

GRESHAM SAVAGE NOLAN & TILDEN,A PROFESSIONAL CORPORATION
LAWYERS • FOUNDED 19103750 UNIVERSITY AVENUE, SUITE 250
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(951) 684-2171 • FACSIMILE (951) 684-2150FOR THE FIRM:
John C. Nolan
e-mail: John.Nolan@greshamsavage.com**FACSIMILE COVER SHEET**

FILE: W756-002	PAGES: 94 INCLUDING THIS PAGE	SENDER: John C. Nolan
DATE:	July 25, 2005	
ATTENTION:	MARGUERITE P. BATTERSBY	
COMPANY:	Richards, Watson & Gershon	
FAX:	(213) 626-0078	
PHONE:		
RE:	Yucaipa City Council, Agenda Item 15	

NOTES / COMMENTS:

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**If you do not receive all of the pages, please call Lisa Miller
at (951) 684-2171 as soon as possible.**

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FOR THE FIRM:
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July 25, 2005

VIA FACSIMILE (213) 626-0078

Marguerite P. Battersby, Esq.
Richards, Watson & Gershon
356 South Grand Avenue, 40th Flr.
Los Angeles, CA 90071

Re: Yucaipa City Council, Agenda Item 15

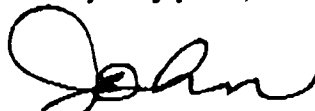
Dear Peg:

As you are aware from our earlier contacts, our law firm represents Wal-Mart Stores, Inc., and has opposed the creation of an ordinance that, on a general basis, prohibits a combination grocery and retail store of the size typically operated by Wal-Mart.

Enclosed is a full set of the materials that we are submitting to the City to oppose this Agenda item.

If you would like to discuss this, please contact me, either at the office telephone number, or my cell phone at (909) 214-3305.

Very truly yours,



John C. Nolan of
GRESHAM SAVAGE
NOLAN & TILDEN,
a Professional Corporation

JCN:llm
Enclosures

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Michigan Department of Natural Resources, 504 U.S. 353 (1992) [striking anti-competitive state law prohibiting disposal of solid waste in any City other than where it was generated].)

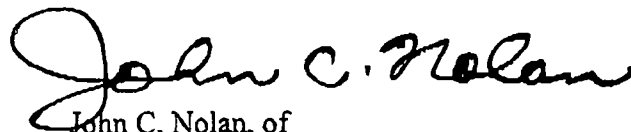
The proposed ordinance would violate the Commerce Clause since (1) it has the purpose and effect of protecting local supermarket chains and local trade unions from competition from Wal-Mart; (2) it would only apply to Wal-Mart, which is headquartered outside California, and (3) there is no legitimate local interest in the goals the proposed ordinance seeks to achieve.

The Proposed Ordinance is Unnecessary

In reality, the proposed ordinance accomplishes nothing that the City could not accomplish on a project-by-project basis. The City has inherent authority through its police powers to regulate land use to promote the general welfare of the community. If the City believes any project under consideration will result in unacceptable traffic and/or economic impacts, the City may simply deny the project. The proposed ordinance does nothing but strip the City of discretion to even consider projects involving Discount Superstores even though the circumstances surrounding the project may indicate that the project would benefit the community. Accordingly, the proposed ordinance is simply unnecessary to address existing City concerns.

The proposed ordinance is a drastic, discriminatory prohibition against lawful commercial uses and is premised on faulty, unsubstantiated allegations regarding traffic and blighting impacts. Wal-Mart urges you not to adopt the proposed ordinance.

Very truly yours,



John C. Nolan, of
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FOR THE FIRM:
John C. Nolan
Email: John.Nolan@greshamsavage.com

July 25, 2005

Mr. John Tooker
City Manager - City of Yucaipa
34272 Yucaipa Boulevard
Yucaipa, California 92399

Re: Big Box Ordinance

Dear Mr. Tooker:

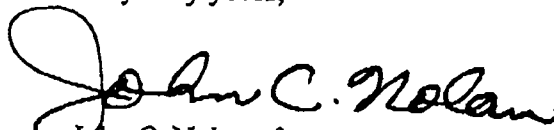
Enclosed is a letter and two separate expert reports that relate to Agenda Item 15 on tonight's Agenda for Yucaipa's City Council.

As can be seen, I have enclosed six copies of each for delivery to the Mayor and Council Members as well as a copy for you.

Please deliver a full set of each of these documents to the Mayor and members of the Council.

Your cooperation is appreciated.

Very truly yours,



John C. Nolan of
GRESHAM SAVAGE
NOLAN & TILDEN,
a Professional Corporation

JCN:llm
Enclosures

cc: Mayor
City Council Members

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July 25, 2005

Honorable Mayor and Members of the City Council
City of Yucaipa
34272 Yucaipa Boulevard
Yucaipa, California 92399Re: Ordinance No. 244 -an Ordinance of the City Council of the City of Yucaipa
Regulating the Sale of Non-Taxable Goods in Large Retail Establishments

Dear Honorable City Council Members:

This office represents Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust (collectively "Wal-Mart"). We have received and reviewed a copy of proposed Ordinance No. 244 which, if adopted, would purport to limit and/or preclude the sale of non-taxable goods in "Large Retail Establishments", which the proposal defines as a retail store comprised of more than one hundred thousand (100,000) square feet of floor area. The proposed ordinance precludes development of Large Retail Establishments that devote more than ten percent (10%) of the total sales area to non-taxable merchandise (groceries) anywhere in the City of Yucaipa ("City"). By so doing the proposal would effectively preclude development within the City of Discount Superstores, such as a Wal-Mart Supercenter.

Wal-Mart is in strong opposition to the proposed ordinance. As discussed in detail below, Wal-Mart's objections to the adoption of the proposed ordinance are based on numerous grounds. Initially, adoption of the proposed ordinance will violate the provisions of the California Environmental Quality Act ("CEQA"), because the City has failed to consider and evaluate the potential impacts that the proposed ordinance may have on the environment, including impacts to traffic, public services and air quality. Additionally, the rationale supporting adoption of the proposed ordinance is not supported by scientific evidence or empirical data. The proposed ordinance is not reasonably related to the public welfare and, therefore, adoption of the proposed ordinance would be an arbitrary act which improperly restricts competition. Finally, because of its arbitrary nature, the proposed ordinance violates the Equal Protection Clauses of both the United States and California Constitutions and the Commerce Clause of the United States Constitution.

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Based on the legal defects identified below, Wal-Mart strongly urges that the proposed ordinance be rejected.

Adoption Of Ordinance No. 244 Is Not Exempt From The Provisions Of CEQA.

A recital contained in Ordinance No. 244 states:

"The City has conducted an environmental review for adoption of an ordinance establishing procedures to provide for the limitation of development of retail stores in the City, and has found that it can be seen with certainty that there is no possibility that the proposed zoning regulations will have a significant adverse effect on the environment, and therefore, it is exempt from the provisions of California Environmental Quality Act"

From the quoted language, it appears that the City is relying on what is commonly referred to as the "common sense exemption" under CEQA. CEQA Guidelines section 15061(b)(3) provides that a project is exempt from CEQA, if "the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant impact on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant impact on the environment, the activity is not subject to CEQA." This exemption is based on the general rule that CEQA applies only to projects which have the potential for causing a significant impact on the environment.

Under this exemption, a lead agency may find a project exempt from CEQA only if it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. Any possibility that the project may culminate in a significant impact removes it from this exemption. If a reasonable argument is made that suggests that a project might have a significant impact, the agency cannot utilize the exemption created by CEQA Guidelines section 15061(b)(3). See: Davidon Homes v. City of San Jose, (1997) 4 Cal.App.4th 106, 118. Moreover, public agencies cannot assume that measures designed to "protect" the environment will not have adverse environmental impacts. Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist., (1992) 9 Cal.App.4th 644, 656. Although the ordinance states that the City conducted an environmental review, which concluded that the project could not possibly result in a significant environmental impact, the City clearly failed to adequately analyze potential significant impacts to traffic, noise, and air quality that will result from adoption of the proposed ordinance. Accordingly, the City cannot legally find that the adoption of the ordinance is exempt from further environmental review pursuant to CEQA.

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1. Traffic Impacts

RK Engineering Group, Inc. has prepared a detailed analysis comparing the traffic generated by Supercenters with traffic generated by other retail uses offering the same or similar uses, including discount clubs, discount stores, supermarkets, and multi-tenant shopping centers and a copy of its analysis is attached as Exhibit A to this letter for your reference. That analysis is based on reasonable assumptions concerning commercial development scenarios in Yucaipa as a result of the prohibition of Discount Superstores. Although the proposed ordinance would prohibit discount retail stores that also have a full service grocery component under the same roof, development of a large discount store and a separate supermarket, or a combination of a multi-tenant shopping center and a separate supermarket, would continue to be permitted.

As stated in the analysis, traffic generated by Discount Superstores is actually lower than traffic generated by other types of retail uses. Based on the trip generation rates identified in *Trip Generation, 7th Edition*, published by the Institute of Transportation Engineers ("ITE")¹, Discount Superstores generate fewer vehicular trips per 1,000 square feet of sales area than regular discount stores, supermarkets, and multi-tenant shopping centers. Pursuant to the ITE trip generation rates, Discount Superstores generate an average of 3.87 trips per 1,000 square feet, while discount stores generate an average of 5.06 trips per 1,000 square feet, and supermarkets generate an average of 10.45 trips per 1,000 square feet of sales floor area. The lower trip generation rate for Discount Superstores is generally attributable to the fact that Discount Superstores provide multiple services allowing customers to reduce the number of traffic trips necessary to fulfill shopping needs.

By preventing the development of Discount Superstores, the proposed ordinance will lead to the development of retail uses in the City which will actually generate greater traffic impacts. Other retail uses such as discount stores, supermarkets, multi-tenant shopping centers, and discount club stores are still permitted under the Yucaipa Municipal Code and will, no doubt, be developed in the future to serve the shopping needs of the City's rapidly growing population. In order to obtain the product selection and services provided by a Wal-Mart Supercenter, a customer would have to visit multiple establishments, such as a discount retail store and supermarket, or a multi-tenant shopping center and a supermarket. The analysis shows that a Supercenter generates 30% less traffic than a discount store and supermarket, and 31% less

¹ Trip generation rates identified in *Trip Generation, 7th Edition*, published by the Institute of Transportation Engineers ("ITE"), are widely accepted as a standard reference used by most Cities, Counties and the California Department of Transportation for estimating probable traffic impacts from proposed development projects. Moreover, as reflected in the analysis prepared by RK Engineering Group, Inc., actual traffic counts conducted at Wal-Mart Supercenters confirm the accuracy of ITE trip generation figures for land use classification 813, Discount Superstores.

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traffic than a multi-tenant shopping center and supermarket. Such an increase in traffic is substantial in relation to the existing traffic volumes and capacity of the City's roadway system.

Finally, the prohibition of Discount Superstores will result in such uses being developed outside the City limits. City residents would then travel longer distances to take advantage of the lower prices and expanded product selection provided by Discount Superstores. Longer vehicle trips will result in greater traffic volumes and roadway congestion within the City.

Accordingly, there is no factual support for the City's conclusion that there is no possibility that the adoption of the proposed ordinance would result in significant environmental impacts. Moreover, as shown above, there is no factual basis to support the stated primary rationale supporting adoption of the ordinance: that Discount Superstores have been shown to generate unacceptable levels of traffic. In fact, Supercenters generally produce less traffic than similar commercial uses that will remain permitted within the City.

2. Air Quality

An obvious corollary to an increase in traffic trips is an increase in mobile air emissions. Yucaipa is located within the South Coast Air Basin, which has been designated non-attainment for carbon monoxide (CO), ozone (O₃) and serious non-attainment for PM₁₀. As a result of reduced traffic trips, Discount Superstores generate lower total CO, O₃, and PM₁₀ emissions than alternative developments incorporating the same or similar uses to those associated with Discount Superstores. As a consequence, by causing land use development patterns that generate greater traffic impacts than Discount Superstores, the adoption of the proposed ordinance will result in higher mobile air emissions which could represent a significant environmental impact.

3. Public Services

The proposed ordinance asserts that "large retail establishments have been shown to . . . burden local law enforcement services, without providing an additional sales tax base with which to provide such services." There is absolutely no evidence in the Administrative Record to support this conclusion. In fact, prohibiting Discount Superstores may result in additional burdens on public services such as fire and police protection. As shown above, development of permitted retail uses offering products and services similar to those offered by a Discount Superstore will result in more and/or longer traffic trips on City roadways. More traffic on City roadways may result in more traffic incidents requiring police, fire and emergency service response. Moreover, the additional trips may also result in substantial adverse physical impacts associated with the provision of new or physically altered public roadways and related governmental facilities. Improvements and expansion may be necessary for police and fire protection services to maintain acceptable response times.

