

**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**

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**University of Southern California Law School  
Los Angeles, CA 90089-0071**

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

*by George Lefcoe<sup>1</sup>*

*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, 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 smattering of law suits 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 can expect to be raised against them. At the top of the legal checklist are equal protection, pre-emption by the National Labor Relations Act, and prohibitions against the use of zoning to regulate economic competition. Anticipating these objections, the UFCW and its allies can make a public record sufficient to insulate virtually any anti-superstore ordinance from being invalidated in court. But this cannot be accomplished easily or inexpensively, because enacting jurisdictions wanting to avoid remand will need to commission studies to fit the claimed rationales for these laws. Market impact assessments sensitive to the local trade area will almost always be required, and in a handful of states, including New York and California, so will environmental impact reports. If the UFCW and their grocery chain allies find the zoning effort too costly and cumbersome, they may wish to consider extending 'living wage' controls to grocery workers, a move more likely to be resisted in the political arena than blocked by courts.*

## **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."<sup>2</sup> Wal-Mart is now the clear frontrunner at merging discount retail with grocery sales. Competing fiercely for market share with grocery stores, after less than a decade Wal-Mart has become the nation's biggest grocer by sales

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<sup>1</sup> Florine and Ervin Yoder Professor of Real Estate Law, Gould School of Law, University of Southern California.

<sup>2</sup> Andy Serwer, Kate Bonamici and Corey Hajim, *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?* April 18, 2005 (On file with author) .

volume.<sup>3</sup> Approximately every 1.65 days, a Wal-Mart Supercenter opens in America.<sup>4</sup>

Consumers love Wal-Mart for its low prices,<sup>5</sup> undercutting the competition by 8-20%.<sup>6</sup> It wields its mass purchasing power to squeeze cut-rate prices directly from manufacturers, bypasses distributors in favor of its own regional distribution warehouses, economizes on the 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 1,500 stores.<sup>7</sup> Another feature of Wal-Mart's business model, an idea of Sam Walton's, is the Saturday morning meeting convened at sites throughout the Wal-Mart empire where key management from Bentonville and staff from each store convey the best practices rapidly from one store to others.<sup>8</sup>

On the labor front, Wal-Mart's implacable stance is well known.<sup>9</sup> Management keeps a watchful eye for signs of union organizing activity, and sends out skilled union-busters to quell those efforts. Despite national media watching over its shoulder, it went so far as to shutter a store in Canada that voted to go union.<sup>10</sup>

Wal-Mart's expansion into the grocery business helps low-income people with low prices, but is attacked as generating poverty with low wages and benefits for its own employees. Wal-Mart's average wage of \$9.68 is too low to support a family, Wal-Mart critics complain.<sup>11</sup>

Wal-Mart counters by noting that "3,000 people often apply for the 300 jobs" every time a

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<sup>3</sup> Patricia Callahan and Ann Zimmerman, *Wal-Mart Tops Grocery List With Its Supercenter Format*, *Wall Street Journal*, May 27, 2003. See also, *Progressive Grocer*, America's 50 Largest Supermarket Chains (Weir 2003), quoted in Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry* (Bay Economic Forum, January, 2004) p.18. [www.bayeconomfor.org](http://www.bayeconomfor.org).

<sup>4</sup> Karrie Jacobs, *Massive Markets*, METROPOLIS, June 2004, p. 106.

<sup>5</sup> "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." Elizabeth Mehren, *Small Town Warily Sizes Up a Big Box*, LOS ANGELES TIMES, April 18, 2005, p. A 11, col. 1.

<sup>6</sup> For a list of comparative price studies, see Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry* (Bay Economic Forum, January, 2004) p.30. [www.bayeconomfor.org](http://www.bayeconomfor.org)

<sup>7</sup> Other sources of savings include labor productivity, and within store scale economies. Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry* (Bay Economic Forum, January, 2004) p.33. <http://www.bayeconomfor.org>

<sup>8</sup> 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 500, April 18, 2005.

<sup>9</sup> Andy Serwer, Kate Bonamici and Corey Hajim, *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?*, April 18, 2005. (On file with author).

<sup>10</sup> Ian Austen, *Wal-Mart To Close Store In Canada With a Union*, NEW YORK TIMES, February 10, 2005, p.C -3.

<sup>11</sup> Steven Greenhouse, *Wal-Mart's Chief Calls Its Critics Unrealistic*, N.Y. TIMES, April 6, 2005.

new store opens. 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.”<sup>12</sup> “Mr. Scott said the company 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.”<sup>13</sup>

The leading union representing grocery workers, the United Food and Commercial Workers (UFCW), perceives Wal-Mart as a threat to the jobs and compensation levels of U.S. grocery workers—about sixty percent of whom belong to a union. Wages and benefits at Wal-Mart average about 40% less than those of union grocery workers, and place heavy downward pressure on their wages and benefits because, to survive, grocery chains are endeavoring to close the gap.<sup>14</sup> The union has given up trying to organize Wal-Mart store-by-store, and instead has embarked on a national campaign to change Wal-Mart’s labor practices, partly by stalling Wal-Mart’s superstore expansion program on the municipal zoning front.

Hoping to keep Wal-Mart from securing any zoning approvals for supercenter expansions, in cities across the country, the UFCW<sup>15</sup> and leading supermarket chains are teaming up with other Wal-Mart foes—environmental advocates, local merchants fearful of competition, residents wary of traffic and eyesores, historic preservation enthusiasts trying to save traditional downtowns from devastating competition locating outside town,<sup>16</sup> and other dedicated ‘sprawl busters’.<sup>17</sup> Union leaders expect their allies among local elected officials to climb aboard the anti-superstore campaign

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<sup>12</sup> Steven Greenhouse, *Wal-Mart’s Chief Calls Its Critics Unrealistic*, N.Y. TIMES, April 6, 2005.

<sup>13</sup> Steven Greenhouse, *Wal-Mart’s Chief Calls Its Critics Unrealistic*, N.Y. TIMES, April 6, 2005

<sup>14</sup> Marlon Boarnet and Randall Crane, *The Impact of Big Box Grocers on Southern California: Jobs, Wages and Municipal Finance* (September 1999), p. 44. (On file with author). Wal-Mart wages and benefits are not published so these numbers are based on estimates from conversations with Wal-Mart employees and store managers. 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, p. 45-47.

<sup>15</sup> See the UFCW website: [http://www.ufcw.org/issues\\_and\\_actions/walmart\\_workers\\_campaign\\_info/index.cfm](http://www.ufcw.org/issues_and_actions/walmart_workers_campaign_info/index.cfm), “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.” (Last visited 04/19/05).

<sup>16</sup> Adjunct professor of environmental studies Donella H. Meadows, at Dartmouth College, refers to the National Trust for Historic Preservation in Washington DC, as “sprawl central” for becoming “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.’”  
[http://www.sustainer.org/dhm\\_archive/search.php?display\\_article=vn553superstoreed](http://www.sustainer.org/dhm_archive/search.php?display_article=vn553superstoreed) (last visited 04/23/05).

<sup>17</sup> “Sprawl Busters” is the name of an organization dedicated to fighting big box retail. <http://www.sprawl-busters.com/>

train as the price for continued political support.

Achieving the UFCW's goal of impeding superstore expansion is not easy. Complete victory is out of the question, as more than 70% of superstore locations will be wedged into facilities already there for which no new entitlements are required.<sup>18</sup> When it needs land use approvals, Wal-Mart often obtains them without a fuss from local officials eager to accommodate big box retailers and the jobs, economic stimulus, property taxes and sales taxes they bring. Even where city councils are not receptive to Wal-Mart and vote to block superstore entry, Wal-Mart has frequently organized successful popular referenda to reverse those unfavorable decisions<sup>19</sup> and contributes heavily in key local elections, supporting its friends and punishing its foes. The threat alone deters some local elected officials from antagonizing Wal-Mart. Besides, elected officials know that consumers vote, and could be inclined to mark their ballots in favor of candidates willing to bring Wal-Mart's bargain grocery prices closer to home. Further opposition to the UFCW campaign comes from quarters intensely sympathetic to the plight of America's lowest wage earners, mindful of Christopher Jenck's observation: "Anything that raises the cost of hiring unskilled workers will further reduce demand for their services."<sup>20</sup> Local officials friendly to the UFCW may themselves have second thoughts after a Wal-Mart supercenter they turned down is 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 loyalty but traffic congestion and retailers worried about their survival.

In communities governed by elected officials with ties to the UFCW, solidarity is expressed by denying zoning applications submitted by Wal-Mart for superstores, and the enactment of 'preventive' anti-superstore ordinances. Thus far, these ordinances have come in three formats. The most common, and straightforward, are outright bans on superstores that carry groceries. Another approach has been to deny superstores any "as of right" zoning, even in commercial zones, by requiring a conditional use permit (CUP). Though government's discretion to deny a CUP is bounded, site specific review can, in applicants being burdened with exacting and costly conditions of approval.

The most intricate of the anti-superstore ordinances has been the one put in place by the city of Los Angeles. 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 material adverse impacts likely to be felt within no less than a three mile radius. Proponents of the ordinance hoped that superstores deemed likely to force unionized grocers or local merchants out of business could be obliged to mitigate the anticipated harms or be denied

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<sup>18</sup> Daniel Barry, *Wal-Mart Stores: Supercenters to Drive Double-Digit Growth*, Merrill Lynch In-Depth Reports, June 2003.

<sup>19</sup> Voters have overturned superstore bans in Clark County, Nevada, Contra Costa County, California, Belfast, Maine, and Bennington, Vermont. In Arizona, voters 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. [http://www.newrules.org/retail/news\\_archive.php?browseby=slug&slugid=60](http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=60) (last visited 04/23/05). Inglewood, California, and Hudson, Ohio, voters turned down Wal-Mart. <http://beta.news.yahoo.com/s/usatoday/walmartfoesgoonetoofar> (last visited 04/24/05).

<sup>20</sup> Christopher Jencks, *RETHINKING SOCIAL POLICY: RACE POVERTY AND THE UNDERCLASS* (Harvard University Press, 1992) p 230.

their CUPs. The mitigation measure most favored by organized labor is a requirement that Wal-Mart pay its workers wages comparable to union scale or a living wage.

This article describes each of these three formats, the legal obstacles they could encounter and how these might be overcome.

## II. The Three Types of Anti-Superstore Ordinances

(1) *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, small percentage of the space is dedicated to the sale of goods exempt from state sales tax. Most food items 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.<sup>21</sup>

To circumvent the ban, Wal-Mart could build two adjacent stores, as it did in Calvert County, Maryland, each sized to fall below the ban threshold.<sup>22</sup> 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”.<sup>23</sup> Wal-Mart could sidestep supercenter bans by expanding its neighborhood market concept, a relatively new format, calling for stores of 42,000 to 55,000 square feet selling groceries and drugstore items. Employees are paid the same wages and benefits, and these stores are supplied through the same distribution centers as other Wal-Mart outlets.

Typically, superstore bans are worded to exclude membership clubs—Costco and Wal-Mart’s Sams’ Club.<sup>24</sup> The UFCW has no beef with Costco.<sup>25</sup> Costco pays much higher wages than Wal-Mart<sup>26</sup> and about one-third of Costco employees are unionized from the days when it merged with

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<sup>21</sup> *Economic Analysis of the Proposed Fremont Wal-Mart*, STRATEGIC ECONOMICS, December 19, 2002, p. iii (prepared for The United Food and Commercial Workers Union, Local 870).

<sup>22</sup> *When One is Too Much, Build Two*, (Associated Press), L. A. TIMES, March 14, 2005, p. C3.

<sup>23</sup> Oakland Ordinance ch. 17.09.040.

<sup>24</sup> See Oakland Ordinance ch. 17.10.345, excluding “wholesale clubs or other establishments selling primarily bulk merchandise and charging membership dues or otherwise restricting merchandise sales to customers paying a period access fee.”

<sup>25</sup> “Costco pays the top wage in retail. Sol Price actually invited unions in to represent Fed-Mart and Price Club workers.” John Helyar, *The Only Company Wal-Mart fears; Nobody runs warehouse clubs better than Costco, where shoppers can’t resist luxury products at bargain prices*, *Fortune*, November 24, 2003. Costco’s execs support Democrats; Wal-Mart’s, Republicans. Costco is strongest in Democratic-leaning states; Wal-Mart, in Republican ones. Costco offers comprehensive health insurance to most of its U.S. employees. Wal-Mart’s health benefit plans are so expensive fewer than 40% of its employees elect coverage. Michael Forsythe and Rachel Kaz, *Costco, Wal-Mart duel in political arena*, SEATTLE POST-INTELLIGENCER, July 21, 2004.

<sup>26</sup> Stanley Holmes and Wendy Zellner, *The Costco Way: Higher wages mean higher profits. But try telling Wall Street*, *Business Week*, April 12, 2004 (Wal-Mart’s Sam’s Club pays wages at a rate three-quarters of Costco).

the Price Club.<sup>27</sup> Local governments can find a rational basis to justify the exclusion because of Costco's lower traffic counts. It sells food in bulk with a smaller array of product choices than Costco (4,000 different items to Wal-Mart's 150,000) so that its shoppers aren't drawn there two or three times a week like the typical supermarket customer. Not competing head-on with local grocers, Costco doesn't risk their ire. Mom and pop grocers are among Costco's best customers, often dependent on stocking their small stores from Costco's shelves.

The UFCW harbors no deep animus towards the other national 'big box' retailers, but hasn't been able to figure out how to exempt a SuperTarget or Super K-Mart from a supercenter ban without raising an insurmountable equal protection issue. Both Target and K-Mart sell groceries in their supercenters; Target is the nation's 27th largest grocer by sales and K-Mart is 22nd; Target plans to add supercenters while Kmart is contracting.<sup>28</sup> Union neutrality towards Target may not continue indefinitely as Target's wages and benefits are no better than Wal-Mart's, maybe a bit lower.<sup>29</sup>

(2) *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. CUPs are a familiar feature of most modern zoning codes empowering designed administrators or planning boards to grant, deny or approved 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, signalled in the ordinance.<sup>30</sup> Typical conditions include larger setbacks so as to increase the distance separating the project from its neighbors, landscape or other screening material to shield the project from the neighbors' views, limits on hours of operation, special security arrangements, valet parking, and design control. Through this process, communities resistant to the uniformly plain appearance of the typical big box retailer hope to coax something more appealing from them.<sup>31</sup> These conditions don't reach the core issue of union concern—wage rates and employee benefit packages—and trap all big box retailers in their net, not just the Wal-Mart superstores that the UFCW is aiming at.

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<sup>27</sup> Interview with Joel Benoiel, Senior Vice-President and Chief Legal Officer, Costco Wholesale, 04-21-05.

<sup>28</sup> Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry* (Bay Economic Forum, January, 2004) p.20. [www.bayeconomfor.org](http://www.bayeconomfor.org) (last visited 04/21/05).

<sup>29</sup> Email from John Matthews, Senior Vice President for Human Resources, Costco Wholesale, 04/27/05.

<sup>30</sup> *Friends of Davis v. City of Davis*, 83 Cal. App.4th 1004, 100 Cal. Rptr. 2d 413 (2000) (Neighbors trying to protect a local bookseller against competition from a proposed Borders had no right to subvert design review process to their purpose. Retail tenant's identity had no bearing on whether the building itself satisfied local design criteria.)

<sup>31</sup> "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, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, 53 DUKE L.J. 1527 (2004), quoting Tom Daykin, *Communities Force Big Box Retailers to Rethink Designs*, MILWAUKEE JOURNAL SENTINEL, June 15, 2001, at D1. Ms. McConnell 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.

(3) *The Los Angeles Superstore Ordinance*.<sup>32</sup> Unions failed several times to garner enough support among Los Angeles' elected officials to enact an outright superstore ban.<sup>33</sup> They succeeded in convincing the city council to subject big box retailers to a CUP review process. The UFCW wasn't satisfied with this. They and their allies came up with another idea, a site-by-site review for superstore applicants seeking approval for greater than 100,000 square feet with more than 10% of its floor space dedicated to non-taxable items. Besides the usual CUP findings for approval, superstores would need to demonstrate "after consideration of all economic benefits and costs, that the Superstore would not materially adversely affect the economic welfare of the Impact Area, based upon information contained in an economic impact analysis."<sup>34</sup> That analysis would identify potential impacts on competitors and jobs within at least a three mile radius of the proposed supercenter. To curb adverse impacts, the applicant might be required to accept mitigating conditions. Ordinance proponents anticipated the imposition of a prevailing or living wage as a preferred standard mitigation to bar lower-than-union wages.<sup>35</sup>

### **III. Living or Prevailing Wages for All Grocery Workers?**

The UFCW could have sought directly to assist union grocers in their competition with Wal-Mart by convincing 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. A prevailing wage identifies the level of compensation paid to workers in a particular industry, usually based on the union pay scale. Typically, these laws apply only to the construction of public works.<sup>36</sup> 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. The Federal Poverty Guidelines are sometimes chosen by local governments as their 'living wage' standard. Some analysts believe this sum is insufficient. A non-profit think tank, the Economic Policy Institute, after studying family budgets across the country, has concluded that a wage nearly twice as high as the poverty line would be required in many parts of the country to support a two-adult,

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<sup>32</sup> The California legislature enacted S.B. 1056 which would have required economic impact reports of superstores statewide. The legislation was opposed by the League of California Cities as an infringement of "local control in these sensitive land use issues" and vetoed by Governor Schwarzenegger. League of California Cities Statement on Governor's Veto of SB 1056, *Business Wire*, September 18, 2004.

<sup>33</sup> See Letter from Philip R. Recht, counsel for Wal-Mart, to Los Angeles City Planning Commission, June 22, 2004.

<sup>34</sup> Los Angeles City Ordinance No. 176166, October 4, 2004, Section 2.

<sup>35</sup> 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, p. 5, 47-48.

<sup>36</sup> In California, prevailing wages are defined as the per diem wages for public works set by the California Department of Industrial Relations in accordance with California Labor Code §§ 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.



two-child household adequately.<sup>37</sup> Predictably, there are substantial variations in the rates actually chosen by cities enacting these laws.<sup>38</sup>

Living wage proponents face two legal impediments to the extension of these laws to all workers or just to grocery workers, though neither is insurmountable. First, the National Labor Relations Act has been held to pre-empt the extension of prevailing wage rates to purely private contracting parties or to any state-enacted regulatory measure that would dictate the crucial terms of collective bargaining agreements between employers and their workers. There is an exception for wage arrangements in government contracts. The NLRA pre-emption obstacle may be overcome by the ordinance exempting employees covered by collective bargaining agreements. Second, the extension must pass muster under the Equal Protection Clause. The Equal Protection Clause is satisfied by applying the law to all workers in the jurisdiction or, if the law is applicable only to a subset of workers, the specification of a rational basis for the designation of that subset. The standard of judicial review is minimal. “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.’ ‘The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.’ A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” (citations omitted)<sup>39</sup>

Considerations of practical politics make broad application of high minimum wages a strategy pursued nowhere.<sup>40</sup> In fact, of the fifty or so ‘living wage’ ordinances enacted so far by cities, most apply to a narrow subset of employers benefitting directly from government contracts. Coverage could be expanded to government “grantees, licensees, lessees and those receiving tax credits or special zoning relief, as a few cities do in their laws.”<sup>41</sup>

By convincing state or local legislators to extend the application of prevailing or living wage laws to all grocery workers, unions could achieve their ultimate goal directly: protecting the jobs of unionized supermarket employees from low wage competition. “Chicago is considering two bills that would require large retail stores to supply their workers with a living wage and a fixed level of

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<sup>37</sup> Economic Policy Institute, *HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES* (2001) (“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* (2002). The author worked at three entry level jobs, including a Wal-Mart in Minneapolis, and recounts her difficulty surviving. Housing was the greatest challenge in each of three cities she studied.

<sup>38</sup> William Quigley, *Full-Time Workers Should Not be Poor: The Living Wage Movement*, 70 *MISS. L.J.* 889,928 (2001).

<sup>39</sup> *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970).

<sup>40</sup> 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. At the November 5, 2002, election, the enactment was repealed by referendum, 48.3% yes, 51.7% no. <http://www.smartvoter.org/2002/11/05/ca/la/meas/JJ/> (Last visited, 04/26/05).

<sup>41</sup> William Quigley, *Full-Time Workers Should Not be Poor: The Living Wage Movement*, 70 *MISS. L.J.* 889, 941 (2001).

health care.”<sup>42</sup> Although they must identify some rational basis for whatever distinctions they draw in applying a living wage law, several precedents sustaining selective applications of living wage ordinances suggest that should not be much of a problem.<sup>43</sup>

*The Proprietor Exception to NLRA Pre-emption.* When Contra Costa County attempted to apply a prevailing wage law to purely private construction contracts without an exemption for employees covered by collective bargaining, the Ninth Circuit struck it down in *Chamber of Commerce of U.S. v. Bragdon*, because the law would have interfered directly with collective bargaining agreements in the construction industry.<sup>44</sup> While local governments would be trespassing on the NLRA if they attempted to impose prevailing wages upon others, it can condition the terms of wages and benefits in the contracts it enters directly. Local governments come within an NLRA “proprietor” exception when contracting for the construction of public works, purchasing goods or services for its own use or distribution, or leasing government property, and may require competing bidders to pay prevailing wages.<sup>45</sup> In these situations the local government isn’t deemed to be acting as a regulator but as a *de facto* employer, and in that capacity enjoys the same leeway as any other employer to negotiate wage rates.<sup>46</sup>

*Rui One Corp. v. City of Berkeley.*<sup>47</sup> 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 benefitting from city investment must provide decent jobs and pay employees a family-sustaining wage. These included restaurants located in the Berkeley Marina.”<sup>48</sup>

A restaurant in the Marina, leasing space from the City, filed suit to challenge the law. There was no basis for claiming the NLRA pre-empted the enactment because the city had exempted workers covered by collective bargaining agreements.

*Equal Protection.* One issue raised by the restaurant was whether the narrow application of

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<sup>42</sup> *Not in my aisle, buddy; Wal-Mart and the Big Apple*, THE ECONOMIST, April 2, 2005.

<sup>43</sup> *International Organization of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843 (9th Cir.1987). Cost of living differentials providing greater compensation for resident than non-residents workers on the Alaska Marine Highway were justified as a way of covering the higher living costs of residents in Alaska’s largest cities over Seattle, where most of the non-residents had come from.

<sup>44</sup> *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir.1995).

<sup>45</sup> *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders*, 507 U.S. 218 (1993).

<sup>46</sup> *Building and Const. Trades Council v. Associated Builders*, 507 U.S. 218 (1993).

<sup>47</sup> 371 F.3d 1137 (9th Cir.2004).

<sup>48</sup> Press release, October 11, 2002; *BRENNAN CENTER AND COALITION OF PUBLIC INTEREST GROUPS JOIN WITH CITY OF BERKELEY IN DEFENDING LIVING WAGE LAW*.  
[http://www.brennancenter.org/presscenter/releases\\_2002/pressrelease\\_2002\\_1012.html](http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_1012.html) (last visited 04/17/05).

law's benefits to Marina restaurants violated Equal Protection. The majority opinion found the requisite rational basis in the fact the Marina land had long been subject to the public trust doctrine, and benefitted from government-funded physical improvements, maintenance and promotional efforts. In addition, since 1987 a city moratorium on commercial development in the marina has protected the restaurant from competition.

*Impairment of Obligation of Contract.* Originally, Berkeley's living wage ordinance had only applied to firms entering contracts or leases with the city after the law became effective. But restaurant workers in the Marina protested. In response, the city amended it to apply to RUI, the restaurant lessee, increasing RUI's annual wage and benefit costs by \$126,000.<sup>49</sup> The restaurant lessee protested this unexpected increase in its costs of doing business, imposed unilaterally by its lessor, the city of Berkeley. By a vote of two to one, the Ninth Circuit decided in the city's favor.<sup>50</sup>

The opening lines of the opinion herald 'living wage' ordinances:

As the cost of living skyrockets around the country, and in the San Francisco Bay Area in particular, the face of American poverty is changing dramatically. More and more frequently, full-time, minimum-wage workers are unable to support their families' basic needs. See *Jim Newton, L.A.'s Growing Pay Gap Looms as Political Issue Poverty*, L.A. TIMES, Sept. 7, 1999, at A1 ("Today's poverty icon is a working mother, toiling eight hours or more a day at a job that does not pay enough to cover the rent, clothe the baby or provide a life of even minimal comfort."). Recognizing the plight of its own working poor, the City of Berkeley, California, has joined dozens of other cities nationwide to help bridge the gap between federal and state laws setting the minimum wage—the real value of which has decreased over the past few decades—and the costs of modern urban living by enacting "living wage" ordinances. These ordinances require certain employers to pay their employees wages approximating the real cost of living in the locality, which is often significantly higher than the applicable state or federal minimum wage.<sup>51</sup>

To the lessee plaintiff, the primary issue in the case was whether, in enacting this ordinance Berkeley had impaired its lease obligations to the Marina restaurant in violation of the contract clause of the U.S. constitution.<sup>52</sup> The Ninth Circuit thought not, characterizing the enactment as a legitimate exercise of the police power. The ordinance covered a topic neither mentioned in the lease, nor implicit in it but of great social urgency. Unquestionably, the contract between the parties had no provision regarding wages.

The opinion has consequences for other government lessees and private redevelopers.

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<sup>49</sup> Press Release, Washington Legal Foundation (12/03/04) <http://www.wlf.org/upload/120304RS.pdf> (last visited 04/17/05).

<sup>50</sup> *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir.2004).

<sup>51</sup> *Ibid.* As the opinion explains, the federal minimum wage law is not pre-emptive and expressly allows state and local governments to set their own minimum wage rates higher than the federal rate, as many have done.

<sup>52</sup> "No State shall ... pass any ... Law impairing the Obligation of Contracts." United States Const. art. I, § 10, cl. 1.

Attorneys caution clients doing business with local governments that “there can be strings attached, including some that you may not have envisioned when you entered the contract. Living wage ordinances are just one example of the type of requirements that some jurisdictions have imposed on employers with which they do business. Another example is the imposition of a requirement for employers holding certain municipal contracts to provide benefits for their employees’ domestic partners. No doubt we will see others as cities use their buying power to influence employment policies within their communities.”<sup>53</sup>

In sharp contrast to the majority, the dissenting opinion did not see the ‘living wage’ enactment as a general exercise of Berkeley’s regulatory police power but as a narrowly applied law clearly impairing the Marina restaurant’s lease. The generous arrangements meted out by the Berkeley Marina ordinance were said to apply to only 56 workers.<sup>54</sup>

Laws that work an “impairment of a State’s own contracts ... face more stringent examination under the Contract Clause than [do] laws regulating contractual relationships between private parties....” There is a good reason for this. Parties enter into contracts to “order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.” When the state is a party, there is an additional risk that it will employ its sovereign powers to alter the settled terms of the contract. Although the temptation to secure by legislation what a state has failed to achieve through negotiation is great, the Contract Clause commands that states resist this temptation.

The City of Berkeley succumbed to this temptation by employing its sovereign power to secure terms that it failed to negotiate in its proprietary capacity with RUI. Through the Marina Amendment, the City imposed obligations on a small number of businesses holding long-term contracts with the City (such as RUI) and, moreover, it made these obligations retroactive. The Marina Amendment is, accordingly, a rule of neither general nor prospective applicability. Berkeley violated the Contract Clause of the United States Constitution because it has “impair[ed], by legislation, the obligation of its own contracts.....”

This narrow reach distinguishes the Marina Amendment from a minimum wage law. If Berkeley had raised the minimum wage through a law of general applicability, RUI would not have cause to complain based on contractual silence in the lease. But that is precisely the problem here. The Marina Amendment is not a law of general applicability. RUI has a valid claim under the Contract Clause because Berkeley enacted a law that was obviously directed at RUI and, maybe, a couple of other

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<sup>53</sup> Perkins Coie, ‘Living Wage’ Ordinance Passes Constitutional Muster, Ninth Circuit Says 14 CAL. EMP. L. LETTER 8 (June 28, 2004).

<sup>54</sup> Henry K. Lee, *Berkeley Sued by Restaurant: Living Wage Law’s Extension Challenged*, S.F. CHRONICLE, October 21, 2000, at A 17, available at 2000 WL 6494739.

Marina lessees. Berkeley may not alter RUI's lease at will just because the City Council, rather than the City's procurement staff, approved the changes." (citations omitted).

Drawing on the precedent of the Berkeley Marina case, the authors of the LA superstore ordinance confined its application to "economic assistance zones", defined as areas having benefitted from federal, state or local funding through such programs as redevelopment, renewal, enterprise zones, or earthquake relief. Repeated revisions of the Los Angeles ordinance washed away any reference to prevailing or living wages. Apparently, the city attorney's office was eager to avoid a challenge based on NRLA pre-emption or Equal Protection. Counsel for Wal-Mart suggested that if the ordinance proponents had no intention of trying later to impose a living wage standard on a case-by-case basis, it should make the ordinance applicable city-wide.<sup>55</sup> The suggestion was ignored.

If the city of Los Angeles, in applying the ordinance to a specific applicant, ever imposes a prevailing or living wage standard in a specific case, we may come to learn whether the drafters of the Los Angeles ordinance have succeeded in bringing their living wage mandate under the umbrella of the Berkeley Marina precedent. Has the applicant benefitted so substantially from public investments in the area as to justify the added labor cost? Also, the NRLA would pre-empt the city's prevailing wage ordinance unless the city's involvement brought it within the proprietor exception as a contractor, purchaser or lessor. Unlike the Berkeley Marina ordinance, the LA ordinance makes no explicit exception for collective bargaining agreements, though we may safely assume that unionized superstores would experience smooth sailing under the ordinance.

#### **IV. Limits on the Use of Zoning to Regulate Competition**

Usually, it doesn't take much for a duly enacted municipal zoning ordinance to pass constitutional muster on equal protection or due process grounds.<sup>56</sup> 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. Once the reviewing court alights upon a plausible reason for the legislative act supported by substantial evidence, its job of constitutional adjudication is largely complete. If both sides produce substantial evidence in the form of well documented expert studies, the city will prevail in any administrative or legislative mandamus action. Courts don't scrutinize conflicting expert studies to pick the most convincing one. That task is left to local legislators.

A more serious objection to superstore bans derives from state zoning enabling laws.

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<sup>55</sup> Statement by Philip R. Recht, counsel to Wal-Mart, 04/21/05.

<sup>56</sup> Opinion of the Attorney General, State of Nevada, to Hon. Stewart L. Dell, Clark County District Attorney, regarding a proposed Clark County superstore ban, October 5, 1999, finding a rational basis 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 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", p.3.

Although states broadly empower local governments to regulate land use under their general police powers, appellate courts will strike down land use controls indefensible except to protect local merchants from economic competition.<sup>57</sup> To “not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them”,<sup>58</sup> local legislators must demonstrate that their decisions were based on substantial evidence pertinent to legitimate land use concerns.

To see how a city crossed the line and abused its zoning powers to regulate economic competition, consider the case of an applicant for a rezoning in Reno, Nevada. 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, 804-room hotel and casino with 312 rooms available for sale as time-shares. Though marked out for hotel-casino use in the Reno Master Plan, the site was zoned M-1(light industrial). The owner needed a change of zone to C-3 (commercial) in order to exceed a 65-foot height limit and market residential time share units, since 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 witnesses’ 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.”<sup>59</sup> 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.<sup>60</sup>

Courts often assert that zoning law can’t 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, courts are supposed to ignore legislative motives. There are good reasons for this. The motives of official decision makers are seldom clearly discernible, and could usually be easily hidden or disguised. Most telling of all, to speak of the “motives” of a legislative body is to attribute human attributes 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 often cited dicta in a 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.” After all, if courts are not in the business of ascertaining legislative motives, how are they to know whether “the primary purpose”

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<sup>57</sup> Robert M. Anderson, *AMERICAN LAW OF ZONING* § 7.28 at 760 (3d ed. 1986).

<sup>58</sup> *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 769 P.2d 721 (Nev.1989).

<sup>59</sup> *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 95-96, 769 P.2d 721, 723 (Nev.1989).

<sup>60</sup> *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 769 P.2d 721 (Nev.1989).

of a zoning law was to regulate economic competition?

The answer is found in the permissive standard of judicial review condoning legislation supported by any coherent public purpose, supported by substantial evidence. Contrary to the literal meaning of the above quote from the California case, courts don't envision establishing a hierarchy of public purposes. As long as any minimally acceptable rationale can be imagined or gleaned from the public record, courts will uphold local zoning laws. Only in the total absence of any plausible rationale, do courts strike down zoning ordinances for having no apparent explanation except to regulate economic competition.

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 due to such impacts as traffic, noise, odors, pollution, fire and safety hazards. The range of acceptable rationales widened as local governments undertook programs of urban redevelopment, economic development and job creation, extensive general planning, and environmental protection. Courts now accept that most land use controls have indirect impacts on economic competition. 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 which 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 rejected as impermissible infringements on private property. 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 couldn't see the rationality 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.<sup>61</sup> 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?<sup>62</sup>

For decades, 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

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<sup>61</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("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.").

<sup>62</sup> *Hering v. City of Royal Oak*, 326 Mich. 232, 236-37, 40 N.W.2d 133 (Mich. 1949) ("mainly 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."); *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.")

quarter.<sup>63</sup> California courts have long held that cities can avoid “a further proliferation of this type of land use in a neighborhood already adequately served by service stations “where there is no demonstrated need for an additional service station in this neighborhood at this time.”<sup>64</sup> Courts cite language in a city’s general plan regarding stability, 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.<sup>65</sup> To shelter fledgling downtown redevelopment projects from fierce suburban competition, many cities have denied rezoning applications filed by suburban mall developers.<sup>66</sup> 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.<sup>67</sup>

In the arena of commercial zoning, many communities have enacted ordinances to require CUPs of ‘formula retail’.<sup>68</sup> “Formula Retail” has been defined 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 services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature.”<sup>69</sup> Residents 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

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<sup>63</sup> *Racetrac Petroleum, Inc. v. Prince George’s County*, 601 F.Supp. 892, 897 (D.C.Md.,1985) (“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”).

<sup>64</sup> *Van Sicklen v. Browne*, 15 Cal.App.3d 122, 92 Cal.Rptr. 786 (1971).

<sup>65</sup> *Ensign Bickford Realty Corp. v. City Council*, 68 Cal. App.3d 467, 137 Cal. Rptr. 304 (1977) ( City determined that the area would only support one shopping center and preferred that center to be located in Springtown instead of on Bickford’s property.)

<sup>66</sup> *Forte v. Borough of Tenafly*, 255 A.2d 804, 806 (N.J. Super. Ct. App. Div. 1969) (zoning ordinance restricting retail sales to a central business district is valid to revitalize the central business district); *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 702 A.2d 397 (Vt.,1997) (court upheld state environmental board decision to block Wal-Mart store from locating two miles from St. Albans town center to protect the local property tax base); *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir.1984) (city shielded from anti-trust claim for denying suburban rezoning in order to protect downtown redevelopment project because it was acting pursuant to state redevelopment law). Murray S. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21 (1983).

<sup>67</sup> *Lazarus v. Village of Northbrook*, 31 Ill.2d 146, 199 N.E.2d 797 (1964).

<sup>68</sup> For a list of cities that have enacted ‘formula retail’ restrictions, see <http://www.newrules.org/retail/formula.html> (Last visited 04/19/05).

<sup>69</sup> See the Coronado ordinance quoted in *Coronadans Organized for Retail Enhancement v. City*, 2003 WL 21363665 (Cal.App. 2003) (appeal granted and pending, hence unpublished, uncitable).



ravages of competition with national chains. These types of controls are upheld<sup>70</sup> although they might not have been in times past.<sup>71</sup>

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 its general plan. 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 major freeways. 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 “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 form vacant storefronts.”<sup>72</sup>

Unfortunately, Turlock neglected to support the “decay” aspect of its “rational basis” with a cogent explanation of how a Wal-Mart superstore would force closures of neighborhood grocery stores within its boundaries. Instead, it relied 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. Albertson’s closure could not be attributed to Wal-Mart, since Wal-Mart had not yet opened a grocery business in Turlock. In the next section we detail the questions a thorough market impact assessment would answer.

## **V. 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 make sure the challenged act was not arbitrary, that it was supported by “substantial evidence” in the public record. Substantial evidence includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or

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<sup>70</sup> *Coronadans Organized for Retail Enhancement v. City*, 2003 WL 21363665 (Cal.App. 2003) (appeal granted and pending, hence unpublished, uncitable).

<sup>71</sup> *Fogg v. City of South Miami*, 183 So.2d 219 (Fla.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. 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.

<sup>72</sup> City of Turlock’s Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, *Wal-Mart Stores, Inc. v. City of Turlock*, Case No. 345253, County of Stanislaus Superior Court, p. 1-2.

narrative, evidence that is clearly inaccurate or erroneous.”<sup>73</sup>

Typically, proponents and opponents of an enactment offer conflicting ‘substantial evidence’. Courts aren’t supposed to exercise independent judgment in deciding who had the better of the argument or the most convincing expert. As long as substantial evidence abounds on both sides of the controversy, courts sustain the government’s decision.<sup>74</sup> Often, buoyed by the knowledge that their decisions will survive legal challenge if justifiable on any rational basis, local governments 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. Wal-Mart’s experts will explain that supercenter shoppers make fewer trips by purchasing groceries and dry goods at the same location. Wal-Mart’s 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

Often, local governments justify superstore restrictions by claiming that a proposed Wal-Mart supercenter will drain so much trade from a local supermarket to force it out of business. 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, leading to urban decay.

What type of market impact assessment would the city need to support its denying a rezoning for Wal-Mart, imposing mitigating conditions on a CUP, or enacting a superstore ban? Admittedly, this is a judgment call based on likely court reactions to different levels of evidence by quality or quantity. To meet Wal-Mart’s assertion that the regulation is nothing but an impermissible attempt to zone out economic competition, a market impact assessment will be needed to provide the requisite substantial evidence to lend credence to the planning-based explanations for the challenged enactment.

For starters, it isn’t enough for an expert to testify about other cities where this scenario occurred without explaining why the enacting city could reasonably expect the same unfortunate outcome. As a leading economist who has studied superstore impacts explains: “The impact 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.”<sup>75</sup>

The impact of a proposed Wal-Mart superstore on grocers already located within the jurisdiction is not easy to assess responsibly. Typically, 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 Wal-Mart, based on their national track record. Then the expert estimates demand, the retail sales purchases of residents. To existing demand, the

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<sup>73</sup> CA. PUB. RES. CODE 21080.

<sup>74</sup> See generally, Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995).

<sup>75</sup> Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry* (Bay Economic Forum, January, 2004) p.63. [www.bayeconomfor.org](http://www.bayeconomfor.org)

consultant estimates 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 areas where population and economic growth are stagnant or in decline. 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 will need to estimate how increased demand will be shared among retailers before concluding the existing merchants will be doomed when Wal-Mart moves in.

Trade market areas vary, covering anywhere from a five to thirty-five mile radius. To the extent Wal-Mart 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,” the local market is that much smaller, and so the predicted adverse impact on local merchants of a new Wal-Mart superstore worsens.

When there doesn’t 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, and the probable reasons for their vulnerability.<sup>76</sup> That guess is substantiated by visits to the retailers at risk, the places from which the superstore will draw trade. For instance, Wal-Mart doesn’t pose much of a threat to “retail nodes offering a memorable shopping experience in a place with appeal and character”, or “specialty shopping districts with a regional orientation and focus on primarily upscale or ethnic niche markets”.<sup>77</sup> The consultant estimates how much trade will be lost,<sup>78</sup> a projection of the excess square footage likely to result, an examination of boarded up space already on the market, an analysis of market absorption rates for retail space compared to the amount of vacant space already on offer, and identification of retail space most vulnerable to becoming blighted.<sup>79</sup>

The consultant studies 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 isn’t set up to serve.<sup>80</sup> Although it is not easy to predict in advance which merchants will adapt and survive, or maybe even prosper, and which merchants will fail, both possibilities should

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<sup>76</sup> *Economic Analysis of the Proposed Fremont Wal-Mart*, Strategic Economics, December 19, 2002, p.6-9 (prepared for The United Food and Commercial Workers Union, Local 870).

<sup>77</sup> *Economic Analysis of the Proposed Fremont Wal-Mart*, Strategic Economics, December 19, 2002, p.23 (prepared for The United Food and Commercial Workers Union, Local 870).

<sup>78</sup> *Economic Analysis of the Proposed Fremont Wal-Mart*, Strategic Economics, December 19, 2002, p. 18-25 (prepared for The United Food and Commercial Workers Union, Local 870).

<sup>79</sup> Philip G. King, Sharmila King, and C. Daniel Vencill, *Economic Analysis of a Proposed Wal-Mart Expansion in Hanford, California* (prepared for Richard Harriman, Attorney at Law, by California Economic Research Associates, March 24, 2004).

<sup>80</sup> Professor Kenneth E. Stone reminded the audience 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.’ Tim Pederson, *Attitude is key for supercenter competitors*, WILLISTON DAILY SUNDAY HERALD, Wednesday, October 27, 2004. Kenneth E. Stone, *Impact of Wal-Mart Stores on Iowa Communities: 1983-93*, ECON. DEV. REV. 60 (Spring, 1995).

be addressed.

These studies are often incomplete because they overlook some important secondary consequences of Wal-Mart entry. Retail demand can easily be underestimated if expert reports disregard the possibility that consumers will spend locally some of their sizable savings from shopping at Wal-Mart.<sup>81</sup> Similarly, estimates of job or wage losses need to take into account the secondary impacts of consumers spending their Wal-Mart savings locally. New retail clerks may be hired to service these fortunate shoppers.

Since about sixty percent of grocery employees are unionized, and Wal-Mart is not, consultants often assume that regional gross income will decline if jobs at Wal-Mart replace jobs at supermarket chains.<sup>82</sup> A typical study might show that a new Wal-Mart employs 350 people at an average wage of \$10 per hour, and displaces 340 employees, averaging \$18 per hour. The net gain in employees is 10 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 weren't working before Wal-Mart 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 (\$1,750—the hourly wage gain) exceeds \$3 x 340 (\$1,020—the hourly wage loss). Modify the numbers, and the balance shifts. Ignore these numbers, and it is impossible to know whether the entry of Wal-Mart increased or decreased 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. 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).

## **VI. NEPA, Baby NEPAs and The California Environmental Quality Act (CEQA)**

*Should the Physical Impacts of Competition Be Subject to Environmental Assessment?* When a local government grants a land use approval for a Wal-Mart superstore, environmental laws may require a market impact assessment. Most environmental legislation excludes purely economic factors from those that must be considered by decision makers unless ruinous competition threatens to bring blight and decay to other parts of town. In the late 1960s, the U.S. Congress responded to widespread concern that federal agencies were disregarding the impact of their decisions on the natural environment by formulating a National Environmental Policy Act (NEPA).<sup>83</sup> NEPA requires

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<sup>81</sup> Dr. Marlon Boarnet et. al., *Supercenters and the Transformation of the Bay Area Grocery Industry*, (Bay Economic Forum, January, 2004) p.1. [www.bayeconomfor.org](http://www.bayeconomfor.org). 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%.

<sup>82</sup> Marlon Boarnet and Randall Crane, *The Impact of Big Box Grocers on Southern California: Jobs, Wages and Municipal Finance* (September 1999), p. 44.

<sup>83</sup> 42 U.S.C.A. § 4321.

that before making a decision involving a “major federal action” significantly threatening the quality of the human environment, decision-makers must make an environmental assessment of potential impacts. 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. Included in the analysis are a list of alternative locations, along with substitute projects that might be more benign than the one under review.<sup>84</sup> 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 Clear Water Act or a permit from the Department of Interior to “take” an endangered species.

Eighteen states have enacted laws modeled after NEPA requiring state and local decision-makers to consider the environmental impacts of government projects before approving them.<sup>85</sup> Reporting requirements under baby NEPAs come into play when developers receive permits, licenses, leases or grants from the state.

Five states 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.<sup>86</sup> In California and New York, for instance, no state agency or local government can make any discretionary land use decision which may have a significant impact on the environment without first preparing and approving a report detailing harmful impacts and possible ways of mitigating them.<sup>87</sup>

While environmental laws, including NEPA, aren’t meant to require disclosure of the purely economic impacts of new development, competition that produces physical impacts may need to be disclosed and analyzed. So, for instance, in *City of Rochester v. United States Parcel Service*,<sup>88</sup> the postal service was about to relocate a regional postal facility from downtown Rochester to the suburbs. The EIS recognized the need to address the potentially significant environmental impacts of this “major federal action” on the transfer of 1,400 employees from downtown: “(1) increasing commuter traffic by car between the in-city residents of the employees and their new job site (only

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<sup>84</sup> 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 U.S. Constitution has been construed to exempt federal entities like the U.S. Postal Service from local land use. *Maryland-Nat’l Capital Park and Planning Comm’n v. U.S. Postal Service*, 487 F. 2d 1029 (D.C. Cir. 1973) (Federal projects not conforming to local land use controls are subject to close scrutiny under NEPA.)

<sup>85</sup> John Landis, Rolf Pendall, Robert Deshansky & William Huang, *Fixing CEQA* 1, n.2.

<sup>86</sup> These jurisdictions are California, Hawaii, Minnesota, New York, Puerto Rico, and Washington. See also Lynn Considine Cobb, *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, citing cases from Maine, Florida, Washington, New York, and California.

<sup>87</sup> The California Environmental Quality Act (CEQA), CA. PUB. RES. CODE § 21000-21176; The New York State Environmental Quality Review Act (SEQRA), McKinney’s ECL § 8-0101.

<sup>88</sup> 541 F. 2d 967 (2d Cir. 1976). See generally, Michael Fix, *Addressing the Issue of the Economic Impact of Regional Malls in Legal Proceedings*, 1980 URB. L. ANN. 101.

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.”<sup>89</sup> (Citations omitted)

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. 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.<sup>90</sup>

CEQA provides the primary basis for legal theories used to derail local government decisions in California that ban or allow superstores. The environmental assessment is supposed to inform decision-makers of all 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. Projects can be approved with negative environmental impacts but only after decision-makers explain why mitigation wasn’t deemed feasible and yet the project was approved anyway.

Secondary impacts of competition were held to come within the scope of an environmental assessment under CEQA in *Bakersfield Citizens for Local Control v. City of Bakersfield*.<sup>91</sup> 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.”<sup>92</sup> 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.”<sup>93</sup> As the Bakersfield

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<sup>89</sup> 541 F. 2d 972-3.

<sup>90</sup> *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976).

<sup>91</sup> 124 Cal. App. 4th 1184 (Cal. App. 2004).

<sup>92</sup> *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1213 (Cal. App. 2004). 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 BCLC did not link the asserted low wages and absence of affordable health insurance coverage to direct or indirect adverse environmental consequences.” 124 Cal. App. 4th at 1196.

<sup>93</sup> *Citizens for Quality Growth v. City of Mt. Shasta*, 198 Cal. App.3d 433, 446, 243 Cal. Rptr. 727 (1988). *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo*, 172 Cal. App.3d 151, 217 Cal. Rptr. 893 (1985).

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 deterioration as a ‘social or economic effect’ of the project.”<sup>94</sup>

In the Bakersfield case, the plaintiffs had replied to the draft EIR by providing the opinion of an expert, an economics professor, Dan Vencill from San Francisco State University, 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, and identified 29 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. Once presented with evidence of the possibility, it was the city’s obligation under CEQA to indicate “reasons why it had been determined that urban decay was not a significant effect of the proposed projects.”<sup>95</sup> The court remanded the case so that the trial judge could oversee the preparation of a new EIR.

*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. “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.”<sup>96</sup> CEQA specifically includes zoning ordinances within its purview.<sup>97</sup>

Recall the City of Turlock superstore ban mentioned earlier. Turlock performed no environmental review at all, claiming that the superstore ban wasn’t a project under CEQA and, even if it was, it would spawn no adverse physical impacts. Turlock’s reluctance to prepare an Environmental Impact Report 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.<sup>98</sup> The enactment of the ordinance would also be

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<sup>94</sup> 124 Cal. App. 4th at 1206.

<sup>95</sup> 124 Cal. App. 4th at 1208.

<sup>96</sup> CA. PUB. RES. CODE 21065.

<sup>97</sup> CA. PUB. RES. CODE 21080: “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.”

<sup>98</sup> Interview with Linda Bozung, CEQA lawyer, Partner, PiperRudnick, Los Angeles, 04/08/05).

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.

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. As CEQA is worded, it makes no difference whether the physical change in the environment is benign or adverse, just that there is a direct physical change or a reasonably foreseeable indirect physical change. "Without a threshold evaluation, however, the City leaves its constituents in ignorance of the avoidable dangers CEQA intended to avert."<sup>99</sup>

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 justified the ban to forestall Turlock residents worsening traffic congestion on streets not designed for it, by making frequent trips to shop for groceries at Wal-Mart's superstore located on the outskirts of town. 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.<sup>100</sup> Alternately, the city contended that the ban only maintained the status quo. 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.

In Step Three the agency determines whether to prepare an Environmental Impact Report (EIR), a "negative declaration" or a "mitigated negative declaration." An EIR must be prepared: "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."<sup>101</sup> CEQA prescribes the preparation of an EIR to disclose any possible adverse effects that surface in the initial study. If there are none, the lead agency issues a declaration of "no possible significant effects" called a "negative declaration".

The statute offers another option called a "mitigated negative declaration": "An 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

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<sup>99</sup> *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App.3d 892,905, 223 Cal. Rptr. 379, 386 (Cal. App.1986).

<sup>100</sup> 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." Superior Court, State of California, County of Stanislaus, Dec. 7, 2004, p. 6. The decision is being appealed..

<sup>101</sup> CA. PUB. RES. CODE 21080.



a significant effect on the environment.”<sup>102</sup>

Because Turlock took the position that the ban wasn’t a “project”, 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 negative declarations, pointing to the statute language that the lead agency *shall* prepare EIRs for any project that *may* have a significant environmental effect. Courts have construed this language to justify a reversal of the usual presumption of validity that accompanies legislative acts. Normally, courts uphold a local government’s decision if supported by substantial evidence. Thus, each side to a dispute introduces substantial evidence to buffer its claims, courts won’t second-guess the legislative choice. But in CEQA-based challenges to decisions not preceded by a comprehensive EIR covering all potentially significant adverse impacts,<sup>103</sup> 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.”<sup>104</sup> Once opponents of a government decision can make a fair argument supported by substantial evidence that the project will have a substantial adverse effect on the environment, an Environmental Impact Report is required and an incomplete EIR must be remanded for revision. 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.

Turlock planners took the position that a superstore ban could have no adverse impacts since it prohibited development instead of allowing or facilitating it. 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.<sup>105</sup> 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 ag land in

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<sup>102</sup> CA. PUB. RES. CODE 21080 (c) (2).

<sup>103</sup> CA. PUB. RES. CODE 21068.

<sup>104</sup> *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*, --- Cal.Rptr.3d ----, 2005 WL 737528 (Cal. App. 2005).

<sup>105</sup> That future development projects outside the TALUP (Travis Air Force Base Compatibility Land Use Plan) 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.’ [Citations.]” . *Muzzy Ranch Co. v. Solano County Airport Land Use Com’n*, 23 Cal.Rptr.3d 60, Review Granted, previously published at: 125 Cal.App.4th 810 (2005).

Kern County.<sup>106</sup> 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

Ironically, if Turlock could have justified the ban as regulation of economic competition, it might have had a basis for classifying the ban as not 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.”<sup>107</sup> It only applies to the regulation of economic competition when that regulation produces physical impacts.

## Summary

The UFCW has added its powerful voice to the foes of Wal-Mart’s superstore expansion program. Its participation in these skirmishes, and the reasons for it, have been well publicized. Since zoning is not intended as a means of regulating economic competition, measures such as superstore bans come under a cloud of legal suspicion unless justified by the sorts of factors that customarily figure in zoning decisions. Because Wal-Mart is a deep-pocketed adversary, municipalities must prepare to defend their anti-superstore ordinances in court. Enacting jurisdictions need to articulate forcefully a “rational basis” for their superstore enactments, supported by plausible if not convincing “substantial evidence.” Simply wheeling in studies from other times and places won’t suffice. Studies need to fit the local facts to the proffered rationales. Such studies don’t come cheap.

In California, local governments enacting a superstore ban will almost certainly be required to invest in costly environmental impact reports. 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 if feasible.

That is the bad news for the UFCW and its allies. The good news is that all of the substantive legal barriers to anti-superstore zoning can be overcome. Limitations on the use of zoning power, and Equal Protection objections are met by communities enacting superstore bans identifying a “rational basis” for their enactments other than to regulate economic competition. At public hearings on zoning matters, the UFCW would be well advised not to frame the central issue as Wal-Mart’s labor practices and instead to defer to environmental advocates, local merchants and residents, historic preservation enthusiasts, and sprawl busters. Usually, the most appropriate justifications will be found in planning preferences regarding the location of retail facilities and traffic management. The legitimacy of zoning laws is no longer limited to nuisance-like factors. A rational basis can also be found in urban betterment and beautification, job creation, tax base enhancement, and protection against competition with publicly funded redevelopment projects.

The UFCW has another legislative option less circuitous than the zoning route for achieving

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<sup>106</sup> *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*, ---- Cal. Rptr. 3d ----, 2005 WL 737528 (Cal. App.2005).

<sup>107</sup> CA. PUB. RES. CODE 21080.

its goal of equalizing wages and benefits between union grocers and Wal-Mart. They could advocate the imposition by local governments of a living or prevailing wage across the board or, if that is politically beyond reach, to all grocery workers. Such an ordinance could easily ward off a successful attack based on NLRA pre-emption by exempting workers covered by collective bargaining agreements. Immunizing a living wage of limited applicability from a successful Equal Protection assault requires the identification of a plausible “rational basis.” Until now, local governments have satisfied this requirement by restricting coverage to firms that have dealt directly with the government in some significant way or benefitted from government largesse. Quite possibly, the same “urban decay” theory used to justify superstore bans might do double service. In the end, any number of rationales might suffice since courts are sure to see the Wal-Mart/UFCW contest as one best resolved in the political arena, not at the court house.<sup>108</sup>

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<sup>108</sup> Thanks to San Francisco attorney Mark R. Wolfe for suggesting this point.