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LEGAL MEMORANDUM

TO: Tigard City Council and City Manager

FROM: Tim Ramis and Damien Hall

DATE: May 28, 2013

RE: **Regulatory Options to Impact Retailers Within the City**
File No. 50041-36799

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

I. Introduction

The City Council has requested that the City Attorney identify its “tool box” of regulatory that would impact the existing “big box” retailers in the City of Tigard (“City”). Because the focus is on the regulation of existing uses, this memorandum does not address any land use regulations.

This memorandum identifies various regulatory concepts that have been examined or adopted by local jurisdictions which would have varying levels of impact to the bottom line of a big box retailer. The memorandum also identifies some of the anticipated policy impacts and legal issues associated with each regulatory concept.

II. Applicability of Regulations

Generally, each of the regulatory concepts that are examined below has the potential to be applied to all business within the City, or can be tailored to include only retail operations that exceed a certain square footage of retail floor area. This tailored approach would allow the City to regulate big box retailers without including retail operations with smaller footprints.

Some of the existing retail operations in the City that likely fall within the “big box” category are,

- Babies “R” Us,
- Costco,
- Fred Meyer,

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- Lowes,
- Walmart, and
- Winco.

That list is by no means exclusive and other retail outlets such as the Washington Square Mall and Bridgeport Village could potentially be impacted.

A case can be readily made for the policy rationale behind regulating big box retailers and their effects on the City economy (e.g. reduced market share for “mom and pop” retailers, lack of ties to the City business community, etc.). However, because any City regulation must have a rational and legitimate purpose, any regulation that seeks to distinguish between big box retailers must do so in a manner that is not arbitrary, or could result in liability to the City. As such, regulations that are more narrowly tailored to target specific retailers are not recommended.

III. Scale of Operations

Big box retailers tend to be national or international operations that rely on economies of scale to justify the overhead costs associated with such relatively large footprints for their retail businesses. The same scale of business operations allows a big box retailer to potentially spread any localized financial impacts from City regulation throughout its chain of stores. As such, the economic impact associated with potential City regulation will be less directly influential to a national or global retailer, than to a business with a greater percentage of total operations in the City.

IV. Regulatory Concepts

The following regulatory concepts are offered as models of potential alternatives that if adopted by Council would have a financial impact on existing big box retailers, as to increase the cost of doing business within the City, for such establishments. The regulatory concepts address the following aspects of big box retailers,

- hours of operation,
- employee wage and hour standards,
- employee benefits standards,
- business license fees, and
- sales tax.

Each of the below regulatory concepts could be adopted by the City, they are not alternative, and the cumulative impact if adopted in combination would be greater than adoption of any single concept.

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A. Hours of Operation

Within reason, the City can limit hours of operation of retailers within the City. For example, the City could require that all big box establishments be closed between the hours of 10:00 p.m. and 6:00 a.m. Such a limitation would apply to all similarly situated retailers, so the City should establish the hours of operation of all affected retailers to understand the impact of such a limitation.

B. Employee Wage and Hour Standards

The City has the authority to establish wage and hours standards for employment within the City. Essentially, such regulation would likely take the form of a local minimum wage. An example of a jurisdiction that has a local minimum wage is San Francisco. In San Francisco, the minimum wage that must be paid by all employers is \$10.55 per hour, as compared to the California state minimum wage of \$8.00 per hour.

Oregon minimum wage is currently \$8.95 per hour. Any local minimum wage that the City would adopt must be greater than the State minimum wage. In order to find the local minimum wage amount that has the desired impact, the City should inventory the wages paid by similarly situated big box retailers. The City could likely impose an industry specific minimum wage, tailored to only be applicable to big box retailers.

C. Employee Benefits Standards

The City has the authority to require employers within the City to provide their employees with specified benefits. An example of such regulation is the City of Portland's recently adopted ordinance requiring that all employees working in Portland be provided paid sick leave. The City could impose requirements for other kinds of benefits as well, such as medical benefits, vacation days, etc., and the requirements could likely be industry specific to big box retailers.

In order to ensure that such employee benefit requirements have the desired impact, the City should inventory the benefits packages currently offered by similarly situated big box retailers.

D. Business License Fees

The City could adopt a business license fee, that is due annually for all businesses or all big box retailers. The amount of the fee would be based on sales receipts of the business. The City of Portland has a similar fee, but it is not industry specific.

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E. Sales Tax

The City could adopt a sales tax. Due to heightened scrutiny of the uniformity of application of taxes, it may prove difficult to tailor an industry specific sales tax, as opposed to a City wide sales tax that takes in all point of sale transactions (car sales, cup of coffee sales, etc.). Due to the political nature of sales taxes, adoption could likely also involve a vote of the people.

Conclusion:

The City can adopt any of the regulatory concepts. However, the City cannot tailor the regulations to single out any specific retailer, so any adopted regulations would apply to all big box retailers within the City (with the possible exception of a sales tax that could apply more broadly).

It is unlikely that any of these concepts would result in the closure of any of the City operations of a big box retailer because the increased cost of doing business associated with any of the regulatory concepts can likely be passed along to consumers, both locally and throughout the operations of the retailer.

To the extent that Council desires to pursue any of the presented regulatory concepts, or an alternative regulatory concept, the City Attorney can work with Council and staff to craft the specifics of regulations to best achieve the desired policy objectives of Council.