OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: November 27, 2006 **IBA Report Number:** 06-56

City Council Agenda Date: November 28, 2006

Item Number: 335

Item: Regulation of Large Retail Establishments and Prohibition of Superstores

OVERVIEW

On September 18, 2006, the City Council adopted two resolutions. The first resolution directed the Office of the City Attorney, with the cooperation of the Mayor's staff and the Office of the Independent Budget Analyst, to prepare an ordinance regulating "Large Retail Establishments" in accordance with the Mayor's recommendations in Report to Council No. 06-124 as follows:

- Establishing a Process 2 Neighborhood Development Permit (NDP) at 50,000 square feet of building size in the Commercial-Community (CC) zones, Commercial-Regional (CR) zones, Industrial-Light (IL-2-1) & (IL-3-1) zones, and planned districts, except in the Centre City Planned District (CCPD);

- Establishing a Process 4 Site Development Permit (SDP) at 100,000 square feet of building size in the CC zones and planned districts; and

- Establishing additional design and landscape regulations in the CC zones, CR zones, IL-2-1 zone, IL-3-1 zone, and planned districts.

The second resolution directed the Office of the City Attorney, with the cooperation of the Mayor's staff and the Office of the Independent Budget Analyst, to prepare an ordinance prohibiting the establishment or development of "Superstores," similar to the ordinance attached as Item 6 to Manager's Report No. 05-136.

Citing the fact that there was no Council discussion concerning possible policy issues tied to the implementation of the requested Large Retail Ordinance, the Mayor's staff requested that the City Attorney prepare an alternative version of the ordinance (Version B) with language and provisions that differed from the original ordinance included as

Attachment "2" to Report to Council No. 06-124. The differences between the two new ordinances are discussed in the Report to the City Council (No. 06-149) dated November 22, 2006. The City Attorney and the Mayor's staff are bringing two versions of the requested Large Retail Ordinance, and the requested Ordinance Prohibiting Superstores, back to Council on November 28, 2006. This report attempts to provide additional clarification to the information provided in the above referenced report.

FISCAL/POLICY DISCUSSION

Version A of the Large Retail Ordinance was prepared by the City Attorney to retain the substantive elements of the original ordinance submitted by the Planning Department in accordance with City Council's direction. Version B of the Large Retail Ordinance was also prepared by the City Attorney to include the Mayor's staff recommendations thereby modifying substantive elements of the original ordinance to provide alternatives for City Council consideration. The primary differences between Version A and Version B focus on (1) whether a 49,999 square foot cap should apply in certain zones, (2) when and where discretionary review should apply (especially in terms of previously conforming large retail establishments), and (3) whether deviations from the required standards should be allowed.

In their Report to the City Council (No. 06-149), the Mayor's staff provides a comparison of the differences between Version A and Version B of the Large Retail Ordinance beginning on page 5. The IBA offers this report in an attempt to further clarify the differences between Versions A and B. We also discuss the Ordinance Prohibiting Superstores.

LARGE RETAIL ORDINANCE VERSION A:

49,999 Square Foot Cap Size in Certain Zones

In preparing Version A of the large retail ordinance, the City Attorney retained the substantive elements of the ordinance that was the subject of the former City Manager's Report No. 05-136. This ordinance had evolved over several years of public discussion and was the referenced subject for City Council's direction on September 18, 2006. In keeping with that ordinance, the City Attorney maintained a 49,999 square foot cap in Version A prohibiting new large retail development (defined as 50,000 square feet or more of gross floor area) in the CN, CO, CV, IP, IH, IS and IL-1-1 base zones. The policy underlining the cap was that new large retail establishments would not be compatible with the character of these commercial and industrial base zones. Under Version A, existing large retail establishments in these zones can continue to exist, but cannot expand or enlarge.

Applicability of Discretionary Review to New and Previously Conforming Large Retail

Under 100,000 square feet: Retaining the substantive elements of the underlying ordinance and in accordance with Councils' direction, Version A requires new development of a large retail establishment between 50,000 and 99,999 square feet in the CC, CR, IL-2, IL-3, and all planned districts except in CCPD to obtain a NDP under Process 2 (Development Services staff level review). Under Version A, previously conforming large retail establishments in these zones can expand up to 99,999 square feet without discretionary review by simply obtaining a construction permit, complying with previously conforming landscape requirements, complying with new setback requirements, and complying with new pedestrian path requirements (existing large retail establishment do not have to comply with building articulation standards).

100,000 square feet plus: Council directed the City Attorney to remove the 150,000 square foot cap (which in the original ordinance applied in all zones except the CR zones and CCPD) and establish a Process 4 SDP at 100,000 square feet in the CC zones and planned districts. Retaining the substantive elements of the original ordinance and in accordance with Council's direction, Version A requires new development of large retail establishments of 100,000 or more square feet in the CC zones and all planned districts to obtain a SDP under Process 4 (Planning Commission Hearing). Version A also requires that any expansion or enlargement of a previously conforming large retail establishment resulting in a structure of 100,000 or more square feet in the CC zones or in all planned districts to obtain a SDP under Process 4. Finally, under Version A, new development and expansion of previously conforming large retail establishments of 100,000 square feet plus in the IL-2, IL-3, and CR zones only requires a NDP under Process 2 because large structures were determined to be compatible within these zones. This was a policy decision made within the original draft ordinance.

Deviations:

Retaining the substantive elements of the original ordinance, Version A does not allow for deviations and will require large retail establishments to fully comply with the new requirements in Section 143.0355 (e.g., landscape, setbacks, pedestrian paths, and applicable only to new development, building articulation).

LARGE RETAIL ORDINANCE VERSION B:

49,999 Square Foot Cap Size in Certain Zones

Version B changes the provisions of the original ordinance and removes the 49,999 square foot cap in the CN, CO, CV, IP, IH, IS and IL-1-1 base zones. This change allows

for large retail development in zones that would have otherwise been restricted to less than 50,000 square feet in the original ordinance.

Applicability of Discretionary Review to New and Previously Conforming Large Retail

Under 100,000 square feet: Version B changes the provisions of the original ordinance and modifies Council's direction by requiring new development of 50,000 or more square feet to obtain a NDP under Process 2 in all commercial and industrial zones, and all planned districts except the CCPD. Unlike Version A, Version B allows for large retail development in several commercial and industrial zones provided they obtain an NDP under Process 2. Version B deals with expansion of previously conforming large retail establishments up to 99,999 square feet in the same manner as Version A, by only requiring a construction permit, and compliance with previously conforming landscape requirements, new setback requirements, and new pedestrian path requirements (existing large retail establishments also do not have to comply with building articulation standards).

100,000 square feet plus: Version B changes the provisions of the original ordinance by requiring new development of 100,000 or more square feet in all commercial and industrial zones, and all planned districts to obtain SDP under Process 4. The primary distinction between Versions A and B is the point at which a SDP under Process 4 is triggered (this distinction is important given the scarcity of land in the City because most retailers are moving into existing buildings and obtaining previously conforming rights). Under Version B, only when expansion of a previously conforming large retail establishment results in a structure of 100,000 or more square feet AND causes an increase in "average daily trips," is a SDP under Process 4 required. Otherwise, no discretionary review is required and previously conforming large retail establishments can expand beyond 100,000 square feet if they simply obtain a construction permit, and comply with previously conforming landscape requirements, new setback requirements, and new pedestrian path requirements (no building articulation standards apply).

The IBA and the Office of the City Attorney have concerns regarding the inclusion of the "average daily trip" (ADT) criteria in Version B. The rationale for, and application of, the ADT criterion was not fully explained in the Report to the City Council. It is our understanding that Process 1 projects (no discretionary review) are not reviewed by the City's Traffic Engineering Department and that it may be challenging for Development Services staff to properly ascertain traffic impacts. The best method to evaluate a permit requiring traffic analysis is typically through a discretionary review process wherein the appropriate department reviews and comments on the impacts of the project. The Office of the City Attorney has suggested that the ADT criterion would be more supportable if it were to be evaluated in at least one public workshop and thereafter developed into an appropriate discretionary permit process.

Deviations:

Version B changes the provisions of the original ordinance by allowing for deviations from the new requirements of section 143.0355 (e.g., landscape, setbacks, pedestrian paths, and applicable only to new development, building articulation).

ORDINANCE PROHIBITING SUPERSTORES

Pursuant to Council's direction, the City Attorney prepared an Ordinance Prohibiting Superstores (OPS) similar to the ordinance attached as Item 6 to Manager's Report No. 05-136, without the "SKU" component because it was determined to be unnecessary and potentially confusing for various retailers. The OPS maintains the same 90,000 square feet and 10% thresholds, and in lieu of the SKU component, adds an exception for discount warehouses and discount retailers that sell in large quantities or in bulk and require a membership fee (precisely what the SKU component was designed to do).
It is important to note that the City Attorney prepared the OPS as a stand alone ordinance that is not contingent upon the adoption of Version A or Version B of the Large Retail Ordinance.

The suggestion on page 4 of the Report to the City Council (No. 06-149) that the OPS is unnecessary if Version B is adopted is misleading. The Report to the City Council states that "Version B will provide adequate protection for the public health and safety, especially when combined with the required market impact analysis proposed in the Economic Prosperity Element," of the Draft General Plan. The City Council cannot reasonably rely on a "draft" of the General Plan that is subject to change and will likely take significant time to codify/implement. Additionally, the subject market impact analysis provision in the current draft of the General Plan is triggered by development at 120,000 square foot threshold. Superstores are already being built significantly under that threshold (e.g., a Superstore recently opened in Florida at 99,999 square feet).

Version B of the Large Retail Ordinance alone requires a SDP under Process 4 only if a development reaches 100,000 square feet and causes an increase in daily trips. This provision would not apply to superstores opening under 100,000 square feet or those that exceed 100,000 square feet in previously conforming development structures without impacting average daily trips. Version B of the Large Retail Ordinance does not define superstores and does not require any market impact analysis. Given that the "prevention of blight" was one of the findings that the City Council made when it directed that an ordinance prohibiting Superstores be prepared, it is logical that, absent OPS, an economic impact analysis requirement be included in Version B.

The IBA does not believe that Version A or Version B of the Large Retail Ordinance will effectively regulate Superstores. Without the OPS, superstores would remain undefined

and allowed in any zone that allows for large retail establishments. The City Attorney's Office shares this opinion and will be prepared to answer any questions in this regard.

CONCLUSION

This report was written with the objective of clarifying differences and presenting certain issues related to the three large retail ordinances that have been submitted for consideration. The IBA issued Report 06-39 prior to City Council discussion concerning the regulation of large retail development on September 18, 2006. One of our primary findings in that report was that developing policy to regulate large retail development warrants thoughtful research and discussion. We noted that staff from the Planning, Economic Development and the City Attorney's Office had, over time, done an excellent job of researching information for consideration. We would reiterate this finding and encourage the City Council to ask these staff any questions they may have regarding policy for regulating large retail development, including Superstores, prior to taking action with respect to these ordinances.

IBA Report 06-39 also recommended that the City Council consider requiring economic impact reports for proposed large retail development. Economic impact reports can assess the business, fiscal, employment and community investment impacts of large retail development, including Superstores. Previous discussion by the Planning Commission and the Land Use & Housing Committee contemplated the benefit of requiring an economic impact report for large retail development of 100,000 square feet or greater; however, the availability of fiscal and economic impact information is now tied to a pending 120,000 square foot requirement within the draft Economic Prosperity Element of the General Plan. Some superstores and other large retail development currently exist/operate with less than 100,000 square feet of gross floor area. In order to ensure that the City Council has a useful tool for evaluating site-specific land use decisions, it would be the IBA's suggestion that a requirement for an economic impact report be, at a minimum, triggered at 100,000 square feet and further be considered for incorporation into either version of the Large Retail Ordinance discussed in this report.

[SIGNED]

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