The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union

George Lefcoe*

Having saturated the less populated heartland of America, Wal-Mart is carrying its supercenter expansion program to major urban areas. Wal-Mart Supercenters merge discount retail with full-service grocery stores under the same roof. Because supercenters compete head-on with unionized supermarkets, they place downward pressure on grocery worker wages. The United Food and Commercial Workers ("UFCW"), the largest representative of grocery workers, has joined other Wal-Mart critics at city halls across the country in using zoning laws to restrain Wal-Mart's Supercenter expansion program. A number of lawsuits have ensued, and more are sure to follow.

This paper describes the types of anti-superstore zoning ordinances favored by the UFCW and the legal objections Wal-Mart and other superstore operators are likely to raise against them. At the top of the legal checklist are: (1) prohibitions against the use of zoning to regulate economic competition, (2) equal protection, and (3) preemption by the National Labor Relations Act ("NLRA"). Cities can justify banning big-box retailers by reference to planning goals such as preserving downtowns from suburban competition. However, in order for a city to negate the claim that it is restricting economic competition, it must cite a plausible planning or zoning rationale to justify regulating a Wal-Mart Supercenter differently than,

---

* Florine and Ervin Yoder Professor of Real Estate Law, Gould School of Law, University of Southern California; former Member and Chairman of Los Angeles County Regional Planning Commission (1978-1987). The author acknowledges the significant contributions made to this paper by Philip D. Recht, Joel Benoliel, and Mark A. Wolfe and research assistance provided by Stephanie Bezner and Justin Murakawa. Thanks to one of California's leading CEQA attorneys, Michael H. Zischke, Partner, Morrison & Foerster, for reviewing the CEQA section of this paper. A word of appreciation as well to Professor James Kushner for his many excellent suggestions.

say, a supermarket located adjacent to a conventional Wal-Mart or Costco. To accomplish this, the enacting jurisdiction may need to commission studies in support of its claimed rationale. A market impact assessment that is sensitive to the local trade area would be helpful, and in a handful of states, including New York and California, environmental impact reports ("EIR") may be required. To the extent site-specific zoning reviews lead to the imposition of union-level wages on superstore applicants as a condition of land use approval, cities could encounter legal challenges based on both the Equal Protection Clause and the National Labor Relations Act.

I. THE EMERGENCE OF WAL-MART SUPERSTORES AND WHY THE UFCW WANTS TO STOP THEM

In the mid-1990s, when Wal-Mart's growth began to stall, its then-CEO David Glass and chairman Rob Walton "decided to bet on the Supercenter concept of huge stores as large as 200,000 square feet that include a full supermarket. . . . The plan was a smash hit."[1] Wal-Mart is now the clear frontrunner at merging discount retail with grocery sales. Despite entering the grocery industry as recently as 1988, Wal-Mart has become the nation's biggest grocer by sales volume.[2] Approximately every 1.65 days, a Wal-Mart Supercenter opens in America.[3]

On the labor front, Wal-Mart's implacable stance is well known.[4] Management keeps a watchful eye for signs of union organizing activity and sends out experienced staffers

1. Andy Serwer et al., *Bruised in Bentonville: For Wal-Mart, the Customer Has Always Been King. But Lately the Retailer Has Realized That It Has Other Constituents—and Some Are Mad as Hell. Can the World's Biggest Company Adjust?*, FORTUNE, Apr. 18, 2005, at 84, 88.

2. Patricia Callahan & Ann Zimmerman, *Price War in Aisle 3: Wal-Mart Tops Grocery List with Supercenter Format; but Fewer Choices, Amenities*, WALL ST. J., May 27, 2003, at B1; *see also* Tom Weir, *America's 50 Largest Supermarket Chains: Wal-Mart's the 1*, PROGRESSIVE GROCER, May 1, 2003, at 35, 36, *quoted in* MARLON BOARNET ET AL., BAY AREA COUNCIL, BAY AREA ECONOMIC FORUM, SUPERCENTERS AND THE TRANSFORMATION OF THE BAY AREA GROCERY INDUSTRY: ISSUES, TRENDS, AND IMPACTS 18 (Jan. 2004), http://www.bayeconfor.org/pdf/PPRSCscreen11.2.pdf [hereinafter BAY AREA ECONOMIC FORUM].

3. Karrie Jacobs, *Massive Markets*, METROPOLIS, June 2004, at 106.

4. *See* Serwer et al., *supra* note 1, at 88.

specifically dedicated and trained to quell those efforts.[5] Despite national media watching over its shoulder, it went so far as to close a store in Canada that voted to unionize.[6]

Unions and their supporters "complain that Wal-Mart's average wage of $9.68 an hour is too low to support a family . . . ."[7] The UFCW, a strongly-led union representing grocery workers, perceives Wal-Mart as a threat to the jobs and compensation levels of grocery workers in the United States—over 22% of whom belong to a union.[8] Though wages and benefits at Wal-Mart are about the same as those paid by other non-union retailers,[9] they average about 20-40% less than those of union grocery workers,[10] and thus place heavy downward pressure on their wages and benefits because, to compete effectively, grocery chains are endeavoring to close the wage-and-benefit gap.[11]

The union has given up trying to organize Wal-Mart store-by-store and has instead embarked on a national campaign to

---

5. Wendy Zellner, *How Wal-Mart Keeps Unions at Bay*, BUS. WK., Oct. 22, 2002, *available at* http://www.laborresearch.org/story2.php/239.

6. Ian Austen, *Wal-Mart to Close Store in Canada with a Union*, N.Y. TIMES, Feb. 10, 2005, at C3. The store, located in Jonquière, Quebec, was closed a week ahead of schedule. *Jonquière: Wal-Mart Has Closed Its Doors*, LE DEVOIR, Apr. 30, 2005, *available at* http://www.truthout.org/cgi-bin/artman/exec/view.cgi/36/10798.

7. Steven Greenhouse, *Wal-Mart's Chief Calls Its Critics Unrealistic*, N.Y. TIMES, Apr. 6, 2005, at C11 [hereinafter Greenhouse, *Wal-Mart's Chief*].

8. Mark Gaffney, *Union Power Creates Middle-Class Benefits; Decline of Labor Ends Up Hurting Prosperity of Nonunion Workers*, DETROIT NEWS, Sept. 23, 2005, at A15, *available at* http://www.detnews.com/2005/editorial/0509/23/A15-324297.htm; Bureau of Labor Statistics, The 2006-07 Career Guide to Industries, Grocery Stores, http://www.bls.gov/oco/cg/print/cgs024.htm (last visited Feb. 2, 2006) [hereinafter Bureau of Labor Statistics].

9. "[A]ccording to the most recent survey by the California Employment Development Department" in the East Bay, Wal-Mart pays $10.82 an hour compared to a general average of $10 for cashiers with three years of experience. James Temple, *Tilting at the Largest Windmill in Town*, CONTRA COSTA TIMES, June 11, 2005, at g01.

10. *See* GREGORY FREEMAN, LOS ANGELES COUNTY ECONOMIC DEVELOPMENT CORPORATION, WAL-MART SUPERCENTERS: WHAT'S IN STORE FOR SOUTHERN CALIFORNIA? 22-24 (Jan. 2004), http://www.laedc.info/pdf/Wal-Mart_study.pdf.

11. MARLON BOARNET & RANDALL CRANE, ORANGE COUNTY BUSINESS COUNCIL, THE IMPACT OF BIG BOX GROCERS ON SOUTHERN CALIFORNIA: JOBS, WAGES, AND MUNICIPAL FINANCES 58, 60 (1999), http//:www.coalitiontlc.org/big_box_study.pdf [hereinafter THE IMPACT OF BIG BOX GROCERS]. Wal-Mart wages and benefits are not published, thus these numbers are based on estimates from conversations with Wal-Mart employees and store managers. *Id.* at 37. The prediction of downward pressure on wages and benefits is supported by labor disputes in Canada that followed in the wake of supercenter expansion there. *See id.* at 45-47.

change Wal-Mart's labor practices,[12] partly by stalling Wal-Mart's superstore expansion program on the municipal zoning front.[13] Hoping to keep Wal-Mart from securing any zoning approvals for supercenter expansions in cities across the country, the UFCW,[14] the Service Employees International Union ("SEIU"),[15] and major supermarket chains are teaming up with a diverse array of Wal-Mart foes. Depending on the community, Wal-Mart superstore opponents could include environmental advocates, local merchants fearful of competition, residents wary of traffic, historic preservation enthusiasts trying to save traditional downtowns from devastating suburban competition,[16] self-described "sprawl

---

12. *See* Deidre McFadyen, *Organizing Wal-Mart Crucial to U.S. Union Movement*, The United Federation of Teachers, Nov. 4, 2004, http://www.uft.org/news/teacher/labor/wal-mart.

13. *See infra* notes 37-70 and accompanying text.

14. The UFCW has stated:

> Wal-Mart threatens the wages, health-care, benefits, and livelihoods of workers across the country and around the world. Whether you work or shop at Wal-Mart, the giant retailer's employment practices affect your wages. Wal-Mart leads the race to the bottom in wages and health-care. The company's disregard for the law and systematic suppression of the basic democratic rights of workers is undermining fundamental American values.

UFCW, *The Wal-Mart Threat*, http://www.ufcw.org/issues_and_actions/walmart_workers_campaign_info/index.cfm (last visited Feb. 2, 2006).

15. *See* Wal-Mart Watch, SEIU Members: Make Your Voices Heard, http://walmartwatch.com/november/seiu (last visited Feb. 2, 2006).

16. Adjunct Professor of Environmental Studies Donella H. Meadows at Dartmouth College refers to the National Trust for Historic Preservation in Washington D.C. as "Sprawl Central,"

> which has become a citizens' clearinghouse for information about rampant commercial growth. The Trust's interest in this issue comes not from antipathy to Wal-Mart or any other particular company, but from what mall sprawl in general does to communities. The Trust likes to quote a letter written by William Faulkner in 1947 to protest the destruction of a historic courthouse in Oxford, Mississippi: "It was tougher than war, tougher than the Yankee Brigadier Chalmers and his artillery. . . . But it wasn't tougher than the ringing of a cash register bell. It had to go . . . so that a sprawling octopus covering the country . . . can dispense in cut-rate bargain lots, bananas and toilet paper. They call this progress. But they don't say where it's going; also there are some of us who would like the chance to say whether or not we want the ride."

DONELLA MEADOWS, SUSTAINABILITY INSTITUTE, HOW TO FIGHT SUPERSTORE SPRAWL, http://www.sustainer.org/dhm_archive/search.php?display_article=vn553superstoreed (last visited Feb. 2, 2006).

busters,"[17] unhappy Wal-Mart employees past and present, and academic critics of Wal-Mart.[18]

This article reviews the policy arguments and offers a few comments on the political process. It then describes the three main formats that anti-superstore ordinances have taken. Finally, it evaluates the strength of the legal obstacles that the local governments enacting them could expect to encounter.

II. THE POLICY DEBATE

The union attack on superstores is based on the claim that some superstore operators are impoverishing their employees by paying low wages and charging too much for company-sponsored health benefit plans. As Christopher Jencks, a staunch advocate for the working poor, observes, "Anything that raises the cost of hiring unskilled workers will further reduce demand for their services."[19] Wal-Mart counters by noting that "more than 3,000 people often apply for the 300 jobs" every time a new store opens.[20] Wal-Mart CEO Lee Scott observes, "It doesn't make sense . . . that people would line up for jobs that are worse than they could get elsewhere, with fewer benefits and less opportunity."[21]

In these zoning hearings, the understandable desire of workers for higher wages is pitted against the equally legitimate

---

17. "Sprawl-Busters" is the name of an organization dedicated to fighting big-box retail. *See* Sprawl-Busters, *An International Clearinghouse on Big Box Anti-Sprawl Information*, http://www.sprawl-busters.com (last visited Feb. 2, 2006).

18. Steven Greenhouse, *Opponents of Wal-Mart to Coordinate Efforts*, N.Y. TIMES, Apr. 3, 2005, at Sec. 1, 20.

> Led by Wal-Mart's longtime opponents in organized labor, a new coalition of about fifty groups—including environmentalists, community organizations, state lawmakers and academics—is planning the first coordinated assault intended to press the company to change the way it does business.
>
> In the next few months, those critics will speak with one voice in print advertising, videos and books attacking the company, they say. They also plan to put forward an association of disenchanted Wal-Mart employees, current and former, to complain about what they call poverty-level wages and stingy benefits.

Id.

19. CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 230 (1992).

20. Greenhouse, *Wal-Mart's Chief*, *supra* note 7.

21. *Id.* Mr. Scott "objected to assertions that Wal-Mart could afford to pay its workers far more, saying the company has a thin profit margin and annual profit of $6,000 an employee, compared with $143,000 at Microsoft." *Id.*

interests of consumers, especially those of moderate means, in having the opportunity to pay low prices. Consumers love Wal-Mart for its low prices,[22] which often undercut the competition by 8-20%.[23] Wal-Mart wields its mass purchasing power to negotiate cut-rate prices directly from manufacturers, bypasses distributors in favor of its own regional distribution warehouses,[24] and economizes on-shelf space by implementing an "on time" delivery system complemented by an integrated network of bar codes that signal manufacturers every time one of their items is sold at any of Wal-Mart's stores.[25] Furthermore, Sam Walton's idea of a Saturday Morning Meeting still exists, convening weekly in Bentonville and enabling key management personnel to convey the best practices rapidly from one store to others.[26]

Wal-Mart's expansion into the grocery business should help all consumers with low prices—not just those that shop at Wal-Mart—as many retailers likely keep their prices down in an effort to compete with Wal-Mart. By restraining the prices of retail goods, Wal-Mart has been credited with helping the country maintain an acceptably low rate of inflation despite buoyant levels of national economic growth.[27]

---

22. *See, e.g.*, Elizabeth Mehren, *Small Town Warily Sizes Up a Big Box*, L.A. TIMES, Apr. 18, 2005, at A11.

> In her hometown here on the shore of Lake Champlain, Erin Raymond pays $18 for a package of 30 diapers for her 2-year-old son. If she drives to the nearest Wal-Mart, about 45 minutes south, she can buy 110 diapers for $27.
>
> The 23-year-old convenience store clerk is one of many enthusiastic supporters of plans to bring the big-box retailer to Vermont's fourth-largest city, where shopping options are limited.

Id.

23. Comparative price studies have been done. *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 30-31.

24. *See id.* at 33.

25. *See* Hedrick Smith, *Is Wal-Mart Good for America? Who Calls the Shots in the Global Economy?*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/walmart/secrets/shots.html (last visited Feb. 2, 2006). Other sources of savings include labor productivity and "within-store scale economies." *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 33.

26. Brent Schlender, *Wal-Mart's $288 Billion Meeting: It's the Single Most Important Business Gathering in the World. But Can Wal-Mart's Legendary Saturday Morning Meeting Take the Controversial Company to the Next Level?*, FORTUNE, Apr. 18, 2005, at 90, 91-92.

27. Daniel Altman, *Yes, Virginia, There Is an Answer*, N.Y. TIMES, June 12, 2005, at Sec. 3, 4.

The price savings Wal-Mart delivers to consumers could prove to be a decisive political factor in its favor. If so, history will have repeated itself. As Professor Richard C. Schragger illustrates, today's anti-Wal-Mart movement had a precursor when chain stores like Great Atlantic and Pacific Tea Company ("A&P") began to expand rapidly in the 1920s to 1940s, threatening local retailers with extinction.[28]

> During the 1920s, chains increased their share of overall national retail sales from 4% to 20%, and their total share of grocery sales to 40%. By 1930, A&P was the fifth largest industrial corporation in the United States, and was running more stores than any other chain store company had or has since. The chain store revolution came quickly, as did the movement to contain them. Between 1920 and 1940, a loose confederation of independent merchant associations, local merchants, antimonopolists, agrarians, populists, and progressives sought to stem the chain expansion. By 1929, associations in over 400 cities and towns had formed to fight the chains.[29]

In sympathetic response to the anti-chain store movement, states enacted sales and license tax regimes that discriminated against chain stores. The United States Supreme Court's response to such regimes was mixed. Some discriminatory measures hurdled the substantive due process barriers constructed by courts of the day; others did not. State government officials that had enacted sales tax laws for the first time with the idea of penalizing chain stores came to regard the enormous sales tax revenues these stores paid as "a reason to embrace them."[30] Starting in the 1930s, during the Depression and the New Deal, a consumer movement was born that quickly grew into a powerful political force that overwhelmed the various anti-chain store initiatives. The same protectionist and survival instincts that led local merchants in the 1920s and 1930s to organize and fight the spread of chain stores presently motivates the chain supermarkets that have joined forces with the unions to fight superstore expansion.

---

28. *See generally* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005); *see also id.* at 1028-38, 1075-80.

29. *Id.* at 1013 (footnotes omitted).

30. *Id.* at 1073.

Another "plus" for Wal-Mart: it is a significant class and race equalizer, just as the chain stores in the 1920s and 1930s were more receptive to women as employees and consumers than many local merchants had been.[31] Regardless of any prejudice that a local shop owner might have, Wal-Mart treats shoppers of all races and classes alike. In fact, Wal-Mart is one of the largest employers of minorities in the country, particularly African-Americans and Hispanics.[32]

III. THE POLITICAL PROCESS

Complete victory in achieving the UFCW's goal of impeding superstore expansion is out of the question, as more than 70% of superstore locations will be wedged into facilities already there,[33] for which no new entitlements are required. When it needs land use approvals for new or substantially remodeled buildings, Wal-Mart often obtains them without a fuss from local officials who are eager to accommodate big-box retailers because of the jobs, economic stimulus, property taxes, and sales taxes they bring.[34]

Even where city councils are not receptive to Wal-Mart and vote to block superstore entry, Wal-Mart has frequently organized popular referenda to reverse those unfavorable decisions,[35] as well as contributed selectively in key local

31. "Chain stores, for example, appealed to blacks in 1920s and 1930s Chicago. Blacks distrusted the local independent grocer and felt that 'packaged goods protected them against unscrupulous storekeepers or clerks.'" *Id.* at 1074.

32. *See* Wal-Mart Fact Sheets, http://www.walmartfacts.com/newsdesk/wal-mart-fact-sheets.aspx (last visited Feb. 2, 2006). Wal-Mart is a leading employer of Hispanic Americans, with more than 139,000 Hispanic associates. Wal-Mart is one of the leading employers of African Americans, with more than 208,000 African American associates. *Id.*

33. *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 13.

34. *See, e.g.*, Sprawl-Busters, *Stoughton, WI. Pro Wal-Mart Forces Win Seats, Push to Lift Size Cap*, Apr. 29, 2004, http://www.sprawl-busters.com/search.php?readstory=1417.

35. *See generally* The Hometown Advantage: Reviving Locally Owned Business, http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid (last visited Feb. 2, 2006) (allowing users to browse by location and type). Voters have overturned superstore bans in Contra Costa County, California, Inglewood, California, Belfast, Maine, Hudson, Ohio, and Bennington, Vermont. *See generally id.* In Arizona, "[v]oters in Payson and Yuma approved Wal-Mart stores in referenda held in 1998 and 1999" and upheld superstore bans in referenda in Chandler, Glendale, Gilbert, and Tucson. The Hometown Advantage: Reviving Locally Owned Business, *Glendale Voters Reject Supercenter*, May 1, 2001, http://www.newrules.org/retail/news_archive.php?browseby=

elections, supporting its friends and punishing its foes.[36] This threat alone likely deters some local elected officials from antagonizing Wal-Mart. Elected officials know that consumers could be inclined to mark their ballots in favor of candidates willing to bring Wal-Mart's bargain grocery prices closer to home.

Unions can play the same hardball politics as Wal-Mart by signaling local elected officials to climb aboard the anti-superstore campaign train as the price for continued political support. In communities governed by elected officials with ties to the UFCW or those fearful of incurring union wrath, solidarity might be expressed by denying zoning applications submitted by Wal-Mart for superstores and by the enactment of "preventive" anti-superstore ordinances. Local officials friendly to the UFCW may themselves have second thoughts after voting down a Wal-Mart only to learn that a Wal-Mart is going to be strategically located just across the municipal boundary in a neighboring city, delivering the town indifferent to unions a hefty boost in sales and property tax revenues while leaving the pro-union town with little to show for its liberal idealism but traffic congestion and retailers worried about their survival.

IV. THE THREE TYPES OF ANTI-SUPERSTORE ORDINANCES

Thus far, anti-superstore ordinances have come in three formats. The most common and straightforward are outright bans on superstores that carry groceries.[37] Another approach has been to deny superstores any "as of right" zoning, even in commercial zones, by requiring a conditional use permit ("CUP").[38] Though government's discretion to deny a CUP is

---

slug&slugid=60.

36. "Wal-Mart, through its Political Action Committee Wal-Mart Stores Inc. For Responsible Government, gives more money to U.S. political candidates than any other corporation." Wal-Mart Wiki, Political Contributions, http://www.walmartwiki.com/index.php/Political_Contributions (last visited Feb. 2, 2006); *see also* Katherine Marks, *Vice Mayor's Wife To Front Pro-Wal-Mart Committee*, NORTH COUNTY TIMES, Jan. 13, 2004, *available at* http://www.nctimes.com/articles/2004/01/14/news/inland/1_13_0423_16_30.txt.

37. *See infra* notes 42-57 and accompanying text.

38. *See infra* notes 58-61 and accompanying text.

limited, site-specific review can result in applicants being burdened with exacting and costly conditions of approval.

The third and most intricate of the anti-superstore ordinances has been the one put in place by the City of Los Angeles.[39] It builds on the CUP format by specifying that, within certain types of economic assistance zones (such as redevelopment areas), superstore grocers must prepare economic impact analyses to identify any materially adverse impacts likely to be felt within no less than a three-mile radius.[40] In all likelihood, proponents of the ordinance hope that superstores deemed likely to force unionized grocers or local merchants out of business will be obliged to mitigate the anticipated harms or be denied their CUPs. One mitigation measure favored by organized labor is a requirement that superstores pay their workers wages comparable to union scale or a living wage.[41]

A. The Absolute Bans

Supercenter bans apply to retail stores larger than some specified gross area floor size, typically 75,000 to 150,000 square feet, where more than a prescribed and usually small percentage of that space is dedicated to the sale of goods exempt from state sales tax.[42] Food items in some states are exempt from state sales taxes, though many products sold in supermarkets are taxed—such as household cleaning products, paper goods, health and beauty products, and other non-comestibles. Between 20% and 35% of all grocery store sales are subject to sales tax.[43] To circumvent the ban, Wal-Mart

39. *See infra* notes 62-69 and accompanying text.

40. The Hometown Advantage: Reviving Locally Owned Business, *Los Angeles Community Impact Review Ordinances*, http://www.newrules.org/retail/impactla.html (last visited Feb. 2, 2006).

41. *See, e.g.*, Rodino Associates, Final Report on Research for Big Box Retail/Superstore Ordinance, Oct. 28, 2003, at 45, 47-48, *available at* http://www.lacity.org/council/cd13/houscommecdev/cd13houscommecdev239629107_04262005.pdf.

42. For instance, the City of Turlock, California banned stores of more than 100,000 square feet with 5% or more of their retail space dedicated to grocery items. *Wal-Mart's Tactics Don't Deter Council*, The Sacramento Bee, Feb. 18, 2005, *available at* http://newage-examiner.com/site/news.cfm?newsid=13992679&BRD=2310&PAG=740&dept_id=226967&rfi=6.

43. STRATEGIC ECONOMICS, ECONOMIC ANALYSIS OF THE PROPOSED FREMONT WAL-MART: SHORT AND LONG TERM IMPACTS ON RETAIL AND ECONOMIC

could build two adjacent stores, as it contemplated doing in Calvert County, Maryland, with each sized to fall below the ban threshold.[44] (Wal-Mart abandoned the plan because of political opposition.[45]) Most California cities have anticipated and countered this move by aggregating the square footage of all adjacent stores "that share common check stands, management, a controlling ownership interest, warehouses, or distribution facilities . . . ."[46]

Another way Wal-Mart could sidestep supercenter bans would be by expanding its relatively new neighborhood market concept,[47] which calls for stores between 42,000 and 55,000 square feet. These stores limit their inventory to groceries and drugstore items and re-stock through the same distribution centers as other Wal-Mart outlets. These smaller stores allow Wal-Mart to move into neighborhoods otherwise incompatible with the larger supercenters.

Typically, superstore bans are worded to exclude membership clubs such as Costco and Wal-Mart's Sam's Club.[48] The UFCW should not be troubled by Costco's practices. Costco pays much higher wages than Wal-Mart,[49]

DEVELOPMENT iii (Apr. 2003) (prepared for The United Food and Commercial Workers Union, Local 870) [hereinafter ECONOMIC ANALYSIS].

44. *When One Is Too Much, Build Two*, L.A. TIMES, Mar. 14, 2005, at C3.

45. Amit R. Paley, *Wal-Mart Drops Plan for Dual Md. Stores*, WASH. POST, May 17, 2005, at B2 ("Wal-Mart has abandoned plans for a controversial pair of side-by-side stores in Calvert County designed to skirt a local zoning ordinance limiting the size of big-box retail outlets.").

46. *See, e.g.*, OAKLAND, CAL., MUN. CODE § 17.09.040 (1997) (defining "Sales Floor Area").

47. *See generally* Don Milazzo, *Wal-Mart Neighborhood Market Set to Debut; Center Point Location First of a Possible Seven in Expansion of Grocery Concept*, BIRMINGHAM BUS. J., Mar. 8, 2002, *available at* http://www.bizjournals.com/birmingham/stories/2002/03/11/story3.html; Jennifer Turner, *Neighborhood Market Concept Grows, Evolves*, THE BENTON COUNTY DAILY REC., June 3, 2005, *available at* http://walmart.nwanews.com/wm_story.php?storyid=21224&section=shareholder.

48. *See, e.g.*, OAKLAND, CAL., MUN. CODE § 17.10.345 (1997) (excluding "wholesale clubs or other establishments selling primarily bulk merchandise and charging membership dues or otherwise restricting merchandise sales to customers paying a periodic access fee").

49. Stanley Holmes & Wendy Zellner, *The Costco Way: Higher Wages Mean Higher Profits. But Try Telling Wall Street*, BUS. WK., Apr. 12, 2004, at 76 (noting that Wal-Mart's Sam's Club pays wages at a rate three-quarters that of Costco). "Costco pays the top wage in retail, starting employees at $10 an hour." John Helyar, *The Only Company Wal-Mart Fears*, FORTUNE, Nov. 24, 2003, at 158, 164, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2003/11/24/353755/index.htm.

and about one-third of Costco employees are unionized from the days when it merged with the Price Club.[50] Local governments can claim to find a rational basis to justify the exclusion in studies showing Costco has lower traffic counts,[51] though other studies suggest the opposite.[52] Costco sells food in bulk with a smaller array of product choices than Wal-Mart (4000 different items compared to Wal-Mart's 100,000)[53] so that its shoppers are not drawn there two or three times a week like the typical supermarket customer. By not competing head-on with local grocers, Costco does not risk their ire. Mom-and-pop grocers are likely among Costco's best customers and could very well depend on stocking their small stores from Costco's shelves.

The UFCW and other unions are going after Wal-Mart because it is the industry pace-setter, and other discount retailers will experience difficulty matching Wal-Mart's low prices while paying significantly higher wages and benefits.[54] Even if unions were eager to exempt some or all of the other national big-box retailers from local zoning ordinances, it has yet to find a convincing rationale for exempting a SuperTarget or Big Kmart

---

50. Interview with Joel Benoliel, Senior Vice-President and CLO, Costco Wholesale, in L.A., Cal. (Apr. 21, 2005).

51. City planning staff in Turlock, California (without the benefit of a city-wide transportation study) opined in public hearings that the superstore would cause traffic congestion. City of Turlock's Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate at 11, 35, Wal-Mart v. City of Turlock (No. 345253) (Stanislaus County Sup. Ct. Sept. 15, 2004). The city pointed to a traffic survey conducted by VRPA Technologies, Inc. on Wal-Mart Superstores in two other states, concluding that those stores generated on average 34.5% more traffic than was predicted by the ITE manual during the afternoon peak-hour period. *Id.* at 35. Wal-Mart's traffic studies were based on ITE data. *Id.*

52. Wal-Mart commissioned a trip generation study by TJKM Transportation Consultants that compared trip generation of a supercenter with a traditional Wal-Mart store located adjacent to a conventional supermarket, a large shopping center with a traditional supermarket as an anchor tenant, and a discount club store located adjacent to a traditional supermarket. Wal-Mart Stores' Notice of Motion and Motion to Augment Administrative Record of Points and Authorities at 15, Wal-Mart v. City of Turlock (No. 345253) (Stanislaus County Sup. Ct. Sept. 7, 2004). The study concluded that the Wal-Mart Supercenter would have a lower trip generation per square foot because it satisfies more trip needs with one stop than do smaller centers and stores. Letter from Gary E. Kruger, Principal Associate, Transportation Consultants, to Members of the Planning Commission, City of Turlock 1-3 (Nov. 20, 2003) [hereinafter Letter from Gary E. Kruger] (on file with the author).

53. Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES, July 17, 2005, at B1.

54. *See* Temple, *supra* note 9.

from a supercenter ban without raising an insurmountable equal protection issue. Both Target and Kmart sell groceries in their supercenters; Target is the nation's twenty-seventh largest grocer by sales and Kmart is twenty-second.[55] Target plans to add supercenters while Kmart is contracting.[56] Union neutrality toward Target is provisional and may come to an end as Target emulates Wal-Mart's wage and benefit practices.[57]

B. Conditional Use Permits

Cautiously responding to forceful demands for superstore regulation, some local governments amend their zoning codes to apply CUP procedures, specifically to superstores.[58] CUPs are a familiar feature of most modern zoning codes. They empower designated administrators or planning boards to grant, deny, or approve with conditions the applicant's detailed plans after close case-by-case scrutiny. The conditions imposed are meant to make an otherwise potentially objectionable land use compatible with its neighbors. No CUP can be lawfully denied or conditioned except on the basis of promulgated standards signaled in the ordinance.[59] Typical conditions can include: (1) larger setbacks so as to increase the distance separating the project from its neighbors, (2) landscape or other screening material to shield the project from the neighbors' views, (3) limits on hours of operation, (4) special security arrangements, (5) valet parking, and (6) design control.

Through this process, communities resistant to the uniformly plain appearance of the typical big-box retailer hope

55. *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 1.

56. *Id.* at 20.

57. UFCW 789 Director of Organizing Bernie Hesse observed, "What we've seen is, in the last three years, Target has adopted the Wal-Mart [wage and benefit] model . . . ." Temple, *supra* note 9.

58. Kenneth Brooks, *Vallejo's Superstore Ordinance Has Unintended Consequences*, Ethical Ego, Oct. 17, 2005, abstract *available at* http://www.ethicalego.com/brooks_opinion.htm.

59. *See generally* Friends of Davis v. City of Davis, 100 Cal. Rptr. 2d 413 (Cal. Ct. App. 2000) (holding that neighbors trying to protect a local bookseller against competition from a proposed Borders had no right to subvert the design review process to their purpose and that the retail tenant's identity had no bearing on whether the building itself satisfied local design criteria).

to coax something more appealing from them[60] and sometimes achieve a measure of success.[61] These conditions do not reach the core issue of union concern, which are wage rates and employee benefit packages. Instead, they trap all big-box retailers in their net, not just the Wal-Mart Supercenters at which the UFCW is aiming.

C. The Los Angeles Superstore Ordinance

Unions failed several times to garner enough support among Los Angeles's elected officials[62] to enact an outright superstore ban.[63] They succeeded, however, in convincing the city council to subject big-box retailers to a CUP review process,[64] which likely left the UFCW satisfied. At last, they and their allies came up with another idea—a site-by-site review for superstore applicants seeking approval for stores greater than 100,000 square feet with more than 10% of their floor space dedicated to non-taxable items.[65]

---

60. "When Wal-Mart opened a retail store in Evergreen, Colorado, local officials 'forced' Wal-Mart to include 'an oak portico over stone pillars at its main entrance, forest green accents, and parking lot medians with evergreen trees.'" Akila Sankar McConnell, Note, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, 53 DUKE L.J. 1537 (2004) (quoting Tom Daykin, *Communities Force Big Box Retailers to Rethink Designs*, MILWAUKEE J. SENTINEL, June 15, 2001, at D1). The note concludes that the Lanham Act probably does not preclude municipal design control of big-box retailers even though, as communities apply differing standards, there will be an erosion of the regulated firms' recognizable trade dress. *Id.* at 1566-67.

61. *See* Jacobs, *supra* note 3 (showing that Wal-Mart is "experimenting with contextualism, as in an Art Deco design for Los Angeles" and a pedestrian-friendly, landscaped plaza at the facility in North Miami Beach).

62. The California State Assembly enacted S.B. 1056, which would have required economic impact reports of superstores statewide. S.B. 1056, 2003-2004 State Assem., Reg. Sess. (Cal. 2004). The League of California Cities opposed the legislation as an infringement of "local control in these sensitive land use issues" and Governor Schwarzenegger vetoed it. Press Release, League of California Cities, Statement on Governor's Veto of S.B. 1056 (Sept. 18, 2004), http://www.cacities.org/resource_files/22781.sb%201056.doc.

63. *See* Letter from Philip R. Recht, Counsel for Wal-Mart, to Los Angeles City Planning Commission 2 (June 22, 2004) (on file with author).

64. Memorandum from the Office of the Los Angeles City Attorney to the City Council on Options for Regulating the Development of Superstores, Dec. 16, 2003, *available at* http://wakeupwalmart.com/facts/regulating-development.pdf (detailing the reference to the earlier CUP ordinance and its failure to deal specifically with the threat to grocery stores of competing superstores).

65. L.A., CAL., MUN. CODE § 12.24(u)(14)(a) (2004), *available at* http://www.lacity.org/pln/Code_Studies/other/superstores.pdf (last visited Feb. 2, 2006).

Besides the usual CUP findings for approval, superstores would need to demonstrate that after consideration of all economic benefits and costs "the Superstore would not adversely affect the economic welfare of the Impact Area, based upon information contained in an economic impact analysis . . . ."[66] That analysis would identify potential impacts on competitors and jobs within at least a three-mile radius of the proposed supercenter.[67] To curb adverse impacts, the applicant might be required to accept mitigating conditions.[68] Ordinance proponents anticipated the imposition of a prevailing or living wage as a preferred standard mitigation to bar lower-than-union wages.[69] New York City is considering similar legislation.[70]

V. PREVAILING WAGES FOR ALL GROCERY WORKERS?

The UFCW could have sought to directly assist union grocers in their competition with Wal-Mart and other companies operating superstores by attempting to convince state or local governments to enact laws lifting all grocery wages and benefits to prevailing or living wage levels. Though often advocated by the same constituencies, "prevailing" and "living" wages are defined differently and could have significantly different legal consequences. A prevailing wage identifies the level of compensation paid to workers in a particular industry in a defined market area, usually based on the union pay scale.[71]

---

66. L.A., CAL., MUN. CODE § 12.24(u)(14)(d)(1), *available at* http://www.lacity.org/pln/Code_Studies/other/superstores.pdf (last visited Feb. 2, 2006).

67. L.A., CAL., MUN. CODE § 12.24(u)(14)(d)(1), *available at* http://www.lacity.org/pln/Code_Studies/other/superstores.pdf (last visited Feb. 2, 2006).

68. L.A., CAL., MUN. CODE, § 12.24(u)(14)(d)(3), *available at* http://www.lacity.org/pln/Code_Studies/other/superstores.pdf (last visited Feb. 2, 2006).

69. A report commissioned by the City of Los Angeles from Rodino Associates suggested that mitigation measures include "living wage" standards and minimum fringe benefit standards. Rodino Associates, Final Report on Research for Big Box Retail/Superstore Ordinance, Oct. 28, 2003 at 47-48, http:// www.lacity.org/council/cd13/houscommecdev/cd13houscommecdev239629107_04262005.pdf.

70. *See Wal-Mart and the Big Apple: Not in My Aisle, Buddy*, ECONOMIST, Apr. 2, 2005, at 31, 31 [hereinafter *Wal-Mart and the Big Apple*].

71. For example, California's Department of Industrial Relations defines a prevailing wage in the following manner:

> The prevailing wage rate is the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification

Typically, these laws apply only to the construction of public works.[72] A living wage is the least compensation necessary for a working person to afford a decent and safe minimal standard of living for herself and her family.[73] The Federal Poverty Guidelines are sometimes chosen by local governments as their "living wage" standard.[74] Some analysts believe this sum is

---

> or type of work within the locality and in the nearest labor market area (if a majority of such workers are paid at a single rate). If there is no single rate paid to a majority, then the single or modal rate being paid to the greater number of workers is prevailing.

FAQs Answer, Welcome to California, http://workitout.ca.gov/viewfaq.asp?id=143&fid=216 (last visited Feb. 2, 2006).

72. California defines prevailing wages as the per diem wages for public works set by the California Department of Industrial Relations in accordance with California Labor Code sections 1773 and 1773.1, as ascertained by reference to established collective-bargaining agreements within the locality in which the public work is to be performed. CAL. LAB. CODE §§ 1773, 1773.1 (West 2003 & Supp. 2006).

73. *Living Wage: Frequently Asked Questions*, Economic Policy Institute, http://www.epi.org/content.cfm/issueguides_livingwage_livingwagefaq (last visited Feb. 2, 2006).

> The living wage level is usually the wage a full-time worker would need to earn to support a family above federal poverty line, ranging from 100% to 130% of the poverty measurement. The wage rates specified by living wage ordinances range from a low of $6.25 in Milwaukee to a high of $12 in Santa Cruz.

Id.

74. *Id.*

> The level of the living wage is usually determined by consulting the federal poverty guidelines for a specific family size. Often, living wage levels are equal to what a full-year, full-time worker would need to earn to support a family of four at the poverty line ($17,690 a year, or $8.20 an hour, in 2000). Some living wage rates are set equal to 130% of the poverty line, which is the maximum income a family can have and still be eligible for food stamps. The rationale behind some living wage proposals is that these jobs should pay enough so that these families do not need government assistance. (The poverty guidelines are available from the U.S. Department of Health and Human Services. Note that poverty guidelines are different from the poverty thresholds; one main difference is that the poverty guidelines are more current.)
>
> Cities and counties with a higher cost of living tend to have higher living wage levels. The wage rates specified by living wage ordinances range from a low of $6.25 in Milwaukee to a high of $10.75 in San Jose. Furthermore, some advocates have attempted to calculate a living wage based on an income that would provide for a family's *basic needs* (see EPI's *How Much is Enough?* for a discussion of "basic family budget" measures). The living wage levels based on these self-sufficiency income measures are generally much higher than the poverty guidelines.

Id.

insufficient.[75] After studying family budgets across the country, the Economic Policy Institute, a non-profit think tank, has concluded that a wage nearly twice as high as the poverty line would be required in many parts of the country to adequately support a two-adult, two-child household.[76] Predictably, there are substantial variations in the rates actually chosen by cities enacting living wage laws.[77]

Considerations of practical politics and the possibility of successful legal challenge make broad application of high minimum wages a rarely pursued strategy.[78] Of the fifty or so "living wage" ordinances enacted so far by cities, most apply to a narrow subset of employers benefiting directly from government contracts.[79] A few expand coverage to encompass

---

75. Jessie Willis, *How We Measure Poverty: A History and Brief Overview*, Oregon Center for Public Policy, Feb. 2000, http://www.ocpp.org/poverty/how.htm.

> In recent years there have been more fundamental challenges to the poverty measure. Concerned that the poverty rate is far too low, community-based organizations around the country have advocated for "living wages." These groups have argued that instead of using "poverty" as the standard to measure people's economic well-being, we should develop a measure of "living wages." Policy and research institutes around the country have developed living wage budgets that take into account the full range of costs required for families of different sizes to maintain a decent standard of living.
>
> The bottom line is that the current system of measurement is out-dated and seriously underestimates the count of the number of poor people in this country. If the government were to acknowledge the true extent of poverty, it would need to dedicate a greater share of its resources to pay the costs of programs to help the poor. It is unfortunately cheaper to use an outdated system of measurement so that fewer people will be in poverty by government standards.

Id.

76. HEATHER BOUSHEY ET AL., ECONOMIC POLICY INSTITUTE, HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES 1 (2001) (finding that "over two-and-a-half-times as many families fall below family budget levels as fall below the official poverty line"); *see also* BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (recounting her difficulty surviving while working at three different entry-level jobs, including a Wal-Mart in Minneapolis, and finding that housing was the greatest challenge in each of three cities she studied).

77. William Quigley, *Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 MISS. L.J. 889, 928 (2001).

78. The City of Santa Monica, California adopted a charter amendment to impose a living wage on hotel and restaurant workers in the coastal zone and downtown. League of Women Voters of California, *Measure JJ: Adoption of Ordinance Pertaining to Establishment of Local Minimum Wage Requirements*, *available at* http://www.smartvoter.org/2002/11/05/ca/la/meas/JJ/ (last visited Feb. 2, 2006). At the November 5, 2002 election, the enactment was repealed by referendum, 48.3% yes, 51.7% no. *Id.*

79. *See* Robert Pollin, *Living Wage, Live Action*, THE NATION, Nov. 23, 1998, *available at* http://www.thirdworldtraveler.com/Economics/LivingWage_LiveAction.html.

government "grantees, licensees, lessees and those receiving tax credits or special zoning relief, as a few cities do in their laws."[80] The City of Chicago is considering the enactment of a living wage law that would apply to all large retail stores.[81]

Proponents of local or state enactment of living or prevailing wage laws would likely face two legal impediments to the extension of these laws to grocery workers within their jurisdictions. First, applying a prevailing or living wage law to only grocery workers would almost certainly be challenged as an infringement of the Equal Protection Clause. Under the "rational basis" review, these challenges are unlikely to succeed. Second, any attempt to impose a prevailing wage standard upon employers with no direct contractual ties to the local government could be pre-empted by the NLRA.[82] As we shall recount, the Act has been held to have preempted the extension of prevailing wage rates to purely private contracting parties.[83]

A. The Equal Protection Challenge to a Living Wage Law for Grocery Workers

Usually, it does not take much for a duly-enacted municipal zoning ordinance to pass constitutional muster on equal protection or due process grounds.[84] The standard of equal protection judicial review for economic regulation is minimal.

> Living-wage laws targeting city contractors will, however, affect only a small proportion of low wage workers. Some organizers have thus taken a more ambitious approach, pushing for laws that would apply to all workers in a municipality, regardless of who their employer is, just as national or statewide minimum wage laws apply to virtually all workers within a geographic area. Recently, organizers in Denver and Houston advanced these more ambitious proposals but were soundly defeated at the polls. At least in part, they lost because of their ambitious scope, which invited an even more determined opposition.

Id.

80. Quigley, *supra* note 77, at 941.

81. *See Wal-Mart and the Big Apple*, *supra* note 70.

82. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

83. *See infra* notes 96, 104-08.

84. *See* Op. Att'y Gen., State of Nevada, to Stewart L. Bell, Clark County District Attorney (Oct. 5, 1999). This opinion regarding a proposed Clark County superstore ban concluded that a rational basis existed in an ordinance finding that

> adding a grocery store use to a large retail superstore will congregate an excessive amount of vehicular and pedestrian traffic into one or two concentrated areas of the building entrances. The health, safety, and welfare concerns for persons driving, walking and parking in such concentrated areas

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[85]

Any reasonably conceivable state of facts, or any rational basis for the classification, will suffice because courts characterize most land use controls as involving social and economic policy and not as targeting a suspect class or impinging upon a fundamental right.[86] Once the reviewing court alights upon a plausible reason for the legislative act, its job of constitutional adjudication is largely complete.

An instructive case applying this permissive standard upheld an Alaska law giving residents greater cost of living differentials and greater compensation than non-resident workers on the Alaska Marine Highway.[87] It does not take an advanced degree in political science to appreciate why state legislators might favor their own residents, taxpayers, and voters over workers from other states. Despite this transparently improper possible explanation for the law's enactment, the Ninth Circuit accepted Alaska's asserted justification that costs of living were greater in Alaska than the other places—such as Seattle—from which highway workers had been drawn.[88]

> are facially valid. . . . Even the possible detrimental economic impacts on neighboring properties have been found by some courts to fall within the legitimate parameters of zoning regulations.

Id. at 3.

85. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)). "'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" *Id.* (quoting Metropolis Theatre Co. v. City of Chi., 228 U.S. 61, 69-70 (1913)). "'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

86. *See, e.g., id.* at 486.

87. *See generally* International Org. of Masters, Mates & Pilots v. Andrews, 831 F.2d 843 (9th Cir. 1987).

88. *See id.* at 845.

The Ninth Circuit rebuffed an equal protection challenge to a living wage ordinance in *RUI One Corp. v. City of Berkeley*.[89] The City of Berkeley, California adopted an ordinance that

> requires employers that lease prime city-owned property, or that receive large city contracts, to pay their employees a living wage—set initially at $9.75 per hour and updated annually for inflation—plus health benefits. The living wage law applies specifically to Berkeley's Marina district, an attractive tourist destination developed with taxpayer dollars. In adopting the living wage law, the Berkeley City Council asserted that businesses operating in the Marina district and benefiting from city investment must provide decent jobs and pay employees a family-sustaining wage.[90]

The scope of the law included restaurants located in the Berkeley Marina.[91] A restaurant in the Marina that leased space from the city filed suit to challenge the law. The court found the requisite rational basis in the fact that the Marina land had long been subject to the public trust doctrine and benefited from government-funded physical improvements, maintenance, and promotional efforts. In addition, a city moratorium on commercial development in the Marina had protected the restaurant from competition since 1987.

To imagine how easily the equal protection challenge could be successfully met, consider how New York City could defend its recently enacted ordinance requiring all grocery store employers to pay $2.50 to $3.00 per hour per worker in health benefits.[92] Proponents described it as a pilot program that might be extended to other employers later.[93] They defended the economic feasibility of industry compliance by pointing out that 72% of all grocery workers already received such benefits, though 6000 employees worked in the 28% of firms not offering

89. 371 F.3d 1137 (9th Cir. 2004); *see also id.* at 1145-46, 1156.

90. Press Release, Brennan Center for Justice, Brennan Center and Coalition of Public Interest Groups Join with City of Berkeley in Defending Living Wage Law, Oct. 11, 2002, http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_1012.html.

91. *RUI One Corp.*, 371 F.3d at 1146.

92. NEW YORK CITY, N.Y., ADM. CODE § 22-506 (2005).

93. Brennan Center for Justice, Frequently Asked Questions, *What Is the New York City Health Care Security Act?*, http://www.brennancenter.org/programs/downloads/HCSA%20-%20Q%20and%20A%2010-11-05.pdf (last visited Feb. 2, 2006).

that level of health care benefit.[94] This same data could probably be useful in repelling an attack predicated on equal protection grounds because the ordinance only applies to grocery workers. It is plausible for the New York City Council to believe that grocery workers already receiving adequate health benefits could lose them as their employers struggle to compete with grocers not paying comparable benefits to their workers.[95] Under the "rational basis" test, this would probably suffice.

B. National Labor Relations Act Preemption and the Proprietor Exception

Living wage laws have been held not to be preempted by the NLRA, but broadly applicable prevailing wage laws have been successfully challenged on this basis.[96] Minimum or living wage laws enacted by federal, state, or local governments are not preempted by the NLRA because employers and employees are still left with wide latitude regarding the processes and outcomes of collective bargaining.[97] Congress enacted the NLRA to allow workers the option of choosing or rejecting union representation in collective bargaining.[98] Workers' rights to organize under Section 7[99] are accommodated to the

94. *Id.*

95. John Catsimatidis, Chairman and CEO of Gristedes, has stated, "When my competitors drop health care for their workers, they're not only hurting their employees, they're hurting mine . . . . If I have to compete with low-road, cost-cutting employers like Wal-Mart, it's going to be hard for me to continue to provide my employees with the care they deserve." Press Release, NY Jobs with Justice & Brennan Center for Justice, *Health Care Expansion Approved by NYC Council* (Aug. 17, 2005), http://www.brennan center.org/programs/Healthcare%20-%20press%20release.html.

96. *See, e.g.*, Chamber of Commerce of the United States v. Bragdon, 64 F.3d 497 (9th Cir. 1995).

97. *See* Associated Builders & Contractors of S. Cal., Inc. v. Nunn, 356 F.3d 979, 991 n.8 (9th Cir. 2004) (citing *Bragdon*, 64 F.3d at 502).

98. "Congress has empowered the NLRB to conduct secret-ballot elections so employees may exercise a free choice whether a union should represent them for bargaining purposes." *The NLRB and You: Representation Cases*, The NLRB, http://www. nlrb.gov/nlrb/shared_files/brochures/engrep.asp (last visited Feb. 2, 2006).

99. National Labor Relations Act, ch. 120, 49 Stat. 449, 452 (1935) (codified at 29 U.S.C. § 157 (2000)) (amended 1947). The law, as amended, reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have

employer's private property rights "with as little destruction of one as is consistent with the maintenance of the other."[100] Section 8 of the NLRA delineates and outlaws unfair labor practices that would undermine the process of employees deciding whether they desire union representation, choosing their bargaining representative, and then negotiating in good faith with employers over the terms and conditions of their employment.[101]

The NLRA was enacted during the Great Depression when high rates of unemployment were undercutting unionization.[102] It was enacted in order to balance the strength of unions and employers and to lift the low wage rates that were perceived as dampening consumer demand and slowing economic recovery. As the United States Supreme Court has noted:

> The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions. . . .
>
> The evil [that] Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at

---

> the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157.

100. National Labor Relations Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

101. National Labor Relations Act, ch. 120, 49 Stat. 449, 452-53 (1935) (codified at 29 U.S.C. § 158 (2000)).

102. *See generally* National Labor Relations Act, ch. 120, 49 Stat. 449, 452 (codified at 29 U.S.C. § 157); *Labor in America: The Worker's Role*, International Information Programs, http://usinfo.state.gov/products/pubs/oecon/chap9.htm (last visited Feb. 2, 2006).

> least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly, it never has been argued successfully that minimal labor standards imposed by other federal laws were not to apply to unionized employers and employees. Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.[103]

Prevailing wage laws are another matter entirely. The leading case striking down a broadly applicable prevailing wage law is *Chamber of Commerce of the United States v. Bragdon*.[104] This case arose as a challenge to a Contra Costa County prevailing wage law which extended to cover not only companies working on government contracts but purely private construction contracts as well. The Ninth Circuit struck down Contra Costa's prevailing wage ordinance because the law interfered directly with collective bargaining agreements in the construction industry. The Contra Costa ordinance purported to set forth the terms and conditions of employment for the private construction industry in great detail. The Ninth Circuit observed that the prevailing wages prescribed by statute were promulgated by the Director of the Department of Industrial Relations based on the blended terms and conditions agreed to by workers and employers in the same market. Imposing the outcomes from other negotiations upon the workers and employers in a particular company deprives them of the right to bargain collectively and interferes with "the free-play of economic forces that was intended by the NLRA."[105]

Labor lawyer Barry A. White explains why a prevailing wage law enacted to aid unionized grocers by forcing non-union grocers to pay union scale would be preempted by the NLRA:

---

103. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753-55 (1985) (citations omitted).

104. 64 F.3d at 504; *see also id.* at 498-99, 502-04.

105. *Id.* at 504. "The Ordinance provides that this total 'per diem' rate must be paid directly to the workers with a credit for benefits paid for the workers. However, at least the base hourly rate calculated in California's prevailing wage calculation must be paid directly to the worker." *Id.* at 502.

under such an ordinance, workers in non-union companies would have little need for a union or for collective bargaining.[106] "[U]nionized grocers might even have an incentive to elevate wages in order to produce a higher blended rate . . . ."[107] Transparently, the law would be "specifically designed to impact what occurs at the bargaining table, and would almost certainly have that effect . . . ."[108] This is exactly the sort of regulation that trespasses on the collective bargaining model that lies at the heart of the NLRA.

1. The Proprietor Exception

A significant, well-established exception to NLRA preemption offers another line of defense for prevailing wages being made a condition of superstore approval under the Los Angeles superstore ordinance. This "proprietor" exception applies when governments act in their capacity as developers of public works, as purchasers of goods or services for their own use or distribution, or as lessors of government property.[109] While acting as proprietors (i.e., owners, investors, or financiers) of construction projects, governments are allowed to prescribe the terms of wages and benefits, or other labor conditions, for contractors working on projects owned, financed, or invested in by the local government.[110] "When a state or local government takes action that affects labor relations but does so for the purpose of serving its proprietary as opposed to regulatory interest, the action is not subject to NLRA preemption."[111]

In these situations, courts have indicated that a city or state's "interest . . . is similar to that of any private purchaser of services . . . attempting to exert pressure on the parties to the collective bargaining negotiations in order to hold down the

106. *See generally* Memorandum from Barry A. White to Philip R. Recht, et al. (June 20, 2005) (on file with author).

107. *Id.* at 2.

108. *Id.* (emphasis omitted).

109. *See, e.g.*, Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 232-33 (1993).

110. *See, e.g., id.*

111. Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County, 359 F. Supp. 2d 749, 754-55 (E.D. Wis. 2005) (citing *Building & Constr. Trades Council*, 507 U.S. at 220-22, 232-33).

costs of purchasing" essential services.[112] Local government can require bidders on a public works project to enter labor agreements to minimize the chance of the project being disrupted by union protests.[113] Although "the scope of the funding condition [must be] 'specifically tailored' to the [government's] proprietary interest," the government need only show that it has a reasonable basis for believing its proprietary interest would be advanced by the challenged rule.[114] "Further, the government's burden of making such a showing is not a heavy one, for state and local governments are allowed some freedom to act innovatively in the marketplace."[115]

Courts have broadly construed the proprietary exception. In one case, a county was allowed to require that private contractors enter into labor peace agreements because the contractors were providing care, treatment, or transportation services for the elderly or disabled, which had an aggregate value of more than $250,000. The county also sought to minimize the risk that paratransit for the elderly or disabled would be disrupted by labor strife.[116] In another case, a county constructing a $212 million Events Center, scheduled to open in 2004, was allowed to require the winning bidder to enter a

---

112. Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3d Cir. 1977) (holding that the NLRA did not prevent New Jersey officials from withholding public funds from private transportation providers who agreed to cost of living increases with no fixed limits).

113. Associated Builders and Contractors of Mass./R.I., Inc. v. Massachusetts Water Res. Auth., 935 F.2d 345, 347 (1st Cir. 1991).

> Another important function of Kaiser is to advise the [Massachusetts Water Resources Authority ("MWRA")] on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites and was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.

Id. (footnotes omitted).

114. *Metropolitan Milwaukee Ass'n of Commerce*, 359 F. Supp. 2d at 759.

115. *Id.*

116. *Id.* at 752-53, 763.

project labor agreement so as to reduce the possibility of construction being delayed by union strife.[117]

2. The Outer Boundary of the Proprietary Exception

The antithesis of proprietary government action is government involvement with labor-management relations as a regulator. The NLRA covers and preempts regulatory interference with labor-relations matters. For example, the Supreme Court barred the City of Los Angeles from refusing to renew Golden State's Yellow Cab franchise until the company reached a settlement of its collective bargaining agreement with the taxi drivers' union, the Teamsters.[118] As the United States Supreme Court explained:

> There is no question that the Teamsters and Golden State employed permissible economic tactics. The drivers were entitled to strike—and to time the strike to coincide with the Council's decision—in an attempt to apply pressure on Golden State. And Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union.
>
> The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help.[119]

The State of Wisconsin provides another oft-cited example of the NLRA preempting a state labor regulation. That case arose as a challenge to a statute which barred persons or companies from doing business with the state who had violated the NLRA three times within a five-year period.[120] The State contended that its policy advanced the goals of the NLRA but must have been disappointed to learn that only the National Labor Relations Board ("NLRB") is empowered to impose sanctions for violations of the Act. The NLRA prevents states

117. Master Builders of Iowa, Inc. v. Polk County, 653 N.W.2d 382, 386, 396 (Iowa 2002).

118. Golden State Transit Corp. v. City of L.A., 475 U.S. 608, 618 (1986).

119. *Id.* at 615 (citations omitted).

120. Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 283 (1986).

"not only from setting forth standards of conduct inconsistent with [its] substantive requirements . . . but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."[121]

Hoping, perhaps, to fit its superstore ordinance within the proprietary exception to NLRA preemption, the authors of the Los Angeles superstore ordinance confined its application to "economic assistance zones," defined as areas having benefited from federal, state, or local funding through redevelopment, renewal, enterprise zones, or earthquake relief.[122] Repeated revisions of the Los Angeles ordinance washed away any reference to prevailing or living wages. Apparently, the city attorney's office was reluctant to defend against a challenge based on NLRA preemption. Counsel for Wal-Mart suggested that if the ordinance proponents had no intention of trying later to impose a prevailing wage standard on a case-by-case basis, it should make the ordinance applicable city-wide.[123] The suggestion was rejected.[124]

If the City of Los Angeles, in applying the ordinance to a specific applicant, ever imposes a prevailing wage standard in a specific case, we may come to learn whether the Los Angeles ordinance qualifies for the proprietary exception to NLRA preemption, but that is doubtful. The proprietary exception requires the city to establish that it is protecting its interest as an active participant in a project or program. Regulation is the antithesis of a proprietary purpose, and the Los Angeles superstore ordinance—its history, sweeping applicability, and requisite notice-and-hearing processes—are all indicative of a land use regulation.

VI. LIMITS ON THE USE OF ZONING TO REGULATE COMPETITION

A potentially serious objection to superstore bans derives from state zoning enabling laws. Although states broadly empower local governments to regulate land use under their

121. *Id.* at 286.

122. Letter from Philip R. Recht, Counsel for Wal-Mart, to Los Angeles City Planning Commission 18 (June 22, 2004).

123. *Id.*

124. *See* L.A., CAL., MUN. CODE § 12.24(u)(14) (2004).

general police powers, appellate courts will strike down land use controls as indefensible except to protect local merchants from economic competition.[125] To "'not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them,'" local legislators must demonstrate that their decisions were based on substantial evidence pertinent to legitimate land use concerns.[126]

Reno, Nevada was the situs of a case illustrating how a city crossed the line and abused its zoning powers when attempting to regulate economic competition.[127] The applicant's site was surrounded on three sides by a Bally Grand hotel-casino. It desired to construct a similar project—a 28-story hotel and casino with 804 rooms, 312 of which would be available for sale as time-shares. Though marked for hotel-casino use in the Reno master plan, the site was zoned M-1 (light industrial). In order to exceed a sixty-five-foot height limit and develop residential time-share units, the owner needed the city to change the site's zoning designation to C-3, as the M-1 zone barred residential use.

To bring the site into conformity with the Reno master plan and the surrounding land uses, the Reno city planning staff had encouraged the applicant to apply for the zone change. At the public hearing, only one witness spoke in opposition and the city council firmly rebutted that witness's testimony on the spot. Nonetheless, the council voted against "what was described as an architecturally 'superior' project on the specified grounds that approval would violate a campaign promise against locating new casinos outside the 'downtown area' and a similar pledge to diversification that would pay higher employee wages."[128] The Nevada Supreme Court concluded that "no evidence, let alone reasoning, was presented to justify a denial of appellants' request for rezoning" and remanded the matter back to the Reno City Council for further consideration.[129]

---

125. KENNETH H. YOUNG, 1 ANDERSON'S AMERICAN LAW OF ZONING § 7.28, at 805 (4th ed. 1996).

126. Nova Horizon, Inc. v. City Council of Reno, 769 P.2d 721, 722-23 (Nev. 1989) (quoting Lowe v. City of Missoula, 525 P.2d 551, 555 (Mont. 1974)).

127. *See generally id*; *see also id.* at 721, 723.

128. *Id.* at 723.

129. *Id.* at 724.

Zoning law cannot be used solely to safeguard local merchants against competition from new development. But it is also axiomatic that reviewing courts regard legislative motive as irrelevant except in cases of heightened scrutiny, usually involving allegations of discrimination based on race, gender, or ethnicity. In all other situations, there are good reasons why courts should ignore legislative motives. The motives of official decision-makers are seldom clearly discernible and could often be easily hidden or disguised. Most telling of all, to speak of the "motives" of a legislative body is to attribute human characteristics to an inanimate construct, the body politic. It has no motives because it is not a person.

How, then, can we explain the Nevada Supreme Court ascribing the Reno council's refusal to rezone the Nova Horizon site as owing to a political campaign promise to limit casino competition downtown? And what can we make of this oft-cited California case: "we hold that so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition"?[130] After all, if courts are not in the business of ascertaining legislative motives, how are they to know whether "the primary purpose" of a zoning law was to regulate economic competition?

The answer is found in the distinction between legislative motive and legislative purpose, as well as in the permissive standard of judicial review condoning legislation enacted for any coherent public purpose proffered. "Although the distinction between motive and purpose can be fuzzy, 'motive' ordinarily addresses the subjective considerations that move a legislator, and 'purpose' speaks to the goals to be achieved."[131] "Courts

130. Van Sicklen v. Browne, 92 Cal. Rptr. 786, 790 (Cal. Ct. App. 1971).

131. Riggs v. Township of Long Beach, 538 A.2d 808, 813 (N.J. 1988).

> The intervenors urge, quite correctly, that "constitutional analysis of legislative purpose does not involve a judicial inquiry into supposed illicit legislative motive." There is a distinction, I believe, between the motives and purposes of individual legislators and an institutional legislative purpose. Legislators may have the purest of personal motives and produce unconstitutional legislation, and contrariwise individual legislators with wrongful motives may vote for a bill and produce legislation which is both beneficent and constitutional.

May v. Cooperman, 572 F. Supp. 1561, 1573 (D.N.J. 1983) (citation omitted).

generally will not inquire into legislative motive to impugn a facially valid ordinance, but will consider evidence about the legislative purpose 'when the reasonableness of the enactment is not apparent on its face.'"[132] Contrary to the literal meaning of the aforementioned quote from the California case, courts do not envision establishing a hierarchy of public purposes. Generally, cities have broad discretion to draw lines between zones with minimal justification. Where not even the flimsiest justification can be conjured to explain the line drawing, courts sometimes invalidate such exercises as "spot zoning." In *Nova Horizon, Inc. v. City Council of Reno*, the Nevada Supreme Court treated Reno's action as spot zoning, which had no apparent purpose except to regulate economic competition.[133]

What counts as a passable rationale for a zoning ordinance has expanded greatly in recent decades. Early zoning laws were justified as a preventive law of nuisance, separating uses deemed incompatible because of such impacts as traffic, noise, odors, pollution, and fire and safety hazards.[134] The range of acceptable rationales has widened as local governments have undertaken programs of urban development, economic development, and job creation.[135] Courts now accept that most land use controls have indirect impacts on economic competition.[136] Planning and zoning decisions are often justified to maintain property values, protect tax revenues, provide neighborhood social and economic stability, arrest blight and decay, provide and encourage affordable housing, attract business and industry, and encourage conditions that make a community a pleasant place to live and work. Any of these, sufficiently evidenced, could suffice to insulate a zoning ordinance from successful attack.

This paradigm shift from nuisance prevention to affirmative planning has led courts to accept types of regulations impacting economic competition that would once have been

132. *Riggs*, 538 A.2d at 813 (quoting Clary v. Borough of Eatontown, 124 A.2d 54 (N.J. Super. Ct. App. Div. 1956)).

133. *See generally Nova Horizon*, 769 P.2d 721.

134. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

135. *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005).

136. *See, e.g., id.* at 2664 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984)).

rejected as impermissible infringements on private property.[137] Consider the example of a property owner wishing to establish a gasoline station at an intersection that already had one or more gas stations. In the early years of zoning, courts could not see the rationale in a city barring a gas station from an area already dotted with them except, impermissibly, to regulate economic competition. This was understandable when viewed from the narrow parameters of the law of nuisance. A "pig could be kept out of a parlor" but not, presumably, out of a barnyard.[138] Once gas stations had arisen on two of the four corners at the same intersection, what could possibly justify zoning out gas stations on the remaining two corners?[139]

For decades now, courts have been willing to look beyond the rather narrow bounds of nuisance law and subordinated property owners' entitlements to the interests of the community in keeping out any land use as intrusive as a gas station, no matter how many of them were already operating in the quarter.[140] California courts have long held that cities can avoid "'a further proliferation of this type of land use in a

---

137. *See, e.g.*, *Ruckelshaus*, 467 U.S. at 1014.

138. *Village of Euclid*, 272 U.S. at 388.

> In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. . . . A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.

Id. at 387-88.

139. *See* Hering v. City of Royal Oak, 40 N.W.2d 133, 135 (Mich. 1949).

> [M]ainly controlling here, is the fact that two other corner properties at the intersection in question are now in use for gasoline stations, the same use that plaintiffs requested the defendants to permit for their property. The testimony bears out the conclusion that plaintiffs' property is not suitable for residence purposes. We agree with the trial court that the ordinance is unreasonable as applied to said property of plaintiffs.

Id.; L.S. Tellier, Annotation, *Zoning Regulations as to Gasoline Filling Stations*, 75 A.L.R.2D 168 ("It is worthy of note that while the earlier zoning ordinances frequently met opposition from some of the courts, the later cases recognize the need for such regulations and there seems to be a greater tendency to uphold their validity, if reasonably possible.").

140. *See, e.g.*, Racetrac Petroleum, Inc. v. Prince George's County, 601 F. Supp. 892, 897 (D. Md. 1985).

> After . . . a review of a 'need analysis' submitted by the plaintiff, the staff determined that the statutory requirement that the special-exception use be necessary to the public in the surrounding area was not met in light of the existence of 31 service stations, including 4 gas-only stations, within a two-mile radius of plaintiff's proposed site.

Id.

neighborhood already adequately served by service stations . . . [where t]here is no demonstrated need for an additional service station in this neighborhood at this time.'"[141] These courts cite language in a city's general plan regarding balance and the efficient movement of goods and people.

In a similar vein, courts accept the notion that cities can target specified areas for commercial use and bar retail activity elsewhere.[142] To shelter fledgling downtown redevelopment projects from fierce suburban competition, many cities have denied rezoning applications filed by suburban mall developers.[143] A community could not zone out a hospital, for instance, because it might drain patronage from other nearby hospitals already struggling to survive. But the same result could be justified by reference to a general public interest in reserving the space for other uses the community will eventually need, not presently located there.[144]

The extent to which local governments may impose regulations substantially impeding competition is illustrated by ordinances requiring CUPs of "formula retail."[145] Cities have defined "formula retail" to mean a

> "type of retail sales activity or retail sales establishment (other than a 'formula fast food restaurant') which is required by contractual or other arrangement to maintain any of the following: standardized ('formula') array of

141. *Van Sicklen*, 92 Cal. Rptr. at 787 (quoting the planning commission's reasons for denial of an application for a use permit); *see also id.* at 787-88.

142. *See, e.g.*, Ensign Bickford Realty Corp. v. City Council of Livermore, 137 Cal. Rptr. 304, 306 (Cal. Ct. App. 1977) (allowing the city to determine that the area would only support one shopping center and prefer that center to be located in Springtown instead of on Bickford's property).

143. *See, e.g.*, Scott v. Sioux City, 736 F.2d 1207, 1212-13 (8th Cir. 1984) (finding the city to be shielded from an anti-trust claim for denying suburban rezoning in order to protect a downtown redevelopment project because it was acting pursuant to state redevelopment law); Forte v. Borough of Tenafly, 255 A.2d 804, 806 (N.J. Super. Ct. App. Div. 1969) (finding that a zoning ordinance restricting retail sales to a central business district was valid to revitalize the central business district); *In re* Wal-Mart Stores, Inc., 702 A.2d 397, 400-01 (Vt. 1997) (upholding a state environmental board decision to block a Wal-Mart store from locating in St. Alban to protect the local property tax base); *see also* Murray S. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21 (1983).

144. *See* Lazarus v. Village of Northbrook, 199 N.E.2d 797 (Ill. 1964).

145. Several cities have enacted "formula retail" restrictions. *See generally* The Hometown Advantage: Reviving Locally Owned Business, *Formula Business Restrictions*, http://www.newrules.org/retail/formula.html (last visited Feb. 2, 2006).

> services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature."[146]

Residents often want to maintain the unique character of their main commercial streets and prefer "boutique" shops that are small, inviting, and unique. A preference for mom-and-pop stores and the preservation of a town's historic village ambience is in itself a legitimate objective even if a consequence is the protection of local merchants from the ravages of competition with national chains. These types of controls are upheld[147] although they might not have been in times past.[148]

Only a very poorly counseled local government would enact a superstore ban without establishing an articulated rationale based on conventional planning and zoning criteria. The City of Turlock, California, for instance, defended its superstore ban by pointing to certain provisions in its general plan.[149] There, it found support for the notion that it had divided retail uses into two categories, neighborhood and regional, in order to minimize traffic and air pollution and preserve the tranquility of its residential zones. In its plan, the place for big-box retailers was out of town on the major highway. Neighborhood shopping centers were spaced throughout the community, often anchored by grocery stores. People shop for groceries far more frequently than for dry goods. So a Wal-Mart superstore with a grocery within it, located on a major artery outside town, would

---

146. *See, e.g.*, Coronadans Organized for Retail Enhancement v. City of Coronado, No. D040293, 2003 WL 21363665, at *1 (Cal. Ct. App. June 13, 2003) (lacking certification or order for publication and therefore uncitable) (quoting CORONADO, CAL., MUN. CODE § 86.04.682 (repealed and replaced by CORONADO, CAL., MUN. CODE § 86.04.309 (2005))).

147. *See, e.g.*, *Coronadans Organized for Retail Enhancement*, 2003 WL 21363665 (lacking certification or order for publication and therefore uncitable).

148. Fogg v. City of S. Miami, 183 So. 2d 219 (Fla. Dist. Ct. App. 1966). The city had denied a permit for a drive-in business on a commercial street because nearby merchants preferred shops designed to encourage consumers drawn to one shop to drift down the street to another. *See id.* at 220. The trial court had upheld the denial but the appellate judge saw it as an unconstitutional effort to subordinate one owner's property rights to the well being of a small class of neighboring merchants. *See id.* at 221.

149. *See generally* City of Turlock's Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate at 11, 35, Wal-Mart v. City of Turlock (No. 345253) (Stanislaus County Sup. Ct. Sept. 15, 2004); *see also id.* at 5-8.

> encourage local residents to frequent the regional shopping centers to satisfy their daily shopping needs, shifting local traffic patterns and increasing traffic demands on local streets which were not designed or intended for this increase in traffic. Second, the City found that the opening of a superstore was likely to result in the closure of two to three existing grocery stores within the City, which would cause existing neighborhood centers to lose their anchor tenants, leading to blight from vacant storefronts.[150]

While Turlock advanced a coherent planning rationale for its superstore ban, the city neglected to support the "decay-inducing" aspect of its "rational basis" contention with a cogent study demonstrating how a Wal-Mart superstore would force closures of neighborhood grocery stores within its boundaries.[151] Instead, it took its chances by relying entirely on testimony about earlier studies of Wal-Mart's impacts in other communities, along with anecdotal evidence that the recent closure of an Albertson's had resulted in a marked decline in the trade of smaller tenants in that same shopping center. However, Albertson's closure could not be attributed to Wal-Mart as it had not yet opened a grocery business in Turlock. The next section details the questions a thorough market impact assessment would answer.

VII. SUBSTANTIAL EVIDENCE: PERFORMING A MARKET IMPACT ANALYSIS

When a piece of legislation or an administrative decision is challenged in a legislative or administrative mandamus proceeding, the job of the courts is limited to making sure the challenged act is not arbitrary, and that it is supported by "substantial evidence" in the public record.[152] "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. . . . Substantial evidence is not argument, speculation, unsubstantiated opinion

150. *Id.* at 1-2.

151. *See id.* at 11-13.

152. *See* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1163 (1995). This is the test employed by the federal government and most of the states, although California employs the "independent judgment approach," which is "idiosyncratic to California." *Id.*

or narrative, [or] evidence that is clearly inaccurate or erroneous . . . ."[153]

Typically, proponents and opponents of an enactment offer conflicting "substantial evidence." Courts are not supposed to exercise independent judgment in deciding who had the better argument or the most convincing expert. As long as substantial evidence abounds on both sides of the controversy, courts sustain the government's decision.[154] Buoyed by the knowledge that their decisions will survive legal challenge if justifiable on any rational basis, local governments may overlook the necessity to invest in the experts and consultants whose documented research findings are needed to satisfy the substantial evidence test.

A locality enacting a superstore ban will need to advance at least one plausible planning or land use factor to justify the enactment. Sometimes, the chosen basis is to reduce vehicle miles traveled and the accompanying air pollution.[155] The superstore's experts will explain that supercenter shoppers make fewer trips by purchasing groceries and dry goods at the same location. Superstore foes contend that superstore shoppers will travel considerable distances to buy groceries two or three times a week instead of shopping at their neighborhood supermarkets. Traffic studies compare the locality's patterns with what happened when supercenters opened in other communities.[156]

The locality's study requires more work for superstore bans than for the typical zoning matter. These bans start with a questionable premise—that a grocery store and a discount retailer operating under one roof will result in more undesirable impacts than a supermarket, such as a Safeway or Vons, located a few steps away from a standard Wal-Mart, Costco, or Target, of a combined size approximately the same as the Wal-Mart Supercenter. The study needs to justify this counterintuitive distinction.

---

153. CAL. PUB. RES. CODE § 21080(e) (West Supp. 2006).

154. *See generally* William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADM. L. REV. 571 (1991); *see also id.* at 727-28.

155. *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 1, 57-61.

156. *See generally* City of Turlock's Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, Wal-Mart v. City of Turlock, No. 345253 (Stanislaus County Sup. Ct. Sept. 15, 2004).

Local governments often justify superstore restrictions by claiming that a proposed Wal-Mart or other supercenter will drain so much trade from a local supermarket as to force it out of business.[157] The expert will predict an ensuing chain reaction of store failures as the number of shoppers declines in the neighborhood center anchored by the failed supermarket. These failures, the expert predicts, would lead to urban decay.

What type of market impact assessment would the city need to sustain its denial of a rezoning for a superstore, imposition of mitigating conditions through a CUP, or enactment of a superstore ban? Admittedly, this is a judgment call based on likely court reactions to different levels of evidence. To counter the assertion that the regulation is nothing but an impermissible attempt to zone out economic competition, a market impact assessment would be helpful to provide the requisite substantial evidence lending credence to planning-based explanations for the challenged enactment.

For starters, an expert's testimony about other cities where this scenario has occurred may not be convincing without a detailed explanation of why the enacting city could reasonably expect the same unfortunate outcome. As a leading economist who has studied superstore impacts explains: "The impacts of a big box will always vary according to the specific conditions in the locale where it opens. There are few universal truths in economic development, and what is a boon for one town may be an intolerable burden for another."[158]

The impact of a proposed superstore on grocers already located within the jurisdiction is not easy to assess responsibly. A consultant might start by estimating supply, the gross sales per square foot of merchants already doing business in the jurisdiction, and the gross sales per square foot of the proposed superstore, based on its national track record. Then the expert should estimate demand—the retail sales purchases of residents. To existing demand, the consultant might consider how much of an increase in consumer demand is likely to result from general trends in growth or income. Many of the studies showing how Wal-Mart puts smaller merchants out of business come from

157. *See generally* Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203 (Cal. Ct. App. 2004); *see also id.* at 219, 222-23.

158. BAY AREA ECONOMIC FORUM, *supra* note 2, at 63.

areas where population and economic growth are stagnant or in decline.[159] In California, healthy growth rates could mean there is enough business to go around, depending on where and how much growth occurs. For trade areas growing in population and affluence, the expert needs to estimate how increased demand will be shared among retailers before concluding the existing merchants will be doomed by the arrival of Wal-Mart or another superstore.

Trade market areas vary, but generally cover an area with at least a five-mile radius, which is over seventy-eight square miles.[160] To the extent a superstore sells to out-of-towners, estimates of adverse impacts on local merchants may be overstated. To the extent local residents do some of their shopping outside of town, a factor known as "leakage,"[161] the local market is that much smaller and local merchants that much more vulnerable to competition from a new superstore.

When there does not seem to be enough trade to go around, the consultant makes an informed guess about which merchants will survive the intense competition and pinpoints those that might not, as well as the probable reasons for their vulnerability.[162] That guess would likely be substantiated by visits to the very retailers at risk. For instance, Wal-Mart does not pose much of a threat to "retail nodes offer[ing] a memorable shopping experience in a place with appeal and character," or "[s]pecialty shopping districts with a regional orientation and focus on primarily upscale or ethnic niche markets . . . ."[163] The consultant estimates how much trade will be lost,[164] projects the excess square footage likely to result, examines boarded-up space already on the market, analyzes

159. Professor Kenneth E. Stone, an economist on the faculty of Iowa State University, did the seminal studies of Wal-Mart's impacts on local merchants, using the Iowa experience to form his conclusions. *See* Kenneth E. Stone, *Impact of Wal-Mart Stores on Iowa Communities: 1983-93*, 13 ECON. DEV. REV. 60 (Spring 1995); *see also*, Richard Freeman, *Wal-Mart Collapses U.S. Cities and Towns*, EXECUTIVE INTELLIGENCE REV., Nov. 21, 2003, *available at* http://www.larouchepub.com/other/2003/3045walmart_iowa.html.

160. BAY AREA ECONOMIC FORUM, *supra* note 2, at 58.

161. *See* Wikipedia, the Free Encyclopedia, http://en.wikipedia.org/wiki/Leakage (last visited Feb. 2, 2006).

162. *See, e.g.*, ECONOMIC ANALYSIS, *supra* note 43, at 22.

163. *Id.* at 21.

164. *Id.* at 31-32.

market absorption rates for retail space compared to the amount of vacant space already available, and identifies retail space most vulnerable to becoming blighted.[165]

The consultant should study the demand for retail space to see if the marketplace is already hopelessly riddled with vacancies or offers promising opportunities for mall owners and retailers to re-position themselves to compete effectively with Wal-Mart and fill niche markets that Wal-Mart is not set up to serve.[166] It is not easy to predict in advance which merchants will adapt and survive, or maybe even prosper, or which merchants will fail. The consultant should address both possibilities.

These studies are often incomplete because they tend to overlook some important secondary consequences of superstore entry. Experts can easily underestimate retail demand by disregarding the possibility that consumers will spend locally some of their sizable savings from shopping at superstores.[167] Similarly, estimates of job or wage losses need to take into account the possible secondary impacts of consumers spending locally their superstore savings and of job-base expansion as new retail clerks are hired to service these fortunate shoppers.

As over 22% of grocery employees are unionized and Wal-Mart and most other superstores are not,[168] consultants might assume that regional gross income will decline if jobs at a discount superstore replace jobs at supermarket chains.[169] A typical study might show that a new Wal-Mart employs 350 people at an average wage of $10 per hour, and later displaces 340 employees averaging $18 per hour. The net gain in

165. Philip G. King et al., Economic Analysis of a Proposed Wal-Mart Expansion in Hanford, Cal., Mar. 24, 2004 (on file with author).

166. Tim Pederson, *Attitude is Key: Stone Highlights Ways to Compete with Supercenters*, WILLISTON HERALD, Oct. 27, 2004, at A1 (reporting on Professor Kenneth E. Stone's address which reminded his audience of one hundred at a proposed Wal-Mart Supercenter that there are many success stories from towns that have supercenters). "It is possible to coexist, but you will have to change your mode of operation." *Id.*; *see also* Stone, *supra* note 159, at 60.

167. BAY AREA ECONOMIC FORUM, *supra* note 2, at 1. Dr. Boarnet estimates the potential savings at nearly $400 million to $1.1 billion per year, depending on the market share Wal-Mart achieves, estimated at 6% to 18%. *Id.*; *see also generally* FREEMAN, *supra* note 10 (detailing the secondary benefits of Wal-Mart).

168. *See* Gaffney, *supra* note 8; Bureau of Labor Statistics, *supra* note 8.

169. *See* THE IMPACT OF BIG BOX GROCERS, *supra* note 11, at 44.

employees is ten,[170] but the regional economic consequence is presumed to be negative because the lost wages far exceed the new incomes earned.

This scenario does not go far enough. It assumes that those 340 employees will remain permanently unemployed and that the 350 new hires were not working before the superstore took them on. Suppose, instead, that the new hires had been working, on average, for $5 per hour, and the displaced supermarket workers will find employment at $15 per hour. Under these assumptions, there will be a net wage gain in the region: $5 x 350 ($1750—the hourly wage gain) exceeds $3 x 340 ($1020—the hourly wage loss). Modify the numbers, and the balance shifts. Ignore these numbers, and it is impossible to know whether the entry of a superstore increases or decreases wages in the aggregate.

Finally, in calculating the land use implications of Wal-Mart entry, consumer spending per square foot varies considerably, though it seems to be 20% to 50% higher at Wal-Mart than at competing grocery chains.[171] The savings in retail space is significant, and never mentioned. It translates into less land to urbanize and pave over, less space to heat and cool, and fewer vehicle trips per dollar spent (though distances traveled per trip may be greater).

VIII. NEPA, BABY NEPAS, AND THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

In addition to zoning regulations, a superstore might also be subject to environmental tests and restrictions upon its introduction into a new area. For example, a company might be

---

170. Actually, the net gain might be greater. One researcher's study of Wal-Mart's impact on a single county concluded:

> I find that immediately after entry, retail employment in the county increases by approximately 100 jobs; this figure declines by half over the next 5 years as some small and medium size retail establishments close. Wholesale employment declines by approximately 20 jobs over five years. Restaurant employment increases slightly; there is no change in employment in manufacturing or in automobile dealerships and service stations. No effect can be detected on retail employment in neighboring counties, due to very large confidence bands.

Emek Basker, *Job Creation or Destruction? Labor Market Effects of Wal-Mart Expansion*, 87 REV. ECON. & STAT. 174, 175 (2005).

171. *See* BAY AREA ECONOMIC FORUM, *supra* note 2, at 19.

forced to assess its potential environmental impact from the front end and then be obligated to file reports on its continuing impact through the life of the store. This section discusses the effect that environmental regulations—both federal and state—might have on the process.

A. Should the Physical Impacts of Competition Be Subject to Environmental Assessment?

When a local government grants a land use approval for a superstore, environmental laws may require a market impact assessment. In the late 1960s, the United States Congress responded to widespread concern that federal agencies were disregarding the impact of their decisions on the natural environment by formulating the National Environmental Policy Act of 1969 ("NEPA").[172] NEPA requires that before making a decision involving "major Federal actions" significantly threatening the quality of the human environment, decision-makers must assess potential environmental impacts.[173] If an environmental assessment reveals them to be significant, the responsible agency is charged with the preparation of an environmental impact statement detailing those impacts.[174] Included in the analysis are a list of alternative locations along with substitute projects that might be more benign than the one under review.[175] Though NEPA applies only to federal agency actions, a private developer can trigger NEPA review by applying for a federal permit or license, such as a permit to dredge or fill a wetland under the Clean Water Act or a permit from the Department of Interior to "take" an endangered species.[176]

---

172. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4347 (2000)).

173. *See* 42 U.S.C. § 4332(2)(C).

174. 42 U.S.C. § 4332(2)(C)(i).

175. *See* 42 U.S.C. § 4332(C), (E). NEPA can be especially important to local governments trying to have a say in the location and design of federal facilities within their boundaries since the Supremacy Clause of the United States Constitution has been construed to exempt federal entities like the United States Postal Service from local land use. *See, e.g.*, Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973) (finding that federal projects not conforming to local land use controls are subject to close scrutiny under NEPA).

176. *See* 33 U.S.C. § 1344 (2000); 16 U.S.C. § 1539 (2000).

Eighteen jurisdictions have enacted laws modeled after NEPA, which require state and local decision-makers to consider the environmental impacts of government projects before approving them.[177] Reporting requirements under baby NEPAs come into play when developers receive permits, licenses, leases, or grants from the state.[178] Five jurisdictions include within the broad sweep of their environmental assessment procedures all local government land-use decisions, such as rezoning, subdivision map act approvals, or general plan amendments, even when those decisions are taken primarily to authorize purely private development projects.[179] In California and New York, for instance, no state agency or local government can make any discretionary land-use decision that may have a significant impact on the environment without first preparing and approving a report detailing harmful impacts and possible ways of mitigating them.[180]

While environmental laws, including NEPA, are not meant to require disclosure of the purely economic impacts of new development,[181] competition that produces physical impacts may need to be disclosed and analyzed. So, for instance, in *City of Rochester v. United States Postal Service*, the postal service was about to relocate a regional postal facility from downtown Rochester to the suburbs.[182] The environmental impact study ("EIS") recognized the need to address the potentially

177. John Landis et al., *Fixing CEQA: Options and Opportunities for Reforming the California Environmental Quality Act* (1995), http://www.ucop.edu/cprc/ceqa.html (last visited Feb. 2, 2006).

178. *See, e.g.*, CAL. PUB. RES. CODE § 21065(c) (West 1996).

179. Landis et al., *supra* note 177. These jurisdictions are California, Hawaii, Minnesota, New York, Puerto Rico, and Washington. *Id.*; *see also* Lynn Considine Cobb, Annotation, *Validity, Construction, and Application of Statutes Requiring Assessment of Environmental Information Prior to Grants of Entitlements for Private Land Use*, 76 A.L.R.3D 388 (1977 & Supp. 2005) (citing cases from California, Florida, Maine, New York, and Washington).

180. The California Environmental Quality Act ("CEQA"), CAL. PUB. RES. CODE §§ 21000-21176 (West 1996 & Supp. 2006); The New York State Environmental Quality Review Act ("SEQRA"), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005 & Supp. 2006).

181. *See, e.g.*, Breckinridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976); Metlakatla Indian Cmty. v. Adams, 427 F. Supp. 871, 875 (D.D.C. 1977).

182. 541 F.2d 967 (2d Cir. 1976); *see generally* Michael Fix, *Addressing the Issue of the Economic Impact of Regional Malls in Legal Proceedings*, 20 URB. L. ANN. 101 (1980).

significant environmental impacts of this "major federal action" on the transfer of 1400 employees from downtown:

> (1) increasing commuter traffic by car between the in-city residents of the employees and their new job site (only one bus route currently serves the HMF site; whether many current employees will find the HMF a more convenient work location is unknown); (2)(a) loss of job opportunities for inner-city residents who cannot afford or otherwise manage, to commute by car or bus to the HMF site, or (b) their moving to the suburbs, either possibly leading "ultimately (to) both economic and physical deterioration in the (downtown Rochester) community," and (3) partial or complete abandonment of the downtown MPO which could, one may suppose, contribute to an atmosphere of urban decay and blight, making environmental repair of the surrounding area difficult if not infeasible.[183]

In the same year, the Sixth Circuit firmly rejected the extension of NEPA to the employment-related secondary consequences of a major federal action—the closure of a military base in Lexington, Kentucky.[184] Plaintiffs contended that the consequences of unemployment and lost revenues following the base closure came within the NEPA phrase "human environment." Based on its reading of the legislative history, the Sixth Circuit disagreed.

CEQA provides the primary basis for legal theories used to derail local government decisions in California that ban or allow superstores.[185] The environmental assessment is supposed to inform decision-makers of all the ecological consequences of their land use approvals, identify ways to avoid or reduce environmental damage from approved projects, prevent damage by rejecting proposals in favor of a "no project" or less intrusive alternative, or modify proposals to include specific mitigation measures, if feasible.[186] Projects can be approved with negative environmental impacts but only after decision-makers explain

183. *City of Rochester*, 541 F.2d at 972-73 (citations omitted).

184. *Breckinridge*, 537 F.2d at 865-66.

185. *See generally* Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203 (Cal. Ct. App. 2004).

186. *See generally* CEQA, CAL. PUB. RES. CODE §§ 21000-21176.

why mitigation was not deemed feasible, and yet the project was approved anyway.[187]

The California Court of Appeals held that secondary impacts of competition fall within the scope of an environmental assessment under CEQA in *Bakersfield Citizens for Local Control v. City of Bakersfield*.[188] After the City of Bakersfield had voted to rezone land for the construction of two new shopping centers, each anchored by Wal-Mart Supercenters, a coalition of residents, grocers, unions, and other local merchants claimed that Bakersfield's EIR had failed to evaluate the possibility that the rezoning could "indirectly cause urban/suburban decay by precipitating a downward spiral of store closures and long-term vacancies in existing shopping centers."[189] Past California court decisions had required cities to study whether the new shopping centers they were about to approve "could conceivably result in business closures and physical deterioration of the downtown area."[190] As the *Bakersfield* court explained,

> proposed new shopping centers do not trigger a conclusive presumption of urban decay. However, when there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact. Many factors are relevant, including the size of the project, the type of retailers and their market areas and the proximity of other retail shopping opportunities. The lead agency cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or

187. *See* CAL. PUB. RES. CODE § 21002.1(c).

188. 22 Cal. Rptr. 3d at 219, 226.

189. *Id.* at 210-11. Interestingly, the court was aware of the controversy surrounding Wal-Mart's labor practices, and disclaimed their significance as a factor in the court's opinion: "We offer no comment on Wal-Mart's alleged miserly compensation and benefit package because [the plaintiff] did not link the asserted low wages and absence of affordable health insurance coverage to direct or indirect adverse environmental consequences." *Id.* at 212.

190. Citizens for Quality Growth v. City of Mt. Shasta, 243 Cal. Rptr. 727, 734 (Cal. Ct. App. 1988); *see also* Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893, 905 (Cal. Ct. App. 1985).

deterioration as a "social or economic effect" of the project.[191]

In the *Bakersfield* case, the plaintiffs had replied to the draft EIR by providing the opinion of an expert, an economics professor from San Francisco State University.[192] Professor Dan Vencill, who had studied the area within a five-mile radius of the proposed new shopping centers, found evidence of decaying commercial space that had long been vacant. He also identified twenty-nine businesses that could be at risk of closure, given the size of the market area and its imminent retail over-saturation.

Instead of preparing a counter-study, the City of Bakersfield had made the mistake of dismissing the economic professor's analysis out of hand, wrongly assuming that economic competition fell outside the scope of environmental review.[193] Once presented with evidence of the possibility, it was the city's obligation under CEQA to "indicat[e] reasons why it had been determined that urban decay was not a significant effect of the proposed projects."[194] The court remanded the case so that the trial judge could oversee the preparation of a new EIR.

B. Superstore Bans Under CEQA

The provisions of the California Public Resources Code dictate the steps in the CEQA review process. Suppose a superstore ban has been proposed. Step One in the process is for the planning staff of the city (the "lead agency," in CEQA parlance) to determine whether the ordinance is a "project" requiring an environmental assessment.[195] "Project" is defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."[196] CEQA specifically includes zoning ordinances within its purview.[197]

191. 22 Cal. Rptr. 3d at 221.
192. *Id.* at 222.
193. *Id.* at 224-26.
194. *Id.* at 222.
195. *See* CAL. PUB. RES. CODE §§ 21065, 21067.
196. CAL. PUB. RES. CODE § 21065.
197. CAL. PUB. RES. CODE § 21080(a).

Recall the City of Turlock superstore ban mentioned earlier. Turlock performed no environmental review at all, claiming that the superstore ban was not a project under CEQA, and even if it was, it would spawn no adverse physical impacts.[198] Turlock's reluctance to prepare an EIR under CEQA is understandable. With the appropriate background studies, an EIR in support of an ordinance like this would cost approximately $100,000 in consulting fees and, perhaps, another $100,000 in legal fees.[199] The enactment of the ordinance would also be delayed for about six months while the report was being prepared, circulated for comment, and revised. Normally, private developers fund the preparation of EIRs, but here the city would have had to pay the bill unless a willing donor appeared.[200]

Turlock's first line of defense, that its action was not a "project" under CEQA, was based on a fundamental misreading of the statute. Turlock claimed the ban was not a project because it would have no *adverse* impact on the environment.[201] As CEQA is worded, the physical change in the environment must be adverse in order for there to be a significant environmental effect.[202] "Without a threshold evaluation, however, the City leaves its constituents in ignorance of the avoidable dangers CEQA intended to avert."[203]

> Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division.

CAL. PUB. RES. CODE § 21080(a).

198. Agenda Report from Michael I. Cooke, AICP, Planning Manager, City Council of Turlock, California 10-11 (Dec. 9, 2003), *available at* http://www.ci.turlock.ca.us/pdf link.asp?pdf=documents/communityplanning/walmart/StaffReport.pdf [hereinafter Agenda Report].

199. Interview with Linda Bozung, CEQA lawyer, Partner, Piper Rudnick, in Los Angeles, Cal. (Apr. 8, 2005).

200. *Id.*

201. Agenda Report, *supra* note 198, at 10-11.

202. *See* CAL. PUB. RES. CODE § 21068 (defining "significant effect on the environment" to mean "a substantial, or potentially substantial, adverse change in the environment").

203. Terminal Plaza Corp. v. City & County of S.F., 223 Cal. Rptr. 379, 386 (Cal. Ct. App. 1986).

For the city of Turlock to have claimed that the ban would effect no physical change flatly contradicts its contention that the enactment was not motivated to regulate economic competition. Turlock's justification for the ban was the prevention of the additional traffic congestion that would accompany the frequent trips its residents would make to a Wal-Mart superstore located on the outskirts of town—trips that would be made on streets not designed for such increased activity.[204] Indisputably, this is a physical impact sufficient for the ban to be classified as a "project" under CEQA, compelling the lead agency to proceed to Step Two.[205] Alternatively, the City contended that the ban only maintained the status quo.[206] But if that were true, there would have been no need for the ban and the accompanying amendment to the specific plan for that area.

Step Two of CEQA requires the lead agency to conduct an "initial study" to scope out possible environmental impacts.[207] In Step Three, the agency determines whether to prepare an EIR, a "negative declaration," or a "mitigated negative declaration."[208] "If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared."[209] If no possible adverse effects surface in the initial study, the lead agency issues a declaration of no possible significant effects called a "negative declaration."[210]

The statute offers another option called a "mitigated negative declaration," which can be issued if an

204. Agenda Report, *supra* note 198, at 8.

205. The trial court misread the statute and accepted Turlock's analysis that its actions were not a "project," "because the ordinance did not commit the city to approve any development and did not expand the types of development which could be permitted on any site. The ordinance only prohibits discount superstores which the city reasonably concluded would result in significant traffic and blight." Wal-Mart Stores, Inc. v. City of Turlock, No. 345253, 6 (Stanislaus County Sup. Ct. Dec. 7, 2004). The decision is being appealed.

206. *See generally* Agenda Report, *supra* note 198.

207. *See* CAL. PUB. RES. CODE § 21080(c)(2).

208. *See* CAL. PUB. RES. CODE §§ 21064, 21065, 21080.

209. CAL. PUB. RES. CODE § 21080(d).

210. CAL. PUB. RES. CODE § 21080(c).

> initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.[211]

Because Turlock took the position that the ban was not a "project,"[212] it never reached Step Two. If Turlock had concluded that the ban could have no adverse impacts, it should have issued a "negative declaration."

Negative declarations are more difficult for lead agencies to sustain than EIRs. California courts have long interpreted CEQA as disfavoring of negative declarations, pointing to the statutory language that the lead agency *shall* prepare EIRs for any project that *may* have a significant environmental effect.[213] Courts have construed this language to alter the usual presumption of validity that accompanies legislative acts. Normally, courts uphold a local government's decision if it is supported by substantial evidence.[214] Thus, if each side to a dispute introduces substantial evidence to buffer its claims, courts will not second-guess the legislative choice. But in CEQA-based challenges to decisions not preceded by a comprehensive EIR covering all potentially significant adverse impacts,[215] courts tilt the substantial evidence test decidedly in favor of the challenger. "California courts . . . routinely describe the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review."[216] Once opponents of a government decision can make a fair argument

---

211. CAL. PUB. RES. CODE § 21080(c)(2).

212. Agenda Report, *supra* note 198, at 10.

213. *See, e.g.*, Pala Band of Mission Indians v. County of San Diego, 80 Cal. Rptr. 2d 294, 301-02 (Cal. Ct. App. 1998); *see also* CAL. PUB. RES. CODE § 21080(d).

214. *See supra* notes 152-54 and accompanying text.

215. CAL. PUB. RES. CODE § 21068.

216. County Sanitation Dist. No. 2 of L.A. County v. County of Kern, 27 Cal. Rptr. 3d 28, 51-52 (Cal. Ct. App. 2005).

supported by substantial evidence that the project will have a substantial adverse effect on the environment, an EIR is required, and, if incomplete, it must be remanded for revision.[217]

In the Turlock contest, Wal-Mart easily jumped the "fair argument" hurdle as it introduced a traffic engineering study that customers one-stop shopping at a superstore would reduce the total number of vehicle trips in the city, alleviating congestion and air pollution.[218] Turlock planners took the position that a superstore ban could have no adverse impacts since it prohibited development instead of allowing or facilitating it.[219] Other jurisdictions have made the same analytical error of disregarding the secondary environmental impacts of their "no growth" moves. An airport land-use authority restricting residential development around the Travis Air Force Base was ordered to prepare an environmental assessment exploring where houses would be built that were excluded from the airport overflight zone.[220] A county that banned sanitation agencies from spreading sewage sludge (the residue of domestic sewage after treatment in a plant) over agricultural lands was ordered to prepare an EIR exploring where that sludge would end up, if not on agricultural land in Kern County.[221] Similarly, Turlock planners would need an EIR to consider the traffic and air quality implications of where supercenters might be built to serve Turlock residents, if not in Turlock.

---

217. *See, e.g.*, Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 864 P.2d 502 (Cal. 1993).

218. *See generally* Letter from Gary E. Kruger, *supra* note 52.

219. Agenda Report, *supra* note 198, at 10.

220. Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n, 23 Cal. Rptr. 3d 60 (Cal. Ct. App. 2005), *review granted*, 27 Cal. Rptr. 3d 360 (Cal. 2005).

> That future development projects outside the TALUP area will be subject to CEQA review is not a satisfactory rationale for delaying an EIR. Future review will ensure consideration and mitigation of environmental effects for each of those projects; it is not a substitute for consideration and notice to the public of the overall effect of restricting development in the TALUP area. To permit adoption of the TALUP with no consideration or notice of environmental effects of the plan as a whole would result in a "piecemeal review in which 'environmental considerations . . . become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.'"

Id. at 72-73 (quoting City of Antioch v. City Council, 232 Cal. Rptr. 507 (Cal. Ct. App. 1986) (citations omitted)).

221. *County Sanitation Dist. No. 2*, 27 Cal. Rptr. 3d at 50.

Ironically, if Turlock could have justified the ban as a regulation of economic competition, it might have had a basis for not classifying the ban as a "project." CEQA specifically excludes "evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment."[222] It only applies to the regulation of economic competition when that regulation produces physical impacts.[223] But had Turlock taken this position, it would have completely undermined the planning and traffic mitigation justifications for its superstore ban.

IX. SUMMARY

Unions representing grocery workers are struggling to assist unionized supermarkets in their impending competition with Wal-Mart Supercenters by persuading local governments to enact ordinances affecting wages and benefits of grocery workers or regulating the location of superstores. On the wage front, the Ninth Circuit opinion in *Chamber of Commerce of the United States v. Bragdon* is precedent for the proposition that the NLRA preempts prevailing wage laws made applicable to the private sector except in the context of government contracting.[224] Living wage ordinances, though permissible under the NLRA, do not go far enough in equalizing the disparate wages and benefits of unionized and non-unionized grocery workers. Proponents of minimum health care benefits for grocery workers hope that courts will ultimately decide that, for NLRA preemption purposes, ordinances calling for minimum health care benefits are deemed more akin to living than prevailing wage enactments.[225]

Land-use controls adopted solely as potential deterrents to superstore expansion are vulnerable to legal challenge as zoning is not intended as a means of regulating economic competition. Enacting jurisdictions that fail to articulate a believable "rational basis" for their superstore enactments may fail to overcome the suspicion that they are abusing their zoning authority. Although legislative motive is supposed to be irrelevant in judicial review

222. CAL. PUB. RES. CODE § 21080(e)(2).
223. *See supra* notes 188-91 and accompanying text.
224. *See* 64 F.3d 497 (1995).
225. *See* supra notes 71-95 and accompanying text.

of legislative acts, legislative purpose can be taken into account. Mandamus contests are decided on the basis of the administrative or legislative record.[226] Thus, a record replete with vituperative attacks on Wal-Mart's or some other superstore operator's labor policies could undermine the putative planning rationales asserted. The perfunctory testimony that might count as "substantial evidence" in the ordinary zoning matter, such as studies wheeled in from other times and places, may not suffice here. Cities will be better positioned to defend their superstore bans if they had commissioned careful studies conducted specifically to fit the local facts to the proffered rationales. Such studies do not come cheap.

In California, local governments enacting a superstore ban will almost certainly be required to invest in costly EIRs. They will not be able to avoid CEQA compliance by contending a superstore ban has no reasonably foreseeable physical consequences while simultaneously claiming its enactment has nothing to do with regulating competition and everything to do with minimizing traffic congestion, conserving open space, protecting downtown commercial centers, or preventing urban decay in neighborhood centers. These are the very sorts of impacts EIRs are meant to disclose, analyze, and mitigate.

226. *See, e.g.*, Western States Petroleum Ass'n v. Superior Court of L.A. County, 888 P.2d 1268, 1273-74 (Cal. 1995).