, University of Georgia School of Law and College of Environmental Design, Controlling Big Box Retail Development in Georgia (Dec. 2004).

e. Constance Beaumont & Leslie Tucker, National Trust for Historic Preservation, Big-Box Sprawl (And How to Control It), *reprinted by permission from* Municipal Lawyer (Mar./Apr. 2002).

f. Los Angeles Times Series on Wal-Mart, November 2003 (Pulitzer Prize winner).

B. Environmental Information

Large scale retail is sometimes addressed in discussions of associated environmental issues (including water quality) not addressed in depth in this memorandum. Additional information is available from the following sources:

- Consent Decree, United States of America v. Wal-Mart Stores, No. 04-301 (D.C.Del.) (water quality problems at construction sites throughout United States).
- US Department of Justice, Press Release, U.S. Reaches Water Pollution Settlement with Wal-Mart (June 7, 2001), *available at* http://www.epa.gov/.
- US Department of Justice, Press Release, Wal-Mart to Pay $400,000 Penalty and Cease Sales of Ozone-Depleting Refrigerants (Jan. 22, 2004), *available at* http://wwwusdoj.gov.

Creating Communities of Place

Office of State Planning

Memo

December 95

Department of the Treasury

Governor *Christine Todd Whitman*

Treasurer *Brian W. Clymer*

Vol. I, No. 2

Big Box Retail

Big box retail is currently the most dynamic sector of the retail industry. While many forms of traditional retail have languished in the last five years, big box retail has achieved significant gains in the marketplace.

The term "big box" refers to large industrial-style buildings with vast floorplates or footprints, up to 200,000 square feet. Although single-story, they often have a three-story mass that stands more than 30 feet tall, allowing the vertical stacking of merchandise. Big box buildings in the range of 120,000 to 140,000 square feet occupy the equivalent of two to three city blocks, or 2 1/2 to 3 1/2 football fields.

Big Box growth in New Jersey in the last five years has been significant. As of the end of 1995, Home Depot operated 16 stores in the state, Wal-Mart operated 13, Sam's Warehouse Club had six and Kmart had 46.

Kmart has long had a presence in New Jersey, mostly with older stores in the range of 50,000 to 60,000 square feet. The other three national chains have only been active here in the last five years.

The openings of the Wal-Mart, Sam's and Home Depot stores represent the addition of 3.5 million to 4 million square feet of retail space in the State in the last five years. If Kmart and the other chains are factored in, the total growth in superstore retail space may have been closer to twice that amount.

This trend continues around the state, with numerous superstores under construction or in various stages of the development review process. In addition, Target Department Stores, the discount branch of Dayton Hudson, one of the nation's largest retailers, has announced a planned expansion into the Northeast.

Big box retail presents challenges and creates opportunities for municipalities. Municipalities and regions should consider whether it is appropriate, where it is most appropriate, what impacts to anticipate, and how best to mitigate the negative impacts.

To be prepared, it is important for municipalities to understand the various formats. Because big box retail is a fairly recent phenomenon, many municipal master plans and zoning ordinances do not adequately address it. Recognizing this, the Office of State Planning has prepared this Memorandum to assist municipalities that are either considering big box retail or facing applications for this type of development.

OSPlanning Memo *is a monthly publication which highlights strategies, techniques and data of interest to the planning community in New Jersey. I welcome your comments on these memos and your suggestions for future topics.*

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What is Value Retail?

There are two key trends in the American retail industry of the 1990s: consolidation, expressed by the sustained growth of national chains; and a greater focus on providing "value" to the consumer. The rise of the big box is linked to both trends.

Value retail reflects a new level of price consciousness on the part of both consumers and retailers. It is a broad label covering several retail concepts, such as discount department stores, "category killers" and warehouse clubs. It can be found in urban, suburban and exurban conditions, either in stand-alone buildings, or in various types of planned shopping clusters, such as "power centers" and "value malls".

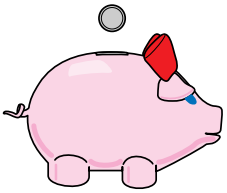
Value retail operators share the following general characteristics:

- an emphasis on providing "value" to the consumer, i.e. quality name brands at discount (considerably less than department store) prices;
- a preference for a superstore (big box) format;
- high-volume turnover, with lower profit margins than conventional retailers; and
- large advertising and promotional budgets.

Lower prices to the consumer are achieved through cost-cutting strategies such as:

- large-volume purchasing, often directly from the manufacturer, minimizing distribution and warehousing costs;
- high-tech purchasing and inventory control systems;
- no-frills sale floors and building facilities; and
- reduced staffing and labor costs.

Studies indicate that today's consumers have less interest in shopping, make fewer trips to shop, and buy more on each trip than in the past. Consumers consider saving time a priority, and they prefer stores offering "everyday low prices" to occasional department store promotions or bargain-hunting from store to store.



What Are The Major Value Retail Formats?

There are four major value retail formats: discount department stores, warehouse clubs, category killers and outlet stores.

Discount Department Stores

Discount department stores offer a wide variety of products -- up to 60,000 items -- ranging from groceries to apparel to auto products to electronics to garden supplies, all at discount prices.This group includes some of the largest retailers in the world, such as Wal-Mart and Kmart.

Wal-Mart had $82 billion-plus in sales in 1994, and sales volume has been growing by 20 percent a year. It has more than 500,000 employees at more than 2,000 stores. Kmart had $34 billion-plus in sales in 1994, and more than 300,000 employees at more than 2,200 stores.

Although the three industry leaders have built retail empires operating stores in the range of 60,000 square feet, the recent trend has been to consolidate smaller market areas and concentrate on a new generation of superstores in the range of 130,000 to 200,000 square feet. These Wal-Mart "supercenters" and Kmart "Super K" stores are often accompanied by the closure of older, smaller stores. The unrelenting competition from the industry leaders has contributed to the financial troubles of smaller chains, such as Caldor and Bradlees.

Warehouse Clubs

Warehouse clubs sell a wide range of goods, in bulk, in many different product categories but offer little selection, with under 5,000 items stocked. Selling at near-wholesale prices, with limited staff and advertising and very low profit margins, warehouse clubs compete directly against conventional supermarkets and other discount stores.

Warehouse clubs operate on large-volume turnover, as well as a strong membership base. Most charge members an annual fee.

Sam's Warehouse Club, a division of Wal-Mart, is the industry leader. Other major players include Pace and Price Costco. It is estimated that more than 1,100 warehouse club stores will be in operation nationwide by 1996.

Category Killers

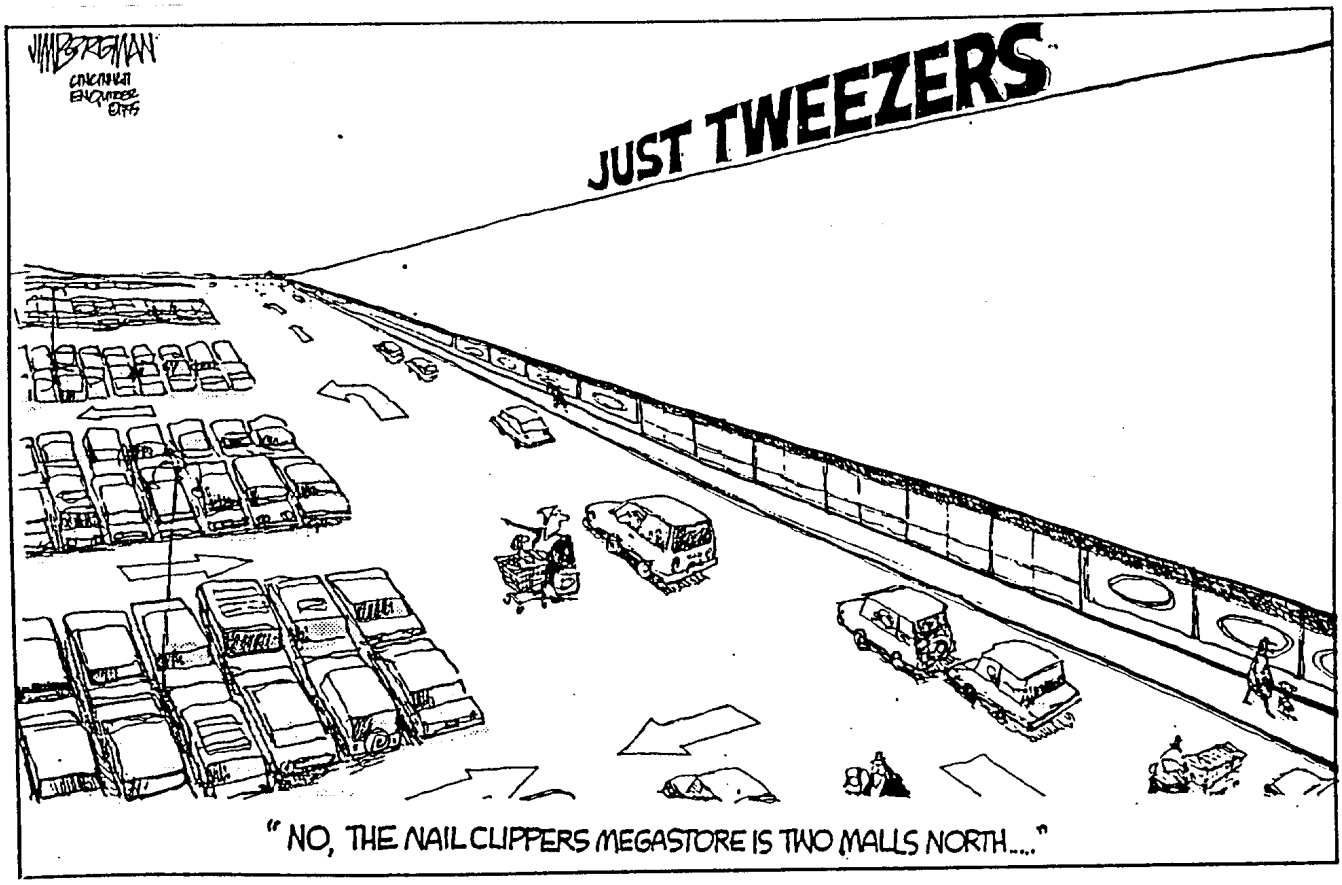
Category killers offer in-depth selection in a special retail category. Examples include Toys "R" Us (children's products), Borders (books and music), Circuit City (electronics) and Home Depot (home improvement).

Category killers, which also include some of the nation's largest retailers, know their market segments very well and trade large volumes of merchandise. This allows them to establish direct relationships with manufacturers and to cut costs by eliminating wholesalers. Store sizes for category killers range from 20,000 square feet to the 120,000 square feet of the average Home Depot.

BIG BOX FACT

Big Box growth in New Jersey in the last five years has been significant. As of the end of 1995, Home Depot operated 16 stores in the state, Wal-Mart operated 13, Sam's Warehouse Club had six and Kmart had 46.

Kmart has long had a presence in New Jersey. The other three national chains have only been active here in the last five years.

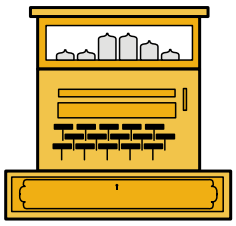


Outlet Stores

Outlet stores are the discount branches of national department stores, such as Nordstrom's (Nordstrom Rack) and Macy's (MCO), or of national manufacturers (Anne Klein, Bass Shoes, North Face, etc). They sell overstocked items or a previous season's line at steep discounts. Outlet stores are frequently clustered in power centers or value malls.

Other Discount Retailers

Merchandisers like Marshall's, TJ Maxx and Filene's Basement sell apparel and often a variety of other products at considerable discounts. They appeal to the traditional department-store shopper with a value orientation, and are frequently found in power centers or value malls, as well as conventional shopping centers.



Types of Planned Value Retail Developments

Once ostracized by shopping centers, discount retailers are currently perceived as very desirable tenants. Power centers and value malls are the two types of discount retail agglomerations that have emerged as particularly significant.

Value retailers are also appearing in conventional regional malls, on equal footing with traditional department store anchors, or even as anchors in smaller, community shopping centers. Many discount retailers also continue to develop or lease free-standing buildings that are not part of a larger commercial development.

Value Malls

Value malls combine in a single, integrated development various value-oriented retail types, such as factory outlets, department store outlets, category killers and large specialty retailers. Examples include Franklin Mills in suburban Philadelphia, Potomac Mills in subur-

ban Washington, D.C., and the MetroMall under construction in the City of Elizabeth. Value malls approach 1 million square feet and tend to locate at the edge of metropolitan areas.

Power Centers

"Power centers" generally bring together the various branches of the big box family -- for example, a discount department store, a warehouse club, and several category killers, along with a limited number of smaller, in-line stores. They can range from 250,000 to more than 1 million square feet and have as many as a dozen anchors and co-anchors. Anchor tenants typically occupy 60 to 100 percent of the center.

Differences Between New and Conventional Retail Formats

Power centers, discount malls and free-standing development have been expanding rapidly at a time when development of more conventional types of retail has stagnated. This can be explained by the following:

- Financing - Most big box firms have good corporate credit ratings. Institutional investors and other lenders have been favoring development projects with big box tenants, while turning down proposals for conventional retail formats.

- Tenant Demand - Big box retailers have been expanding prodigiously, while traditional department stores have stagnated or cut back.

- Risk - In power centers, anchors take up 80 percent to 90 percent of the space. Cash flow is more predictable, developer risk is reduced and leasing and management are easier.

- Cost - With little or no common space, and with outdoor amenities at a minimum, power centers are less expensive to manage and maintain than conventional regional malls.

- Merchandise Selection - Category killers and other big box retailers offer great depth in merchandise selection, which responds to current consumer demand.

- Value Orientation - Big box retailers successfully exploit the economic uncertainties of our times, as reflected by consumers' enhanced price-consciousness.

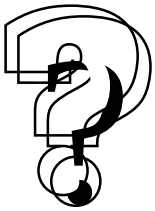
- Convenience - The industry perception is that big box retail offers greater convenience to shoppers, and this is at a premium, particularly to two-income households.

Value retail centers may differ from a standard regional mall or a conventional shopping center in the following ways:

- Financing - Many power centers are financed by institutional investors through "tenant credit" or "bonded" leases that rely on the retailer's corporate creditworthiness, not the developer's pro-forma. The lender generally requires the tenant to assume responsibility for most operating costs.

- Management - Under tenant credit leases, many power-center tenants are responsible for functions -- such as maintenance of outdoor areas, taxes, liability insurance, and security -- previously performed by the shopping center management. In many cases, the property is subdivided and there is no common management.

- Tenant Configuration - The traditional configuration with one or more anchors, preferably large department stores (or supermarkets, in smaller shopping centers), and a multiplicity of small, in-line specialty stores has been replaced. Power centers are built on anchors, and have considerably fewer in-line tenants -- or sometimes none.



Where is Big Box Retail Locating?

Big box retail is locating in every type of environment, including urban areas, older suburbs, edge cities, outer suburbs and rural areas. In new suburban and exurban areas, it typically occupies new greenfield sites. In downtowns or inner-ring suburban sites, it is occurring through the adaptive re-use of existing buildings or through redevelopment or infill.

Big boxes typically require 10-to-15-acre sites at a minimum, and favor locations along major arterials, which maximize access and visibility. But some retailers, particularly warehouse clubs, have located in manufacturing and warehousing districts, areas not considered prime by conventional retail.

This has led planners in cities like New York, Philadelphia, and Toronto to view big box retail as a tool to redevelop obsolete industrial land, provide new employment opportunities, generate tax revenues and recapture consumer expenditures flowing to similar facilities in the suburbs. In New Jersey, the proposed MetroMall in Elizabeth is expected to spearhead the redevelopment of derelict industrial land.

Given the right market conditions, retailers are locating in urban areas and adapting their standard formats and floor plans to the more complex and constrained development conditions typical of older cities. In response to higher land costs and less land, multi-level stores are becoming the norm.

There are also examples of big boxes in smaller downtowns. In Carroll, Iowa, population 9,500, Wal-Mart located in a previously cleared site adjacent to the City's two-block retail core.

BIG BOX FACT

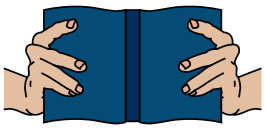
Big box retail is locating in every type of environment, including urban areas, older suburbs, edge cities, outer suburbs and rural areas.

The new store was designed to complement the area's traditional architecture and is served by a parking lot shared by all downtown users. The City facilitated site acquisition and shared the costs of building the new parking lot and upgrading infrastructure.

THE PLANNING ISSUES

The first question to be addressed is whether big box retail is an appropriate and desirable use in the community. There is no stock answer -- each municipality must consider its specific conditions and constraints.

Some may wish to attract this type of retail to boost the fiscal base, provide employment or revitalize older industrial or commercial areas. Others may not want any large retail, or may not have adequate infrastructure capacity to accommodate it. Either way, big box retail uses are regulated by local land use controls -- the municipal master plan and land development ordinances -- and the municipal master planning process is the appropriate forum to discuss the issues.



Municipal Master Plan

The planning process should start with the municipal master plan. Too often, municipalities react to developer proposals instead of being pro-active and taking control.

The master plan establishes the framework for distribution of land uses. A municipality should review its land use plan and identify those areas where big box retail might be appropriate. It is crucial that the master plan language describing each land use district accurately portray the town's intention for that area.

Because big box retail is a relatively new phenomenon, many municipalities around the nation have enacted development moratoriums, while they revise their planning documents and adopt appropriate standards. This option is not available to New Jersey municipalities, since the Municipal Land Use Law specifically prohibits development moratoriums (N.J.S.A. 40:55D-90a).

It is during the planning process that municipalities should address the following questions:

- how much land is designated for retail uses, and is that an appropriate amount?
- does the community want retail that will support a predominantly local population, or does it want to serve a larger, regional population?
- is there a traditional downtown or Main Street that might be adversely affected?
- will the older shopping centers lose their tenants and close?
- how will retail uses impact on neighboring municipalities and the larger region?

The master plan process provides an opportunity to discuss the broader role of retail in the community and region and to devise and adopt policies that respond to community concerns. Communities that are concerned about the impacts of big box retail on local merchants and established retail centers are respond-

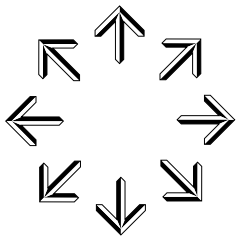
BIG BOX FACT

The master plan process provides an opportunity to discuss the broader role of retail in the community and region and to devise and adopt policies that respond to community concerns.

ing with a variety of planning strategies, such as the retail "caps" adopted by towns in Massachusetts, Pennsylvania and Wisconsin. Retail caps typically establish a maximum square footage per building or building footprint, in effect requiring large-format retailers to go multi-story or occupy several buildings, respecting the finer "grain" and scale found in older downtowns. Or, in the case of Mequon, Wis., the total amount of retail in the town core has been capped at 500,000 square feet and strict controls are enforced on new retail construction outside the core. Communities in New Jersey are advised to check the relevant State statutes and case law when considering innovative controls such as these.

The master plan process also provides an opportunity for municipalities to discuss retail issues with adjoining municipalities, particularly regarding retail facilities of regional significance. Because trade areas for retail go well beyond the boundaries of individual municipalities, sound retail policies often require inter-jurisdictional agreements.

Many municipalities have come to realize that the concessions required to compete in the ratable chase make for poor planning. This creates the opportunity to evaluate development proposals jointly, and to reach equitable solutions regarding the distribution of costs and benefits.



Zoning and Land Development Regulations

The next step is to revisit the municipal zoning code and land development regulations and assess the locations zoned for retail in terms of permitted uses, bulk requirements, development standards, exactions, and so forth, in light of a better understanding of this type of development. Municipalities should be certain that the uses that have been zoned for are indeed the desired uses and that their *scale* is appropriate. If a use is not appropriate for a particular location or if the scale is excessive, it is far better for this to come out during the planning process, rather than during a contentious application hearing.

Site Layout and Development Standards

Site layout for suburban big box retail is similar to the generic configurations favored by conventional suburban retail. Stand-alone buildings are usually sited parallel to the arterial, with considerable setbacks and front-yard parking. These buildings create the same concerns raised by conventional strip development, such as disjointed internal circulation, multiplicity of curb cuts, restrictions to cross-access, etc.

Power centers, like shopping centers, generally follow an "L" or "U" configuration, with the parking field located between the buildings and facing the arterial. With more anchors and fewer in-line stores than conventional shopping centers or malls, power centers generally have more stand-alone buildings, resulting in more disjointed site layouts, less efficient internal circulation systems, fewer pedestrian amenities, and so forth.

Nevertheless, municipalities in New Jersey and elsewhere *can* to a remarkable extent influence site layout, building location and the overall configuration of retail development through the planning and zoning tools at their disposal. The schedule of bulk regulations contained in every land development ordinance -- which defines development parameters such as tract size, lot size, lot coverage or floor area ratio (FAR), setbacks, buffer provisions, etc. -- is instrumental in determining the character of future development.

- Tract and lot size define the scale of retail development, through the subdivision or lot consolidation process. It is important to stress that municipal codes can control both *minimum* and *maximum* lot and tract sizes, which will define the general character of the retail development.

  Lower minimum tract sizes encourage small, stand-alone buildings and fragmented development. Higher minimum tract sizes encourage larger, integrated developments. A maximum tract size places a cap on the scale of development.

- Coverage, site disturbance and/or FAR, combined with lot size, define the intensity and scale of development. A lower maximum coverage mandates less development, while a higher coverage encourages a more intensive use of a site. Again, both *minimum* and *maximum* coverage and FARs should be controlled.

- Setbacks and buffers are often-overlooked parameters that define the envelope for building and site improvements. Originally conceived as a means of separating and buffering uses, these provisions are very effective in separating and creating barriers to circulation between adjacent buildings and lots, even when the uses are complementary. Excessive buffers and setbacks have significant unintended consequences in deterring lot-to-lot pedestrian circulation, and unnecessarily complicating lot-to-lot vehicular circulation.

Municipalities are increasingly adopting *design guidelines* to control the appearance of new retail development. Cities like Toronto, Fort Collins, Colo., and Cambridge, Mass., have strict guidelines requiring large-format stores to respect design objectives and neighborhood character. Design guidelines typically address *site* layout issues, such as parking lot orientation, building orientation, building entrances, pedestrian circulation, public spaces and lighting and landscaping; as well as *architectural* issues such as facades and exterior walls, fenestration and display windows, materials and colors, roofs, architectural details, awnings and canopies, signage, and so forth.

Retailers have also taken interesting initiatives with innovative building design -- Wal-Mart's well publicized environmental demonstration store in Lawrence, Kan., features energy conservation measures, such as skylights, as well as construction materials and building systems designed to minimize the building's impact on the environment.

Since big box retail depends by definition on undercutting the competition, developers faced with weak standards may extend this "stripped-down" approach to site development, and limit or eliminate shade trees and other landscaping, architectural details and sidewalks. But municipalities should be cautious in relaxing site standards. If a retailer is interested in a given market, reasonable improvements are not an obstacle.

For example:

- Even though it is a co-anchor in Central Park Plaza in Steamboat Springs, Colo., the Wal-Mart store blends in with its surroundings, given the shopping center's unified approach to design, landscaping and signage.

- Responding to strict design guidelines, a Target store in Rancho Cucamonga, Calif., has pedestrian amenities: promenades, pavilions, benches and lighting. The store faces the street, and its architecture reflects the local Mission style.

- Woodfield Village Green, a power center in Schaumburg, Ill., has extensive landscaping, gazebos, garden seating areas and other pedestrian amenities.

- The Nassau Park power center in West Windsor Township New Jersey, when fully built, will include extensive landscaping and pedestrian amenities.

Vehicular and pedestrian circulation planning, parking standards and access management plans are other critical tools for shaping retail areas. In New Jersey, the Municipal Land Use Law (NJSA 40:55D-35) requires that municipal zoning be consistent with adopted access management plans, in order to preserve road capacity. This provision is being enforced along State highways, as a result of the State Highway Access management Code. Municipal codes can require alternative access to retail facilities, thereby eliminating or reducing the number of curb cuts (driveway access) from major or minor arterials.

This may entail provisions encouraging shared driveway access, cross-access between parking lots, and rear access. Rear-access roads can be defined in the municipal master plan as *master plan* roads, or designated in the *official map*. Municipal standards for internal circulation, both vehicular and pedestrian, are also critical.

Site layout should also consider future *retrofitting* options. Most newer retail buildings will almost certainly reach *functional* obsolescence well before they reach *physical* obsolescence. The rapid pace of change in retail formats will continue to vacate buildings that remain sound in structure and systems.

BIG BOX FACT

Municipalities in New Jersey and elsewhere can to a remarkable extent influence site layout, building location and the overall configuration of retail development through the planning and zoning tools at their disposal.

Accordingly, today's site layout should try to anticipate tomorrow's needs. Parking lots may become public plazas or open spaces; retail buildings may become housing, offices or civic uses. And the circulation system should be planned to facilitate future connections -- including pedestrian and bicycle links -- to surrounding uses.

Parking

There is no consensus on the most appropriate parking provisions for big box retail. In the absence of specific standards for this type of retail, shopping center stan-

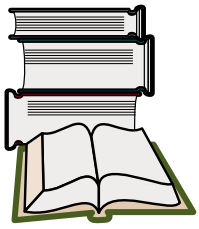
dards are generally used. The industry norm for shopping center parking is 4 spaces per 1,000 square feet of gross leasable area in shopping centers of up to 400,000 square feet; 4.5 spaces per 1,000 square feet in centers from 400,000 to 600,000 square feet; and 5 spaces per 1,000 square feet in centers of more than 600,000 square feet.

Communities are free to set their own standards and it is not known to what extent they adhere to the industry-recommended standards. There is evidence that some communities require standards that are clearly in excess of the industry norms.

And some big box chains, site conditions permitting, have implemented parking ratios well above industry standards, on the theory that each big box is a destination store, with little or no cross-shopping, which leads to longer parking turnover and less potential for parking to be shared between tenants. For example, the Wal-Mart development application in Raritan Township, Hunterdon County, proposes 5 spaces per 1,000 square feet for a building of 160,000 square feet.

On the other hand, big box projects in urban areas either provide no parking (e.g. in Manhattan) or are increasingly relying on structured parking, with ratios no higher than 4 spaces per 1,000 square feet (e.g. in other New York City boroughs).

Different formats may have different parking needs. A recent study in the April 1993 issue of the *ITE Journal* suggests that warehouse clubs generate almost half the traffic -- and parking demand -- of a conventional shopping center with the same area.



Impact Studies

Municipalities that require impact studies as part of the application process can better assess the consequences of development and make more informed decisions. Various impact studies may be requested -- environmental, fiscal, traffic, market area, etc.

The more sophisticated the assessments, the better the information available for local decisions. Impact assessments are also instrumental in determining the appropriate off-site improvements and exactions.

Impact studies are usually required only for projects exceeding a minimum threshold. The threshold can be low -- it is 10,000 sq ft in Cape Cod, Mass., and Vancouver, B.C. -- or high, perhaps in excess of 200,000 sq ft. It should reflect the community's level of concern with that type of development, its eagerness to attract new ratables, the level of "overstoring", etc..

Economic Impacts

It is often feared that large-format value retailers will capture a portion of the existing market base at the expense of existing retailers. Published studies suggest that this is often the case, but there may be significant variations, depending on local markets.

Early studies of Wal-Mart stores in 30 Iowa towns during a five-year period showed that for every $20 million in annual Wal-Mart sales, the host town's total sales volume increased by an average of $9 million, but the town's existing retail base lost $11 million. Within the host towns, businesses carrying the same merchandise as Wal-Mart lost sales, but "complementary" businesses -- those that provided goods or services not provided by Wal-Mart -- benefited from the higher traffic generated by Wal-Mart, and increased their sales.

Small towns (population 500 to 5,000) within a 20-mile radius suffered a net sales loss of almost 20 percent in the five-year period after the Wal-Mart's opening. Other small towns farther away but still within the trade area suffered sales reductions of 10 percent. Stone points out that in dynamic, growing markets, there is much greater potential to assimilate large discount retailers without serious dislocation of existing merchants.

Other studies, including a 1989 impact assessment of 10 Wal-Mart stores in Colorado, confirmed that, although new superstores increased retail sales in host communities by an average of 15 percent, a portion of those sales came at the expense of existing retailers. An assessment of a Wal-Mart proposed for Greenfield, Mass. reached similar conclusions.

The assessment estimated that Greenfield would gain 177 retail jobs within 10 years and between $51,000 and $100,000 in annual property taxes. However, Wal-Mart could displace 25 percent of the city's retail base of 365,000 square feet.

A 1989 study conducted for Wal-Mart by the University of Missouri presented a dissenting view. It found that payrolls, gross sales, tax revenues and the number of retailers were all positively affected in the 14 Missouri counties where Wal-Mart opened stores between 1983 and 1987.

Impact studies in more complex, metropolitan markets, on the other hand, suggest that fears of economic dislocation caused by super-

stores may be misplaced or exaggerated. New York City studies of new large-format supermarkets indicate that, although smaller, independent supermarkets and other existing foodstores lose market share, there is little impact on gross sales. Prices are lower at the new large-format supermarkets, and they offer much greater variety and depth of products. But smaller stores are faster and more convenient, and frequent, large-volume shopping is not feasible for urban populations with low auto-ownership rates.

Most of this discussion has focused on the impacts of new store openings on the existing retail base. However, market-dominant big box retailers are closing smaller, older stores and consolidating market areas around new superstore facilities. Nowata, Okla., and Hearne, Texas, are two such cases.

Based on the available studies, it is unclear how impacts may differ between complex urban markets and simpler rural markets, or between dynamic, growing markets and stagnant markets. It is also not well understood whether store size plays a role; that is, whether small stores are affected differently from medium-size stores.

Traffic Impacts

Traffic impacts are often the most contentious aspects of any application for commercial development. In the absence of specific trip-generation standards for big boxes, impact studies rely on traditional retail standards, including shopping center standards.

With the possible exception of warehouse clubs, it is generally accepted that the number of costumer trips generated by big box retail is comparable to conventional retail with the same square footage (about 7,400 average weekday trip ends for a 100,000-square-foot facility). It is important to remember that not all trips will be new. A rule of thumb is that 70 percent of trips will be destination trips, while 30 percent will be pass-by trips drawn from the existing traffic stream.

It is also accepted, but often overlooked, that big box retail generates far more truck traffic than conventional retail. This is due to higher sales volumes and merchandise turnover.

Shopping centers generate approximately 1.35 daily truck trips per 10,000 square feet of floor area. Different retail uses, however, have dramatically different delivery requirements.

According to a recent study where a conventional department store generates one tractor-trailer a day, a home improvement store generates 35 tractor-trailers and six small trucks/vans. A supermarket generates two tractor-trailers and 20 small trucks/vans a day.

Site planning for efficient goods delivery therefore takes on added importance. Municipalities may want to consider regulating delivery schedules similarly to Fort Collins, Colo, which prohibits deliveries between 7 p.m. and 7 a.m.

Fiscal Impacts

Many communities view the capture of non-residential ratables as an important means of stabilizing or even reducing local property tax rates. While this may be true for some communities for short periods of time, the tax implications of non-residential ratables, particularly retail, are often considerably more complex than anticipated.

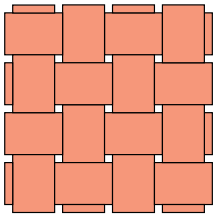
New retail development does not directly generate school-age children, but it does require outlays for public services such as police, fire, courts, road maintenance and traffic control. In addition, the availability of retail services often stimulates residential development nearby, requiring additional public services.

The tax revenues generated by new retail ratables may be partially or substantially offset by formula-based increases in county taxes and regional school taxes resulting from the relatively greater tax capacity of the municipality. State aid for schools or municipal services may also decrease for similar reasons. The net effect of increased direct service requirements, induced residential demand, higher tax payments for regional services and possible loss of state aid requires careful analysis.

BIG BOX FACT

According to a recent study, whereas a conventional department store generates one tractor-trailer a day, a home improvement store generates 35 tractor-trailers and six small trucks/vans. A supermarket generates two tractor-trailers and 20 small trucks/vans a day.

The most appropriate time for this analysis to be conducted is during the preparation or re-examination of the master plan, when a variety of alternative proposed land use patterns can be examined. Fiscal, economic, environmental, traffic and social impacts should be carefully projected and the interrelationships between these impacts weighed. Unfortunately, fiscal impacts all too often are considered only at the project review stage.



Development Exactions

Development exactions should be part of the local code and preferably defined in advance, through transportation improvement districts (TIDs) or other accepted mechanisms for pro-rating costs to individual developments. Municipalities should be careful to base exactions on accepted methodologies; to establish a "reasonable relationship" between development proposal and development exaction; and, preferably, to link specific exactions to the results of credible impact studies. Exactions that are unrelated or poorly linked to a proposed project are likely to raise objections and may not withstand legal challenge.

There are many examples of big box-related development exactions. Nassau Park -- a development with 1 million square feet of office space and a 600,000-square-foot power center anchored by Wal-Mart, Home Depot and Sam's -- contributed $1.8 million to West Windsor Township for transportation and sewer improvements, and $2.2 million to Mercer County for transportation improvements.

The developer is also required to submit an annual survey of peak trip generation and employee traffic. The site is in the municipal TID. Exactions based on area-wide TIDs have been upheld by New Jersey courts.

Municipalities around the nation have not limited exactions to infrastructure applications. Some towns, like Colliersville,Tenn., charge impact fees on new commercial development outside the downtown to fund downtown improvements. Auburn, Wash., required a suburban mall developer to provide shuttle bus service to and from the downtown, in addition to financial and marketing support for the downtown. And the package offered by Wal-Mart in Greenfield, Mass., included funds for downtown streetscape improvements; funding for an archaeological dig on the development site and a mobile exhibit of the findings for local schools; and the contribution of a 75-acre parcel to extend the municipal industrial park. Again, New Jersey municipalities considering innovative exactions should check the relevant State statutes and case law.

Citizen Activism

Big box retail development proposals have inspired considerable resistance from coalitions of "Main Street" merchants, environmental organizations, neighborhood groups, historic preservation interests and others, both in New Jersey and around the country. (New Jersey case law involving a development dispute is found in *Manalapan Realty vs Township Committee of Manalapan Township*, a case where the municipality, responding to neighborhood concerns, effectively precluded a Home Depot from locating in an expanded regional mall.)

Wal-Mart, as the leading and fastest-growing retailer, has been repeatedly targeted by these groups, and has come to represent the entire industry. Perhaps the most widely publicized cases have been in Vermont, where proposals to build retail outside the state's traditional centers have been repeatedly blocked under Act 250, a growth-management framework that requires state review and permitting of projects of regional significance.

The state of Vermont has been working with Wal-Mart executives to explain the statewide growth management rationale and to suggest suitable locations close to existing downtowns. Wal-Mart has finally received approval to open a store in an old Woolworth building near downtown Bennington.

Resistance to big box proposals has spawned a small growth industry, with a national network dedicated to the dissemination of information on strategies that have worked. The National Trust for Historic Preservation has taken a leading role in the field. There is a growing number of consultants who advise Main Street and other local merchants on how to reposition their businesses when facing the eminent opening of Wal-Mart or other discount department stores; some publications also address these issues directly.

Big Box Retail Within the Framework of New Jersey's State Plan

Although big box retail is not explicitly discussed in the New Jersey State Development and Redevelopment Plan, which is a broad policy document, it contains principles that are important in framing the issues raised by any type of large-format development.

At the core of the State Plan is an appeal for municipalities to embrace better planning. This often involves looking beyond municipal boundaries and reaching interjurisdictional agreements.

Because large-scale retail draws on large trade areas, the Office of State Planning encourages municipalities to consider jointly the broader role of retail, through their master planning processes, and to evaluate jointly projects of regional significance. Municipalities participating in the State planning process can request assistance from the Office in planning, project evaluation, or interjurisdictional agreements. Also, assistance is often available from county planning boards.

The Office encourages municipalities to refer to the State Plan's Resource Planning and Management Structure and to direct large-format development to the appropriate center types in accordance with the policy objectives of the relevant Planning Area. Communities involved with the centers designation process should also make sure any large-format retail facilities are within the Community Development Boundary.

The State Plan encourages mixed-use development in compact forms, with retail and services within walking distance of housing and other uses. Big box formats with their large building floorplates and surface parking requirements seemingly challenge this model. However, the experience with both "in-town" regional shopping malls and with urban big box development suggests that the traditional fabric of streets and blocks that inspired the State Plan concept of centers is very flexible, and that large-format uses can be accommodated in these settings, with appropriate design guidelines.

Historically, this has been the case. Large industrial and warehouse buildings, which the big boxes emulate, as well as other land-intensive uses, such as transportation terminals, stockyards, and large educational and health facilities, are integrated into the surrounding physical pattern without compromising fundamental principles of accessibility to pedestrians and mass transit, and without destroying neighborhood character. Although big boxes raise design challenges, the Office believes it is necessary for planners, developers, retailers, local officials and community residents to find innovative ways to accommodate these uses without compromising fundamental growth-management and quality-of-life-objectives.

BIG BOX FACT

Because large-scale retail draws on large trade areas, the Office of State Planning encourages municipalities to consider jointly the broader role of retail, through their master planning processes, and to evaluate jointly projects of regional significance.

For Further Information

This paper is the first in a proposed series on retail and its planning implications. To obtain a copy of a larger study of big box retail, please contact Sheila Bogda at (609) 292-3744. For further information on this topic, to consult documents on which this document is based or to find out more about how the Office of State Planning can assist your community in this area, please contact Carlos Macedo Rodrigues, Manager -- Special Projects, at (609) 292-3097.

Controlling Big Box Retail Development in Georgia

Land Use Clinic

University of Georgia School of Law and College of Environment & Design

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I. Introduction – The Rise of "Big Box"[1] Development

A. Background – The Rise of Sprawl

Since the end of World War II, America has witnessed the ever-increasing phenomenon of sprawl. Traditional neighborhoods were characterized as "mixed use, pedestrian friendly communities of varied population, either standing free as villages or grouped into towns and cities…."[2] But as suburbs spread further from the urban core in the years following the end of World War II, large tracts of land were cleared to build the suburban tract housing that is characteristic today. Suburban sprawl has become "the standard North American pattern of growth;"[3] and is "characterized as 'non-contiguous, automobile-dependent, scattered, new development on the fringe of settled areas….'"[4] In these fringe areas were built large retail developments, which have evolved into today's "big box" stores.[5]

The rise of big box retail is no accident. Following World War II, America experienced a boom that saw our economy "shift from a central city-based manufacturing economy to a suburban-based service and information economy."[6] At the same time, the "desire to be free of central city taxation and zoning… the availability of open land… [as] taxable assets; pressure from landowners to convert open land to more valuable suburban uses; and broad, judicially unreviewable and politically unaccountable grants of zoning authority from state legislatures to

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[1] "Big Box" development refers to stores that range from 90,000 to 250,000 square feet, which are typically 20 to 50 times the size of typical downtown retailers. Leslie Tucker, *Retail Caps for Retail Glut: Smart Growth Tools for Main Street*, NATIONAL TRUST FOR HISTORICAL PRESERVATION 1 (2002), *available at* <http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit_retailcaps.pdf>.

[2] ANDRES DUANY, ELIZABETH PLATER-ZYBERK, AND JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 5 (2000).

[3] Id.

[4] Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 565 (2000).

[5] Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 448 (2003).

[6] Henry R. Richmond, *Sprawl and its Enemies: Why the Enemies are Losing*, 34 CONN. L. REV. 539, 548 (2001).

municipalities" also contributed to the rise of sprawl.[7] The result of this shift was that by 1990, "of the eighty percent of the American people who lived in metropolitan areas, two-thirds lived in suburbs—few of which even existed in 1910."[8] This environment helped set the stage for the success of big box retailers by providing new markets in outlying suburbs and the consumers needed to support the increasingly large retail stores.

B. What is Big Box Development?

Big box stores are built as part of power centers[9] or as freestanding stores and have grown increasingly larger in recent years. Today, big box retailers are said to account for over half of all new retail space built in America.[10] Underscoring the size and impact of these stores, Fortune recently reported that "Wal-Mart… [opens] almost 300 new stores a year… A Supercenter can be a $100 million-a-year business with up to 600 employees."[11] While big box stores boast convenient, one-stop shopping, they are criticized for their hidden costs.[12] These include:

> [T]raffic congestion; loss of trees, open space and farmland; displaced locally-owned small businesses; substitution of jobs that support families with low-paying jobs that don't; air and water pollution; dying downtowns with vacant buildings; abandoned shopping centers and the creation of more retail space than the local economy can support; a degraded sense of community; placing large burdens on public infrastructure, such as sewers

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[7] Id. at 554.
[8] Id. at 551.
[9] Also called a super-community center, power centers differ from traditional malls in that they are not enclosed, have few amenities, and are composed of multiple anchor tenants. In addition, a small percentage of a center's leaseable area is devoted smaller stores on a speculative basis after the center is developed. Raymond G. Truitt, *Fe Fi Fo Fum: Retail Giants Rule Power Centers*, 10 APR PROB. & PROP. 38, 39 (1996).
[10] Tucker, supra note 1.
[11] Cora Daniels, *Women vs. Wal-Mart*, FORTUNE, July 7, 2003, *available at* <http://www.fortune.com/fortune/careers/articles/0,15114,462970,00.html>.
[12] Tucker, supra note 1.

and road maintenance; discouraging new business development; and sprawl.[13]

Big box stores are often built to last for only short periods of time, with many of them leased from developers who build them on open land at the edge of town, where development costs are low.[14] This lack of investment by the store in the development project makes it easier for big box retailers to simply walk away when they find it fitting to do so. Indeed, communities "worry that a big box user may abandon a store as corporate restructuring and market analysis determine that a once desirable site has become less profitable."[15] A further problem is presented when the former retailer continues to lease the abandoned space to prevent a competitor from moving in, effectively prohibiting the center's redevelopment.[16]

II. The Law of Big Box Development

A. Underlying Zoning Principles and Law

Georgia's constitution provides that "[t]he governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning."[17] While this does not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power, this grant of power leaves the substance of planning and zoning laws up to the local municipality or county governing authority.[18] Thus the power to regulate the development of big box retail stores falls to the municipalities. The basic legal issue involved in limiting the size of big box superstores is whether the exclusion advances a legitimate zoning

[13] Constance E. Beaumont & Leslie Tucker, *Big-Box Sprawl; (And How to Control It)*, MUNICIPAL LAWYER, 7 (Mar./Apr. 2002).
[14] *Fold Big-box Stores Before It's Too Late*, ATLANTA JOURNAL-CONSTITUTION, Oct. 17, 2000, at A18.
[15] Truitt, supra note 9, at 39.
[16] *Fold Big-box Stores before It's Too Late* at A18.
[17] GA. CONST., art. IX, § II, Para. IV (1983).
[18] Id.

purpose, with the court normally ruling in favor of the city if it has a reasonable planning based rationale for its action.[19] In Georgia, the burden is on the property owner challenging a zoning ordinance to establish by clear and convincing evidence that the owner "will suffer a significant detriment" under the ordinance and that the zoning "bears an insubstantial relationship to the public interest."[20]

B. Case Law on Big Box Development

The law on the use of retail caps to limit the size of big box retail stores in Georgia appears to be nonexistent, reflecting the relatively recent nature of use of caps in this state. However, there is a small body of case law from other jurisdictions where retail facilities exceeding certain square footage requirements are prohibited from certain zoning districts. For example, the validity and constitutionality of a law that set caps on the size of big box retail stores was discussed in *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*.[21] After adopting a six-month moratorium on site plan approvals for retail stores exceeding a gross floor area of over 20,000 square feet, the city passed the Superstore Law, restricting the establishment of superstores and supermarkets except within the Central Business zoning district.[22] Prior to the passage of the law, A & P had applied for a site plan approval for a supermarket that would have been placed outside of the Central Business zoning district in a Neighborhood Business zoning district. Due to its expected size, 33,878 square foot area with a 15,000 square floor cellar,[23] the proposed supermarket was denied approval based on the passage of the Superstore Law.

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[19] Tucker, supra note 1.
[20] *Henry County v. Tim Jones Properties, Inc.*, 273 Ga. 190 (2000).
[21] 997 F.Supp. 340 (1998).
[22] The Superstore Law defines a 'superstore' "as a retail store located within a building whose gross floor area equals or exceeds 10,000 square feet," and defines a 'supermarket' "as a superstore in which food and/or beverages constitute the predominate goods for sale." Id. at 345.
[23] Id.

In arguing against the Superstore Law, A & P argued "that the size restrictions imposed by the Superstore Law were wholly arbitrary, not in the furtherance of any legitimate governmental purpose, do not bear a reasonable relationship either to the ends sought to be achieved by the law or to the public, health, safety, morals, or welfare."[24] Ultimately the constitutionality of the ordinance was not addressed by the court because the appeal was based on a motion to dismiss, which did not provide sufficient facts for such a determination.[25]

In *Home Depot U.S.A. v. Portland*, the city amended its zoning ordinance to make "retail facilities... [in excess of 60,000 square feet] non-permitted in certain 'industrial districts' where they previously had been conditionally permissible... [and] also made the uses only conditionally permissible in certain 'employment districts' where they previously were permitted outright."[26] The city based the law's purpose on the need to "'protect Portland's industrial sanctuaries, areas that generate a high percentage of family-wage jobs, from large scale retail and office uses and their negative impacts on traffic and land value.'"[27]

Home Depot argued that the amendments were either inconsistent with or not supported by findings to be consistent with a statewide planning goal that required local urban area plans "to provide 'for at least an adequate supply of sites of suitable size types, locations, and service levels for a variety of industrial and commercial uses[.]'"[28] The court rejected this argument, however, finding that the goal "requires planning and provision for a 'a variety of industrial and commercial uses,' not a Herculean—or quixotic—planning and zoning effort whereby every community assures that there are available sites for every conceivable kind of business

[24] Id. at 345.
[25] Id. at 348.
[26] 169 Or.App. 599, 601 (2000).
[27] Id. at 601.
[28] Id.

activity."[29] Instead of depleting the land supply for commercial and industrial uses, the court found that the amendments only changed "the conditions under which a particular kind of business activity may be approved within areas that remain zoned as business districts and remain available for business uses of various kinds."[30] Indeed, the court concluded its decision noting that, "When it is all said and done, petitioner's challenges to the city's finding and to the substance of its decision reflect a disagreement at the policy and planning level… This court of course is not the appropriate forum to resolve" these issues.[31] While such a case does not seem to have been brought in Georgia, relying on a policy based justification could be an important defense if retail caps are challenged.

Big box control ordinances are also challenged as effecting a taking. Such was the case in *Loreto Development Co. v. Village of Chardon*, where the court considered the denial of a conditional use permit for a proposed ninety-eight-thousand-square-foot Wal-Mart store in a zone where retail establishments were limited to "local retail businesses" of 10,000 square feet or less.[32] While the trial court ruled the ordinance unconstitutional, the Court of Appeals noted that the appellee "failed to establish, beyond a fair debate, that the zoning restrictions deprived it of the use of its property."[33] The court noted that there was evidence that the owners could develop the site as zoned and had been offered more for a portion of the property than it had originally paid for it.[34]

The city's justification for the ordinance was crucial to this outcome. In answering whether the zoning ordinance advanced a legitimate governmental interest, the court found that

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[29] Id. at 602.
[30] Id. at 603.
[31] Id. at 604.
[32] 119 Ohio App.3d 524, 527 (1996).
[33] Id. at 528.
[34] Id.

the regulations "[are] intended to prevent traffic congestion, excessive noise, and 'other objectionable influences'" and that the preservation of "the residential, small town character of this part of town…was clearly a legitimate interest to be advanced by this zoning."[35] The appellee also argued that the floor size restriction "fails to advance the purported interests… because the total area of retail space is the same whether there are nine small stories or one large store, there is no difference in the noise and traffic generated by the larger store."[36] Yet the court found that even the evidence presented by the appellee supported the position that "such a large store would cause noise and traffic congestion and would destroy the existing character of the area" because it would draw business from surrounding communities.[37] Thus, the appellate court found the restrictions unconstitutional, since the "appellee failed to present competent, credible evidence that the local retail business restrictions both deprive it of any economically viable use of its property and failed to advance a legitimate governmental interest…."[38] This indicates that it is possible to uphold big box retail restrictions despite their impact on the use of property interests.

III. Controlling Big Box Development in Georgia

A. The Use of Retail Caps

In recent years, several devices have been used to guard against the blight that results from abandoned big box stores, many of which stand in the shadows of new, larger stores built or leased by their parent companies. Indeed, "[b]ig box retail is another growing commercial use problem. Municipalities may try to deal with it by limiting the size of stores in commercial

[35] Id.
[36] Id. at 529.
[37] Id.
[38] Id. at 528-29.

districts."[39] This is exactly what many communities have done thorough the use of retail caps, which are limits on a retailer's sales volume, or limits on the size of big box stores.[40] These size limits can apply to either overall square footage or to the so-called "footprint"[41] of a store. The limitations on store footprints often allow large retail stores to be built larger by adding another story to the structure.[42]

It is important to note that the retail cap should be based on local planning efforts and should not simply be copied from another jurisdiction. While many of these caps have been set under 100,000 square feet, caps range from 30,000 to 80,000 square-feet and more.[43]

B. Peachtree City

Peachtree City's big box ordinance represents one of the first attempts by a Georgia municipality to address the issues associated with big box blight. At the time the ordinance was passed city leaders expressed fears that there could be a string of big box stores built if the issue was not addressed.[44] This fear is reflected in the language of the ordinance itself. According to the ordinance, the intent of creating the general commercial district includes the desire to "avoid the development of 'strip' type business areas."[45]

Peachtree City's ordinance is designed primarily around the use of retail caps as part of an overall big box ordinance that seeks to limit the impact that these stores would have on the city. Under the city's general commercial district ordinance, retail businesses that sell

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[39] DANIEL R. MANDELKER, LAND USE LAW §5.36 (5th ed. 2003).
[40] Tucker, supra note 1, at 1.
[41] Footprint is used to refer to stores that build multiple floors on top of one another, with only the first floor's square footage applying to the size of the store that can be built. Id.
[42] Id.
[43] Tucker, supra note 1, at 2-4.
[44] Sonja Lewis, *Peachtree City May Limit New Big-stores Size: Proposal is Designed to Protect Against the Possibility of Unsightly Abandoned Buildings*, ATLANTA JOURNAL-CONSTITUTION, Aug. 24, 2000, *available at* 2000 WL 5472338.
[45] PEACHTREE CITY, GA., CODE OF ORDINANCES § 1006.1 (2000) [hereinafter PEACHTREE CITY].

merchandise "on an individual zoning lot where an individual tenant occupies more than 10,000 square feet"[46] are subject to the ordinance.[47] Maximum areas on any zoning lot are set at 150,000 square feet for general retail space and 50,000 square feet for theater and restaurant space.[48] The ordinance's key requirement is that "[n]o single commercial tenant shall occupy more than 32,000 square feet [of] floor area."[49]

Peachtree City officials also designed the ordinance as a tool to help landlords market their property after retailers leave to occupy newer, larger spaces nearby.[50] The surrounding business owners and community are often hurt by the continued leasing of the empty space by the previous big box tenant. Peachtree City's ordinance requires that empty stores be maintained as if they are occupied, including such activities as cleaning the windows regularly. This discourages blight and may even an incentive for old tenants to give up their lease on the empty property.[51]

Also, the ordinance requires that leases for big box stores contain a clause forbidding the tenant from continuing to lease the space after vacating it. Under the law, tenants occupying more than 10,000 square feet are required to

> [P]rovide the city attorney with a copy of the rental agreement between the tenant and its landlord which contains a contract provision prohibiting the tenant from voluntarily vacating such premises or otherwise ceasing to conduct its retail business on such premises while simultaneously preventing the landlord, by continuing to pay rent or otherwise, from leasing the premises to another person or company who will operate a permitted business on the premises.[52]

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[46] PEACHTREE CITY, supra note 45, at § 1006.3.
[47] Id. at § 1006.3(a).
[48] Id. at § 1006.3(a)(1).
[49] Id. at § 1006.3(a)(2). The 32,000-sq. ft. restriction in the ordinance was based on the size of big box stores in Peachtree City at the time the ordinance was proposed. Telephone Interview with Jim Williams, former Development Services Director, Peachtree City, Georgia (June 10, 2003).
[50] Id.
[51] Id.
[52] PEACHTREE CITY, supra note 46, at § 1006.3(6).

This requirement raises possible Contract Clause issues because of the city's involvement in the contracting process between lessor and lessee. The U.S. Constitution states: "no state shall pass any... Law impairing the Obligation of Contracts..."[53] Yet "[t]he contact clause is not an absolute bar to a land use regulation that impairs a contact."[54] Accordingly, a court must first determine that there has been an impairment of a contact, but this impairment can be found valid if it is justified by a legitimate governmental purpose.[55] "Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's 'adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and is of a character appropriate to the public purpose justifying [the legislation's] adoption.'"[56] It is important to note that, when addressing requirements upon private party contracts,[57] a court should show deference to the legislative judgment as to the "necessity and reasonableness of a particular measure."[58]

Some cases arise where ordinances are claimed to be either cases of restrictive commercial zoning, which could be a violation of the rule that control of competition is not a proper zoning purpose,[59] while others claim that it is it an attempt to use "zoning to control market demand."[60] And while "zoning may not be used to control competition... Some courts... uphold zoning that affects competition if control of competition is not its primary purpose and if it implements other legitimate zoning objectives."[61] Even if a claim of competition interference were to be raised, the fact that the ordinance is based on the comprehensive plan further insulates

[53] U.S. CONST., art. I, § 10, cl. 1.
[54] MANDELKER, supra note 40, at §2.52.
[55] Id.
[56] *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470, 505 (1987).
[57] As opposed to contracts in which the state is a party.
[58] Id.
[59] MANDELKER, supra note 40, at § 5.33.
[60] Id. at § 5.44.
[61] Id.

it from being overturned because "commercial zoning may not be invalid as an improper control of competition if it is based on a comprehensive plan."[62]

There has been one lawsuit filed against Peachtree City based on this ordinance. The case primarily turned on whether a Target store had a right, pre-existing the ordinance, to build on a particular site. The case was settled and so the overall validity of the ordinance was not litigated. In the settlement Target agreed to reduce the project size by 20 percent and change the location of the store's entrance to ease neighbor's concerns over traffic.[63] Prior to the settlement, Target was planning to argue that the ordinance was unconstitutional because it singled out retail for restriction over other land uses.[64]

C. Fayetteville

In April 1996, Fayetteville amended its zoning rules to create a category for stores in excess of 75,000 square feet. The ordinance also requires that [b]ig box stores be built on sites that have access to two state highways.[65] This followed an attempt by Wal-Mart to build a 200,000 square feet store next to a subdivision on Georgia Highway 85, which led the city to pass a moratorium on new big box stores in order to effect the zoning changes.[66] Fayetteville regulates big box stores as high intensity commercial and requires that commercial centers and single tenant retail stores over 75,000 square feet be planned unit developments (PUDs) only.[67]

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[62] Id. at § 5.47.
[63] Kevin Duffy, *Peachtree City: Agreement heads off trial over Target*, THE ATLANTA JOURNAL CONSTITUTION, Sep. 22, 2005.
[64] Kevin Duffy, *Accord paves way for Target*, THE ATLANTA JOURNAL CONSTITUTION, March 27, 2004.
[65] Rick Minter, *'Big-box' stores must have access to 2 highways*, THE ATLANTA JOURNAL CONSTITUTION, Apr. 18, 1996, M11, *available at* 1996 WL 8202027.
[66] Id.
[67] CITY OF FAYETTEVILLE, GA., CODE OF ORDINANCES § 94-168(3) (1997). Under a planned unit development, "the city can incorporate controls into the plan, such as, for example, requiring buffer zones. The PUD plan is then recorded, thereby protecting the city and the public as well as the purchasers in the development." *Mayor and Aldermen of the City of Savannah v. Rauers*, 253 Ga. 675, 676 (1985).

The C-4 zoning designation for these stores also allows any use permitted in the C-3 zoning district, including single tenant retail business and service stores with a maximum gross floor area of 50,000 to 75,000 square feet,[68] planned commercial centers with 50,000 to 75,000 square feet for any single tenant and 100,000 square feet per planned center;[69] and building supply sales that have up to 75,000 square feet, excluding outside storage.[70]

D. City of Roswell

The City of Roswell adapted a big box ordinance in February of 2003, and amended the ordinance in May of 2004.[71] The amended ordinance defines big box commercial retail structures as retail businesses on an individual lot that occupy more than 10,000 square feet.[72] No single commercial retail occupant can occupy more than 65,000 square feet.[73] However, due to the recent annexation of land containing many existing large retail sites, the amended City of Roswell ordinance also provides for the redevelopment of existing big box sites above and beyond the square footage limitations for new structures.[74]

The City of Roswell got good news in August 2004 when Home Depot announced they would be utilizing the site of a vacant Wal-Mart, Roswell's biggest vacant box store. Home Depot said they planned to tear the existing big box down and build a new store on the same site. However, the news had a downside: this meant that Home Depot would be vacating their current

[68] Id. at § 94-167(2).
[69] Id. at § 94-167(3).
[70] Id. at § 94-167(14).
[71] CITY OF ROSWELL, GEORGIA ORDINANCE TO AMMEND THE ZONING ORDINANCE REGARDING BIG BOX STRUCTURES § 10.9 (2004) [hereinafter CITY OF ROSWELL].
[72] CITY OF ROSWELL § 10.9 (3).
[73] Id. at § 10.9 (a).
[74] Id.

Roswell location, leaving another big box store empty.[75] Roswell City Council recently "approved a mixed-use ordinance that sets guidelines for the higher-density developments."[76] When commenting on the ordinance, one Councilwoman said the City didn't want any more commercial development, and that the amount of Roswell's commercial development is already three times the national average.[77]

The City of Roswell ordinance prohibits large expanses of blank walls.[78] This requirement can be met through a variety of design options, which are to be reviewed and approved by the Roswell Design Review Board or the Historic Preservation Commission. The City of Roswell has had no threatened or actual litigation regarding its big box statutes.[79]

E. City of College Park

In December of 2003, the City of College Park amended its zoning rules to create a category for "especially large buildings".[80] This big box ordinance applies to new structures over 30, 000 square feet, as well as to non-conforming existing structures over 15,000 square feet which are left vacant for at least six months. Additionally, the ordinance sets a retail cap on new structures over 60,000 feet.[81] The College Park ordinance is notable because it is the first ordinance in Georgia to specify strict design and pedestrian scale requirements for big box development. Also, it provides for the analysis of local noise and visual impacts, as well as regional traffic impacts.

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[75] Paul Kaplan, *Home Depot to rehab old Wal-Mart site*, THE ATLANTA JOURNAL CONSTITUTION, 12 Aug. 2004, at 1JM.
[76] Paul Kaplan, *Roswell, property owner ponder development possibilities*, THE ATLANTA JOURNAL CONSTITUTION, 2 Jul. 2006, at 11ZG.
[77] Id.
[78] Supra note 71, at § 10.9 (b).
[79] Telephone interview with Jean Marshall, paralegal, City of Roswell, Georgia (October 12, 2004).
[80] CITY OF COLLEGE PARK, GEORGIA CODE OF ORDINANCE 2003-39(13) (2003).
[81] Id. at § 2003-39(13)(a)(1)&(2).

The College Park ordinance requires that the facade and exterior walls be designed to include projections and recessions, o reduce the massive scale and uniform appearance of traditional big box development.[82] Similarly, street frontage must be designed to include windows, arcades, or awnings for at least 60% of the façade.[83] Additional specifications address the number and variation in rooflines, appropriate building materials and colors, the clear indication of entryways, and the inclusion of pedestrian scale amenities and spaces.[84] Machinery equipment, outdoor sales, trash collection areas, and parking structure facades must be screened in a manner consistent with the overall design of the building and landscaping.[85] Delivery and loading areas must be designed so as to minimize visual and noise impacts.[86] Submission of a noise mitigation plan is required.[87]

A landscape buffer, which includes canopy trees, is required for all sites which adjoin residential uses or zones.[88] Street access is limited to major arterial roads as specified by a master plan.[89] Additional requirements specify that parking areas should be distributed around large buildings in an attempt to shorten the distance to other surrounding buildings, public sidewalks, and transit stops.[90] Sidewalks must be provided along the full length of any building where it adjoins a parking lot. Sidewalks must also connect store entrances to transit stops, and to nearby neighborhoods.[91] All applicants must also submit a traffic impact study, and an

[82] Id. at § 2003-39 (13)(b).
[83] Id. at § 2003-39 (13)(c).
[84] Id. at § 2003-39 (13)(d),(e)&(f).
[85] Id. at § 2003-39 (13)(h),(k),(m)&(n)(1).
[86] Id. at § 2003-39 (13)(q).
[87] Id. at § 2003-39(13)(u).
[88] Id. at § 2003-39(13)(j).
[89] Id. at § 2003-39(13)(i).
[90] Id. at § 2003-39(13)(n)(1).
[91] Id. at § 2003-39(13)(o).

outdoor lighting report which provides information on how outdoor lighting will be accomplished to minimize the impacts on adjacent properties.[92]

The College Park ordinance addresses the risk of future abandonment by requiring the submission to the city of a performance bond equal to 110% of the estimated cost of removal of the structure.[93] Such a bond could be utilized to demolish the structure if 70% of floor area of the structure remains unoccupied for more than six months. The City of College Park has had no threatened or actual litigation regarding its big box ordinance.[94]

F. Result of Proposed Big Box Ordinances: Marietta, Forsyth County, and Cherokee County

Several Georgia counties and cities considered the adoption of big box ordinances from 2004 to 2006 with mixed results. Marietta City Council approved an amendment to their zoning code relating to large retail establishments by a unanimous vote. Their ordinance outlines new architectural standards for single retailers occupying buildings of more than 40,000 square feet, requiring the buildings be broken up architecturally or designed with windows, canopies, or awnings.[95]

Forsyth County Board of Commissioners passed a "watered-down" big box ordinance.[96] The final ordinance did not include a "controversial" provision that would have required a demolition bond to be paid by developers to fund tearing down abandoned stores.[97] (Before the Forsyth County ordinance passed Wal-Mart submitted a store design that complied with the

[92] Id. at § 2003-39(13)(r)&(s).
[93] Id. at § 2003-39(13)(w).
[94] Telephone interview with Winston Denmark, attorney, City of College Park (October 13, 2004)
[95] Staff, *Catching up,* THE ATLANTA JOURNAL CONSTITUTION, Aug. 17, 2006, at 14J.
[96] Bill Johnson, *Northside Business: BUSINESS,* THE ATLANTA JOURNAL CONSTITUTION, 26 Jan. 2006, at 16JH.
[97] Id.

proposed new standards. The store had an equestrian theme because of its proposed location near horse farms.)[98]

The Forsyth County ordinance was modeled after Peachtree City's big box ordinance. The ordinance was prompted by a proposal by Wal-Mart to build a Supercenter near two subdivisions. Angry homeowners convinced state environmental officials that the construction plan ignored streams on the property.[99] In February 2005 a stop work order was issued while the Georgia Environmental Protection Division and the developer "talked."[100]

A proposed new big box ordinance did not fare so well in Cherokee County. In June, 2006 the County Commissioners tabled a proposed new big box ordinance indefinitely. The Commission felt the proposed ordinance limited small and medium-sized developments too much. The Commissioners said they had wanted to regulate only true big box stores, not all retail. The current Cherokee County Ordinance bans construction of stores measuring over 80,000 square feet on two lane roads or within a half mile of schools.[101]

IV. Local Bans and Statewide Controls – The Case of California

California has experience with both statewide planning efforts and local municipal efforts to control big box development. The state's size and population make it attractive for big box retail. In 2002 Wal-Mart announced plans to build 40 such centers in California over the next

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[98] Doug Nurse, *Forsyth County: 'It will be like no other Wal-Mart'*, THE ATLANTA JOURNAL CONSTITUTION, 4 Dec. 2005, at 4ZH.
[99] Doug Nurse, *Forsyth County: Big-box stores become an issue,* THE ATLANTA JOURNAL CONSTITUTION, 26 Sep. 2004,at 1ZH.
[100] Janet Frankston, *Keeping big-box stores in line,* THE ATLANTA JOURNAL CONSTITUTION, 14 Feb. 2005, at 4F.
[101] Paul Kaplan, *Commissioners take little swing at big development,* THE ATLANTA JOURNAL CONSTITUTION, 15 Jun. 2006, at 1JQ.

four years, each with an average size of 187,000 square feet each.[102] However, it has had difficulty meeting this goal. As of October 2005 there were only six Supercenters currently in operation in California and five more in development.[103] Construction of new stores was slowed by litigation and opposition from local communities. Locals, concerned by Wal-Mart's employment practices, the impact of a new Superstore on the community, and the environmental impact of the stores, filed lawsuits on the grounds of environmental regulation violations and passed ordinances that kept Supercenters away.[104] Wal-Mart is not likely to back out of plans to expand their California operations, especially considering that four of Wal-Mart's top five retail generating stores are in the state.[105]

Two of the most publicized fights have been in Contra Costa county and Inglewood. Contra Costa county banned the Superstore concept altogether.[106] County Supervisor John Gioia, the ban's author, believed that the Supercenter would not be able to generate sufficient revenue to cover the burdens that the store would place on county roads.[107] As a result, the ban prohibited stores that covered more than 90,000 square feet and devote more than 5 percent of the space to nontaxable items, such as groceries, from being located in the unincorporated areas of the county.[108] However, in early 2004 Wal-Mart lead a campaign to defeat the Contra Costa

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[102] *Wal-Mart Supercenters Face Resistance*, THE DESERT SUN, July 22, 2003, available at <http://www.thedesertsun.com/news/stories2003/business/20030722023945.shtml>. [hereinafter *Wal-Mart Supercenters*]; see also Sandy Kleffman, *County Supervisors Target 'Super-sized' Retail Stores*, CONTRA COSTA TIMES, June 4, 2003, available at <http://www.bayarea.com/mld/cctimes/news/local/states/california/counties/contra_costa_county/6010221.htm>.
[103] Pia Sarkar, *Defying the Juggernaut*, THE SAN FRANCISCO CHRONICLE, 16 Oct. 2005.
[104] Id.
[105] Id.
[106] Supra note 101.
[107] In passing its ordinance, Contra Costa County Board of Supervisors relied on a study conducted by the San Diego County Taxpayers Association (SDCTA) to support its argument that the Supercenter would harm the community. The SDCTA study "found that an influx of big-box stores into San Diego would result in an annual decline in wages and benefits between $105 million and $221 million, and an increase of $9 million in public health costs… [and] that the region would lose pensions and retirement benefits valued between $89 million and $ 170 million per year…." Id.
[108] Id.

County ordinance. Although Wal-Mart claims to have no current plans to build in the area covered by the ordinance, the company spent over one-hundred thousand dollars collecting signatures on a petition for a referendum regarding the ban.[109] In March of 2004 residents voted down the ban by a 6 percent margin of victory.[110]

During that same election, however, votes in Inglewood, California voted down a measure that would have exempted Wal-Mart from all environmental, traffic and zoning laws in the low income community.[111] Efforts to ban or limit big box retail continue throughout California. For example, Los Angeles passed an ordinance that requires developers of large scale retail projects in certain zones to file economic, environmental, and traffic impact reports with an application for a permit for any store of 100,000 square feet, with at least 10% of the store devoted to the sale of non-taxable goods (groceries and prescription drugs).[112] And although Wal-Mart had indicated its development plans do not include San Francisco, the city's Board of Supervisors nevertheless passed a ban on stores over 120,000 square feet, with retailers seeking approval for stores larger than 50,000 square feet required to applied for a conditional use permit.[113]

At the state level, California seeks to address the proliferation of big box[114] retail stores through restrictions on financial assistance to retail stores when they seek to relocate. Unless the legislative body of the local agency to which the relocation will occur offers to the local agency from which the relocation is occurring a contract for apportionment of the sales tax generated

[109] Id.
[110] Josh Dubow, *Wal-Mart Has Mixed Results in California Votes*, USA TODAY, 3 March 2004.
[111] Ruth Rose, *Merchant of Shame*, SAN FRANCISCO CHRONICLE, 3 May 2004.
[112] Robert Green, *Thinking Outside the Big Box*, L.A. WEEKLY, 13-19 August 2004.
[113] Adriel Hampton, *Supes Restrict 'Big Box' Stores*, THE INDEPENDENT, 12 May 2004.
[114] California defines a big box retail store as any store that is "greater than 75,000 square feet of gross buildable area…." CAL. GOV'T CODE § 53084(f)(1)(West 2003).

from the retailer or dealership, [115] local agencies are prohibited from providing financial assistance to car dealerships, big box retailers, or landlords of either if the tenant is "relocating from the territorial jurisdiction of one local agency to… another local agency *but within the same market area*."[116] If the relocation is occurring within the same market area, the receiving agency "shall notify the community from which the relocation is occurring of its intent to give financial assistance."[117] They must then send a contract "that apportions the sales tax generated from the automobile dealership or big box retailer after the relocation between the two local agencies."[118] This is an effort to address cases where big box retailers leave one area for another close by, having negative consequences for the community and nearby businesses left behind. This situation seriously undermines the efforts of those who seek to control the costs of big box development, and makes regional planning that much more difficult.[119]

V. Other Examples of Controlling Big Box Development

A. Moratorium and Design Regulations – Fort Collins, Colorado

Temporary development controls are an effective way for communities "to maintain the status quo while they review and strengthen their planning and zoning laws."[120] Development moratoria provide a good illustration of such a temporary development control device. These moratoria "allow communities to place a temporary halt on new development so that local

[115] Id. at § 53084(a).
[116] Market area is defined as a "geographical area that is described in independent and recognized commercial trade literature, recognized and established business or manufacturing policies or practices, or publications of recognized independent research organizations as being an area that is large enough to support the location of the specific automobile dealership or the specific big box retailer that is relocating. For automobile dealerships, this area shall not extend more that 40 miles and for a big box retailer, the area shall not extend more than 25 miles. Id. at § 53084(f)(4)(A).
[117] Id. at § 53084(c)(1).
[118] Id.
[119] Richmond, supra note 6, at 563-564.
[120] Leslie Tucker, *Temporary Development Controls: Smart Growth Tools for Main Street*, NATIONAL TRUST FOR HISTORIC PRESERVATION, 1 (2002), *available at* <http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit_moratoria.pdf>.

officials can examine the impact of proposed development and put measures in place to manage it."[121] This land use tool allows local planners time to assess the benefits and costs of big box developments, which include traffic, loss of community character and the displacement of local businesses.[122]

In Fort Collins, Colorado, this approach was used after several developers announced plans to simultaneously develop big box stores in an area the city wished to protect from sprawl.[123] To allow the city planners time to "study the community impacts of the 'superstore' phenomenon in more detail and to provide the community with clear and enforceable policies to mitigate those impacts,"[124] the city enacted a six-month moratorium on all big box developments. The city argued that "the bulk, size, and scale of such superstores present unusual land-use concerns for the City…. The development of superstores, in the absence of appropriate regulatory guidelines, may have an irreversible negative impact upon the City."[125] The guidelines the city subsequently adopted in early 1995 "require a basic level of architectural variety, compatible scale, pedestrian and bicycle access, and mitigation of negative impacts."[126] These include rules that prohibit long blank walls that discourage pedestrian activity,[127] require that display windows, awnings, and other features are required to add visual impact to the store,[128] and that sidewalks must link stores to streets, transit stops, building entrances, etc.[129]

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[121] Id.
[122] Id.
[123] Id.
[124] City of Fort Collins, Colorado, *Design Standards and Guidelines for Large Retail Establishments* (1995), *available at* <http://www.fcgov.com/advanceplanning/pdf/large-retail-doc.pdf>.
[125] Id.
[126] Tucker, supra note 83.
[127] CITY OF FORT COLLINS, COLORADO CODE OF ORDINANCES § 3.5.4(C)(1)(a)1 (1995).
[128] Id. at § 3.5.4(C)(1)(a)2.
[129] Id. at § 3.2.2(C)(5)(a).

A square footage retail cap was considered by a citizen advisory committee, but this idea was abandoned in favor of allowing the market to determine store size.[130] Today, Ft. Collins has a Home Depot store measuring 130,000 square feet and a Super Wal-Mart store that measures 208,000 square feet.[131]

B. Restrictions on Outdoor Display and Storage

Often accompanying big box retail stores is the display or sale of merchandise outdoors, such as on the sidewalk or even in the parking lot. Unregulated, this display or sale can be unsightly; it can also interfere with ingress and egress, disturb nearby neighbors, and take up parking spaces, thus leading to more paved parking than may be necessary.[132] Many big box ordinances address issues such as whether or in what manner such display should be allowed. Restrictions range from total bans on outdoor display to factors such as limits on display's square footage relative to the store, the display's location on the zoning lot, and sometimes screening requirements.

In Georgia, Peachtree City restricts certain outdoor displays according to its zoning districts, but incorporates a detailed plan for permissible and impermissible outdoor displays into its sign ordinance.[133] There is a general ban on outdoor storage or display in a commercial area, with certain specific exceptions. A permanent, fully enclosed space "reasonably screened from public view" is allowed, as is a display previously approved as part of the site plan by the planning commission.[134] Displays not extending more than six feet from the primary building (and not occupying more than twelve feet along an exterior wall) are generally allowed, if they

[130] E-mail from Ted Shepard, City of Fort Collins, Colorado, to Matt Roberts, 3L, University of Georgia School of Law (July 10, 2003, 08:52:20)(on file with author).
[131] Id.
[132] Chris Duerksen and Robert Blanchard, Belling the Box: Planning for Large-Scale Retail Stores, Proceedings of the 1998 National Planning Conference, AICP Press, available at <http://www.asu.edu/caed/proceedings98/Duerk/duerk.html>.
[133] PEACHTREE CITY, supra note 46, at app. A, art. IX, §908.7 (2005).
[134] Id. at §908.7(a)(1-2).

meet certain requirements.[135] They must not encroach into a required zoning setback or buffer, or into a landscaped area.[136] They may not interfere with pedestrian or vehicle traffic on the site, and may not be displayed outside for more than 24 consecutive hours; finally, there may be no sign associated with or advertising the merchandise that is legible from off the site.[137]

However, a temporary use permit can allow nonconforming displays up to four times in a calendar year, for not more than seven consecutive days on a single permit.[138] An applicant submits the display plan to the city planner, who with other city staff reviews the application to ensure the temporary display will not pose a threat to health, safety, or public welfare.[139] There is no exception to the sign restriction for a temporary use permit.[140]

Peachtree City's approach is similar to other ordinances, many of which also provide general restrictions with a permit process for occasional nonconforming displays. LaFayette, Colorado, for example, bans all outdoor displays without a permit; the permit application explicitly requires more detail than Peachtree City's, including a sketch outlining location of merchandise, parking access, utilities, hazards, and signs.[141] The planning director retains the right to require additional approval from other officials such as the building inspector or fire marshal.[142] No more than 120 days of outdoor sales per calendar year may be obtained through a temporary permit.[143]

Parsippany, New Jersey instead opts for a general permit for regulated "sidewalk sales" around five major holidays (Presidents' Day, Memorial Day, Independence Day, Labor Day and

[135] Id. at §908.7 (a)(3).
[136] Id. at §908.7 (a)(3)(a).
[137] Id. at §908.7 (a)(3)(b-e).
[138] Id. at §908.7(b)(1-2).
[139] Id. at §908.7 (b)(3).
[140] Id. at §908.7 (b)(4).
[141] LAFAYETTE, COLORADO. DEVELOPMENT AND ZONING CODE § 26-14-15.1.
[142] Id.
[143] Id.

Thanksgiving); no sidewalk-type displays are allowed at other times.[144] Holiday displays may not extend more than 4 feet beyond the building façade or exceed 25 feet in length (or the building length, if shorter); one temporary sign, maximum sixteen square feet, is allowed.[145]

Other cities allow displays year-round, but with greater restrictions. For example, Aurora, Colorado requires that any display be at least 10 feet from any property line.[146] Outdoor displays must be "neat and orderly," not on landscaping, and be at least three feet from the side or 10 feet from the front of the store entry.[147] Display space may not be rented out, and it is limited to ten percent of total gross interior floor area, not to exceed 100 square feet.[148] Lancaster, Pennsylvania allows outdoor displays with explicit restrictions on location. All displays must be approved by the city, and displays are generally not permitted on the front of any building, or a sidewalk.[149] Additionally, a six-foot opaque fence must enclose outdoor displays, which may take up a maximum of fifteen percent of total store area.[150] Like many ordinances, Lancaster's ordinance exempts auto, boat, or RV sales lots.[151] Lancaster also allows once-annual sidewalk sales.[152]

Asheville, North Carolina and Bloomington, Indiana both allow a combination of permitted/permanent uses, and less strict requirements for temporary displays. Asheville permits outright outdoor seasonal displays, and as a conditional use year-round display or storage with

[144] TOWNSHIP OF PARSIPPANY – TROY HILLS, MORRIS COUNTY, N.J., §19-26.1
[145] Id.
[146] BUILDING AND ZONING CODE OF THE CITY OF AURORA, COLORADO, Art. 12, 146-1249.
[147] Id.
[148] Id.
[149] LANCASTER TOWNSHIP ZONING ORDINANCE, ART. XIX, SUPP. REGULATIONS § 1917.
[150] Id.
[151] Id.
[152] Id. at § 1917.6.

city approval.[153] Bloomington allows permanent outdoor displays, but does not allow them to encroach on the required setback; however, a temporary display can encroach 10 feet.[154]

Another approach focuses on the nature of the merchandise displayed. For example, Beaufort, South Carolina, like many other cities, restricts outdoor displays to typical outdoor items, such as plants, gardening supplies, pottery, bicycles, or cars.[155]

VI. Conclusion

The rise of big box retail presents a number of serious challenges that can be addressed by local governments. The use of big box control devices in Georgia should be expected to continue, especially as many cities are experiencing a problem of "big box blight" in an increasing number of abandoned and underutilized former big box sites.

While big box stores offer discount princes and a level of variety that few stores can match, they also are known to have negative impacts on the communities in which they are built. This in turn has driven an increasing number of local governments to adopt controls to control the development of these types of retail stores. Retail caps are emerging as a common restriction placed on big box stores, for they allow local governments to limit the size of the stores. This can have a tremendous impact on things such infrastructure costs and the sustainability of local businesses. As should be evident by the use of planning moratoria and renovation requirements, other tools are emerging to address the wide range of impacts that big box stores can have. The practical effect of these tools is that they allow each local government to adopt requirements as they are needed depending on the goals and purposes set out by each city.

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[153] ASHEVILLE CODE OF ORDINANCES, ART. V, § 16-147.
[154] BLOOMINGTON, INDIANA MUNICIPAL CODE, § 804-4.
[155] BEAUFORT, SC. UNIFIED DEVELOPMENT ORDINANCE, art. VI, §6.6(F)(1)(a) (2003, revised 2006).

Note: This paper is an on-going student project of the Land Use Clinic, supervised by clinical professor Jamie Baker Roskie. Students who have contributed include; Matt Roberts, Brian White, Elizabeth Simpson, Lauren Giles, and Anna Hauser. While this is not meant to be an exhaustive survey of all types of big box regulations in all communities, we do try to stay abreast of developments in Georgia. If you know of community efforts and regulations that should be included, please contact the clinic at (706) 583-0373 or jbroskie@uga.edu.

Agenda Item PH-1

City of Tacoma
Community and Economic Development Department

TO: Planning Commission

FROM: Donna Stenger, Manager, Long-Range Planning Division

SUBJECT: Large Scale Retail Moratorium – Public Hearing

DATE: September 28, 2011

At your next meeting on October 5, 2011, the Planning Commission will hold a public hearing regarding the emergency moratorium on large scale retail establishments that was adopted by the City Council on August 30, 2011. The specific purpose of this hearing is to solicit community input to help the Commission make its recommendation to the City Council regarding the need for and appropriate duration of the moratorium.

Attached is the Public Hearing Report that summarizes the moratorium, the process for consideration of moratoria, and the public notice process. Following the close of the comment period (5:00 p.m. on October 7) staff will be compiling and providing all of the public testimony for the Commission's consideration. The Commission is currently scheduled to review the testimony and make your recommendation regarding the moratorium at the meeting on October 19.

If you have any questions or requests, you may contact Brian Boudet at (253) 573-2389 or by e-mail at bboudet@cityoftacoma.org.

Attachment

c: Peter Huffman, Assistant Director

PUBLIC HEARING REPORT
Tacoma Planning Commission Public Hearing
October 5, 2011

A. SUBJECT:

Emergency moratorium on the permitting of large scale retail establishments.

B. BACKGROUND:

On August 30, 2011, the City Council enacted an emergency moratorium on large scale retail establishments (Ordinance No. 28014, a copy of which is included as Attachment 1). The moratorium specifically prohibits the filing, acceptance and processing of applications for land use, building or other development permits associated with the establishment, location, or permitting of retail sales establishments with a floor area greater than 65,000 square feet in size. The moratorium applies Citywide and was enacted for a duration of six months (until February 28, 2012). As stated in the ordinance, the purpose of the moratorium is to allow the City time to evaluate the impacts of these kinds of uses and consider potential changes to its regulations and requirements.

C. LAND USE REGULATORY CODE – PROCESS FOR MORATORIA:

In accordance with Tacoma Municipal Code Section 13.02.055, the process for moratoria is as follows:

1. Declaring a Moratorium

a. A moratorium and/or interim zoning controls may be considered either as a result of an emergency situation or as a temporary protective measure to prevent vesting of rights under existing zoning and development regulations.

b. Moratoria or interim zoning may be initiated by either the Planning Commission or the City Council by means of determination at a public meeting that such action may be warranted.

c. Where an emergency exists, prior public notice may be limited to the information contained in the public meeting agenda. City Council-initiated moratoria or interim zoning shall be referred to the Planning Commission for findings of fact and a recommendation prior to action; provided, that where an emergency is found to exist by the City Council, it may act immediately and prior to the formulation of Planning Commission findings of fact and recommendation.

d. At its next available meeting immediately following the City Council's referral or action, the Planning Commission shall consider the measure and shall respond with its findings of fact and recommendation to the Council within 30 days. If it finds evidence that an emergency exists necessitating the immediate imposition of a moratorium or interim zoning, or that temporary measures are needed to protect the status quo, it shall recommend adoption to the City Council.

e. In emergency situations where the City Council has first enacted a moratorium or interim zoning, but where the Planning Commission's findings of fact and recommendation do not support the action, the City Council shall reconsider, but shall not be bound to reversing, its action.

2. Public Hearing and Action

a. The Planning Commission will hold at least one public hearing prior to formulating its recommendation to the City Council.

b. In the case of moratoria or interim zoning, the City Council shall hold a public hearing within at least 60 days of adopting any moratoria or interim zoning, as provided by RCW 36.70A.390.

c. The City Council shall adopt findings of fact justifying the adoption of moratoria before, or immediately after, it holds a public hearing.

3. Duration of Moratorium

a. As part of its findings of fact and recommendation, the Planning Commission shall recommend to the City Council a duration for the moratorium and note if a study, either underway or proposed, is expected to develop a permanent solution and the time period by which that study would be concluded.

b. Moratoria or interim zoning may be effective for a period of not longer than six months, but may be effective for up to one year if a work plan is developed for related studies requiring such longer period.

c. Moratoria or interim zoning may be renewed for an unlimited number of six-month intervals following their imposition; provided, that prior to each renewal, a public hearing is held by the City Council and findings of fact are made which support the renewal.

D. GENERAL INFORMATION:

1. Environmental Evaluation

Procedural actions such as the adoption of legislation, rules, regulation, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment is exempt from SEPA environmental evaluation under WAC 197-11-800(19).

2. Public Review Process

The Large Scale Retail Moratorium was first reviewed by the Planning Commission at its September 21, 2011 meeting. The Planning Commission was provided a copy of the emergency moratorium, Ordinance No. 28014, and a preliminary schedule for both review of the moratorium and consideration of potential code changes within the 6-month timeframe provided by the Council. The Planning Commission discussed its responsibilities under the moratorium, one of which is to conduct a public hearing on the moratorium. The Planning Commission authorized the distribution of the moratorium for public comment and set October 5, 2011 as the date for a public hearing regarding the moratorium.

3. Notification

Written and/or electronic notice of the Planning Commission's public hearing was sent to community members who testified on the emergency moratorium to the City Council at its August 30, 2011 meeting and at the Environment & Public Works Committee meeting on August 24, 2011, and all known owners and operators of existing large scale retail establishments in the City. The notice also was provided to all recipients of the Planning Commission agenda, the Planning Commission's electronic mailing list, City Council members, Neighborhood Councils, business district associations,

adjacent jurisdictions, state and other governmental agencies, the Puyallup Tribal Nation, City staff, City Commissions, environment, development, civic and social organizations, major institutions and employers, and other interested individuals and groups. In addition, notice was sent to taxpayers of record for all known properties currently containing a large scale retail establishment and to taxpayers of record for all properties within 400 feet of these properties. In total, the notice was sent to more than 3,000 addresses. Additionally, the public notice was posted on the bulletin boards on the first and second floors of the Tacoma Municipal Building and on the City's internet website.

The notice could also be viewed and downloaded at the Planning Division's website (www.cityoftacoma.org/planning). The notice was also posted on the public information bulletin boards on the first and second floors of the Tacoma Municipal Building.

The notice stated the time and place of the hearing, the purpose of the public hearing, where and how additional information could be obtained and how to provide comments. Advertisement of the public hearing was published in *The News Tribune* on September 29, 2011.

E. COMMUNITY AND ECONOMIC DEVELOPMENT DEPARTMENT RECOMMENDATION:

Staff recommends that the Planning Commission accept and evaluate all oral and written testimony submitted at the public hearing and prior to the comment deadline of October 7 before to making a recommendation to the City Council.

F. ATTACHMENTS:

1. Public Hearing Notice
2. Ordinance No. 28014 – Large Scale Retail Moratorium

NOTICE OF PUBLIC HEARING

MORATORIUM ON LARGE SCALE RETAIL ESTABLISHMENTS

On August 30, 2011 the City Council adopted Ordinance No. 28014, placing a six-month moratorium on the permitting of large scale retail establishments (those with a floor area greater than 65,000 square feet). The purpose of the moratorium is to allow the City time to evaluate the impacts of these kinds of uses and consider potential changes to its regulations and requirements.

PLANNING COMMISSION PUBLIC HEARING

Wednesday, October 5, 2011 5:00 pm City Council Chambers

Tacoma Municipal Building, 747 Market Street, 1st Floor

WHAT IS THE PURPOSE OF THE PUBLIC HEARING?

The City Council referred the moratorium to the Planning Commission to develop findings and recommendations regarding the moratorium. The Planning Commission is seeking public comment addressing, at a minimum:

- Is the emergency moratorium needed?
- If so, what is the appropriate duration of the moratorium?

Please Note: *This public hearing is on the need for and duration of the moratorium and not to discuss or review any particular changes to the City's regulations or requirements relative to large retail uses.*

Attachment 1

WHERE CAN I GET ADDITIONAL INFORMATION?

Additional information, including the complete text of the moratorium (Ordinance No. 28014) adopted by the City Council, is available from the Community and Economic Development Department at the address to the right, and on the Planning Division website:

www.cityoftacoma.org/planning

(click on "Large Scale Retail Moratorium")

HOW DO I PROVIDE COMMENTS TO THE COMMISSION?

You can testify at the hearing or provide written comments no later than 5:00 p.m. on **Friday, October 7, 2011** using the return address on this card or by facsimile at (253) 591-2002 or via e-mail at planning@cityoftacoma.org.

If you have additional questions please feel free to contact Brian Boudet at:

(253) 573-2389

The City of Tacoma does not discriminate on the basis of disability in any of its programs, activities, or services. To request this information in an alternative format or a reasonable accommodation, please contact the City Clerk's Office at 591-5505. TTY or speech-to-speech users please dial 711 to connect to Washington Relay Services.

Tacoma

PLANNING COMMISSION
747 MARKET STREET – ROOM 1036
TACOMA WA 98402
(253) 591-5365

PRSRT STANDARD
US POSTAGE
PAID
TACOMA WA
PERMIT NO 2

Req. #13037 Amended 8/30/11

ORDINANCE NO. 28014

BY REQUEST OF DEPUTY MAYOR WALKER AND COUNCIL MEMBERS MELLO, FEY AND CAMPBELL

AN ORDINANCE adopting an immediate six-month moratorium relating to land use and zoning, establishing a moratorium on the acceptance of applications for new building or other development permits associated with the establishment, location, or permitting of retail establishments that exceed 65,000 square feet in the aggregate, and establishing a plan and dates for review and development of regulations relating to these types of large retail establishments; referring the moratorium to the Planning Commission to hold a public hearing to develop findings of fact and recommendations by October 19, 2011, including the need for and the duration of the moratorium; setting October 25, 2011 as the date for a public hearing on the moratorium; declaring an emergency in the passage of this ordinance providing that the moratorium will take effect immediately upon adoption and publication and, unless extended, will sunset within six (6) months of the date of adoption; and providing for severability.

WHEREAS large retail sales establishments of various formats may have unintended and often unconsidered economic, environmental and social impacts which outweigh or diminish the benefits of such establishments, and

WHEREAS such impacts may include the increased costs of public infrastructure, such as roads, sewers, storm and water lines, increased costs for public services, such as law enforcement, fire, and other emergency services, and increased tolls on the environment, and such costs may diminish or exceed the public revenue generated from such establishments, and

WHEREAS the City requires time to conduct appropriate research and analysis of these types of uses and the impacts of this kind of development, and to ensure that such uses are developed in a manner that is consistent with the policies and intent of the Comprehensive Plan and in a manner that minimizes or mitigates any community impacts, and

WHEREAS the citizens of Tacoma are concerned about potential negative economic and environmental impacts of larger retail sales establishments on the community and existing businesses, particularly smaller local businesses, both in the retail sphere and in supporting areas, and

WHEREAS the City Council supports environmental responsibility and a sustainable, local economy, and

WHEREAS the City Council believes in promoting competition to protect and benefit the public interest, and such large retail sales establishments may limit competition by causing the loss of existing, smaller businesses, and

WHEREAS a moratorium on the issuance of permits for large retail sales establishments is necessary to enable the City Council to consider whether to amend the City's development regulations to formulate criteria which will address economic, environmental and other impacts, and to hold a public hearing on the moratorium within 60 days of the commencement of the moratorium, and

WHEREAS, the potential adverse impacts on the economy, the environment, public health, public safety, public property and public peace justify the passage of an emergency ordinance, and

WHEREAS, pursuant to RCW 35.63.200 and RCW 36.70A.390, the City may adopt an immediate moratorium for a period of up to six months, provided that the City holds a public hearing on and adopts findings of fact related to the proposed moratorium within 60 days after its adoption; Now, Therefore

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That pursuant to the provisions of RCW 36.70A.390, a moratorium is hereby imposed on the filing, acceptance, and processing of applications for land use, building permits or other development permits associated with the establishment, location, or permitting of retail sales establishments with a floor area greater than 65,000 square feet in size, unless complete applications were filed with the City prior to the effective date of this ordinance.

Section 2. That this moratorium shall be in effect for six (6) months following the effective date of this ordinance, and may be renewed as provided by law.

Section 3. That, pursuant to Section 13.02.055 of the Tacoma Municipal Code, the City Council hereby refers the moratorium to the Planning Commission for its review at its next available meeting on September 21, 2011, and to hold a public hearing and develop findings of fact and recommendations, including the need for and duration of the moratorium, by October 19, 2011.

Section 4. That as required by RCW 36.70A.390, within sixty (60) days of passage of this ordinance the City Council will hold a public hearing on this moratorium and will adopt the necessary findings required by law.

Section 5. That during the moratorium, the City Manager is authorized to direct City staff to study and report both to the Planning Commission and to the City Council at appropriate times and places as to whether the City code should be amended to address the impacts, particularly economic, environmental and social, and/or to provide mitigation requirements for large retail sales establishments.

Section 6. That this Ordinance shall be transmitted to Washington State Department of Commerce, pursuant to RCW 36.70A.106.

Section 7. That for the reasons set forth above, and to promote the objectives stated above, the City Council finds that a public emergency exists, necessitating that this ordinance take effect immediately upon its passage and publication unless repealed , extended, or modified by the Tacoma City Council after subsequent public hearings and entry of appropriate findings of fact pursuant to RCW 35.63.200.

Section 8. That if any section, subsection, paragraph, sentence, clause, or phrase of this ordinance, or its application to any person or situation, should be held to be invalid or unconstitutional for any reason by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this ordinance or its application to any other person or situation.

Passed AUG 30 2011

Mayor

Attest:

City Clerk

Approved as to Form:

City Attorney

Ord13037amend.doc-JHC/tok

LEG 004 (11/89)

Agenda Item
C-1

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE

TACOMA CITY COUNCIL

FILE NO.: 124.1317

PETITIONER: Alder Street Apartments, LLC

SUMMARY OF REQUEST:

Real Property Services has received a petition to vacate the alley right-of-way between South Alder and South Lawrence Streets and lying southerly of South 45th Street.

RECOMMENDATION OF THE HEARING EXAMINER:

The requested vacation petition is recommended for approval, subject to conditions set forth herein.

PUBLIC HEARING:

After reviewing the report of the Department of Public Works, Real Property Services Division, examining available information on file with the application, and visiting the subject site and the surrounding area, the Hearing Examiner conducted a public hearing on the application on September 22, 2011.