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## Urban Planning and Land Use

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**To:** City Planning Commission

**From:** City Staff

**Date:** February 11, 2019

**Re:** **Proposed Ordinance Amendment definitions and a new provision to Section 27-593(a), Planning and Development of Kansas City, Kansas Code of Ordinances, requiring a special use permit for small box variety stores.**

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### GENERAL INFORMATION

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This is a follow up to a request of staff from the Board of Commissioners to prepare and process an ordinance concerning small box variety stores. An amendment was passed in 2016, but when a subsequent ordinance was passed it inadvertently deleted this ordinance. Additionally, we were made aware of some potential legal issues with the format of the old ordinance, so the new ordinance has been modified following a national example.

Two studies are attached and links are listed in the whereas clauses of the ordinance that give significant background on the need for this regulation. The first is the Kansas City, Kansas Health Food Assessment from October of 2017. The study notes we have significant gaps in physical food infrastructure, food related disease in Wyandotte County, low incomes, and the need for community action. It recommends a plan to build a community-based food system, raise funds for that infrastructure, and engage community residents in the discussion. To that end, the Unified Government imitated the Northeast area Master Plan. A primary tenant of the now adopted plan is urban food access and new grocery services. Additionally, the Unified Government has contracted with a local coop, the MERC, to occupy a new grocery store built by the Unified Government. That investment is approximately 6 million dollars! To assure the success of that store, the Unified Government sent individual fliers to over 19,000 urban addresses seeking input at 4 public meetings on the new grocery store.

Secondly, we have attached a study by the City of New Orleans titled Small Box Retail Diversity study. Key findings are that small box retail stores may impede the entry of full line grocery stores. That is a very important finding given the findings of the study noted above. The second finding that is key to the need for this ordinance is that with few exceptions, these stores do not provide for the sale of fresh fruits and vegetables. Access to fresh fruits and vegetables is a key part of beginning to eliminate food related disease.

There is a great need for this ordinance amendment in a community with such severe food and health issues when these stores have the potential to impeded full service grocers and they generally fail to provide the fresh fruits and vegetables necessary for healthy living.

Please take the time to read and understand each of the attached studies. The executive summaries will be included in this report.

**Purpose:** To better regulate the total number and proximity of small box retail stores to assure the best possible opportunity to provide fresh fruits and vegetables to the community.

**Advertisement:** Wyandotte Echo – January 17, 2019

**Public Hearings:** February 11, 2019

**Public Opposition:** We have received a letter in opposition to the previous ordinance by a representative of a small box retail store chain. That letter is attached. Planning and legal staff believe we have addressed the legal concerns expressed in that letter and that it is not applicable to this ordinance.

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## PROPOSAL

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This ordinance recognizes that small box retail stores may serve needs that are not being served by other businesses in the neighborhood. However, the proliferation of these stores near each other can negatively impact the character of the neighborhood. They also have the potential to inhibit the provision of healthy foods as described above. The following guidelines are meant to allow for the provision of healthy foods and preserve the character of each neighborhood while still allowing small box retail stores to flourish.

Currently, more than 30 small box variety stores exist, with many near each other. Some are national chains while others are not. In the proposed ordinance, the separation requirement of 10,000 feet was determined after considering current location patterns and pedestrian and transit access.

While this definition encompasses what are commonly referred to as dollar stores, it would also include other retailers meeting the definition below. The proposed ordinance follows.

(Published \_\_\_\_\_)

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE providing a definition of “small box variety store” and requiring a special use permit for new small box variety stores; amending Sections **27-340** and **27-593** to Chapter 27, Article VIII, of the 2008 Code of Ordinances and Resolutions of the Unified Government of Wyandotte County/Kansas City, Kansas.

WHEREAS, a significant number of small box variety stores are already in operation in Kansas City, Kansas; and

WHEREAS, many of the small box variety stores are currently in close proximity to one another; and

WHEREAS, while it is recognized that small box variety stores may be the only convenient source of some food items for people in areas underserved by traditional grocery stores, it is also recognized that small box variety stores offer limited healthy fresh food options, especially when it comes to fresh fruits and vegetables and fresh or frozen meats; and

WHEREAS, many small box variety stores do not include WIC essential items and therefore are not certified to accept WIC coupons; and

WHEREAS, 10% of Wyandotte County households have no access to a vehicle, and therefore according to experts, in order to adequately reach these shoppers, fresh food should be available less than a one-quarter mile walk from each home; and

WHEREAS, while it is necessary to continue to allow the presence of small box variety stores, it is also necessary to regulate them and to encourage stores to offer more healthy fresh food options; and

WHEREAS, such regulations will promote the efficient use of land and resources in Kansas City, Kansas and are necessary to protect the health, safety, and welfare of the citizens of Kansas City, Kansas; and

WHEREAS, the findings contained in the Crossroads Resource Center's "Kansas City, Kansas Healthy Food Assessment" dated October 2017 and the City of New Orleans' "Small Box Retail Diversity Study" dated December 18, 2018 are incorporated by reference herein. Copies of the findings are available online at <https://www.crcworks.org/kswyco17.pdf> and <https://www.nola.gov/getattachment/City-Planning/Major-Studies-and-Projects/Small-Box-Retail-Diversity-Study/Small-Box-Retail-Diversity-Final-Report.pdf/>, and are also available for public inspection during regular office hours of the Unified Government Clerk, Municipal Office Building, 701 N. 7<sup>th</sup> Street, Kansas City, Kansas.

**BE IT ORDAINED BY THE UNIFIED GOVERNMENT COMMISSION OF  
WYANDOTTE/COUNTY/KANSAS CITY, KANSAS:**

**Section 1.** That Chapter 27, Planning and Development, Article VIII, Section **27-340 and 27-593** of the 2008 Code of Ordinances and Resolutions of the Unified Government of Wyandotte County/Kansas City, Kansas, are hereby amended to read as follows:

**Sec. 27-340. – Definitions.**

Small box variety store means a store of 15,000 square feet or less which sells at retail an assortment of physical goods, products, or merchandise directly to the consumer, including food or beverages for off-premises consumption, household products, personal grooming and health products, and other consumer goods. Small box variety stores do not include retail stores that:

- (1) dedicate at least 15% of shelf space to fresh or fresh frozen food;
- (2) dedicate less than 2% of shelf space to food of any kind;
- (3) contain a prescription pharmacy, or
- (4) offer for sale gasoline or diesel fuel.

Fresh or fresh frozen food means food for human consumption that is unprocessed, or otherwise in its raw state; food that was quickly frozen while still fresh. This includes unprocessed meat and seafood.

**Sec. 27-593. - Allowable special uses.**

- (b) The following uses are permitted only on approval of a special use permit regardless of the zoning district of the proposed location:

(21) Small box variety stores only in C-2 general business district, C-3 commercial district, M-1 light industrial and industrial park district, M-2 general industrial district, and M-3 heavy industrial district subject to the following criteria:

a. Separation Requirements

1. No small box variety store shall be located within 10,000 feet of any other small box variety store or within 200 feet of any property used primarily for a single-family residence, a two-family residence, a town home, or any apartment building. The separation distances shall be measured from property line of the small box variety store to the property line of the property containing the residential use. This separation provision shall not apply to any small box variety store that can demonstrate to the Unified Government that they were in operation at the location requested in the license application prior to the effective date of this article, and that they have operated continuously under the same business name since that time.

b. Signage

1. Following all permanent sign requirements under section 27-727.

c. Façade, Landscaping, and Screening

1. All commercial design guidelines must be met for all facades including, but not limited to, the creation of quality development with respect to site planning, architectural design and landscaping.
2. Commercial uses in industrial districts shall be subject to commercial design guidelines.

PASSED BY THE COMMISSION OF THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS, THIS 28th DAY OF FEBRUARY 2019.

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David Alvey, Mayor/CEO

Attest:

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Unified Government Clerk

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## ATTACHMENTS

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Via weblinks:

City of New Orleans titled Small Box Retail Diversity study (executive summary included below)

Kansas City, Kansas Health Food Assessment from October of 2017 (executive summary included below)

Letter in opposition

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## STAFF COMMENTS AND SUGGESTIONS

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The staff recommends approval.

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## REVIEW OF INFORMATION AND SCHEDULE

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Action	Planning Commission	Unified Government Commission
Public Hearing	February 11, 2019	February 28, 2019

**STAFF CONTACT:**      **Rob Richardson**  
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## MOTIONS

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I move the Kansas City, Kansas City Planning Commission **RECOMMEND APPROVAL** of this ordinance amendment to the Unified Government Board of Commissioners as meeting all the requirements of the City code and being in the interest of the public health, safety and welfare subject to such modifications as are necessary to resolve to the satisfaction of City Staff all comments contained in the Staff Report; and the following additional requirements of the Kansas City, Kansas City Planning Commission:

1. \_\_\_\_\_;
2. \_\_\_\_\_; And
3. \_\_\_\_\_.

**OR**

I move the Kansas City, Kansas City Planning Commission **RECOMMEND DENIAL** of this ordinance amendment, as it is not in compliance with the City Ordinances and as it will not promote the public health, safety and welfare of the City of Kansas City, Kansas; and other such reasons that have been mentioned.

## Executive Summary Small Box Retail Diversity Study – New Orleans

### A. Executive Summary

#### Introduction

Small box discount stores, commonly known as “dollar” stores, have operated across the United States for well over a century. These original “five and dime” stores, such as Woolworth’s, have since closed, but newer iterations such as Dollar General, Family Dollar, and Dollar Tree, all of which emerged in the 1950s, have filled the gap. The small box discount industry is well-established in New Orleans and has been for decades. According to Dollar General, for example, the chain opened its first store in New Orleans in 1983.

Following national trends, small box discount stores have rapidly proliferated across the city in recent years. New Orleans East, in particular, contains a disproportionate number of these stores compared to other retail options—most notably full-line grocery stores. Currently, two grocery stores and 12 small box discount stores operate in New Orleans East.

In an effort to address this rapid expansion citywide, but particularly in the East, including the hypothesis that small box discount stores may impede the entry of full-line grocery stores, which are a source for fresh food, City Council adopted Motion (As Corrected) M-18-256 on June 21, 2018 directing the City Planning Commission to produce this Small Box Retail Diversity Study. The scope of the Small Box Retail Diversity Study is outlined in the motion and directs the City Planning Commission to explore the following subject matter in its study:

- Define “small box discount stores”
- Explore regulations such as the following:
  - Use standards:
    - Requirements to provide fresh food
    - Limitations on the sale of alcohol
    - Restrictions based on spacings/block-face
    - Any necessary restrictions to assist in curbing the proliferation of small box discount stores that fail to offer fresh fruits and vegetables
    - Appropriate zoning districts where “small box discount stores” may be permitted by right, conditional, and prohibited
- For the purposes of the study, “small box discount stores” include businesses that have a floor area of 5,000 to 10,000 square feet, which sells at retail physical goods, products, or merchandise directly to the consumer, including food or beverages for off-premises consumption, household products, personal grooming and health products, and other consumer goods, with the majority of items being offered for sale at lower than the typical market price, but does not:
  - Dedicate at least 15% of floor area to fresh foods and vegetables
  - Contain a prescription pharmacy, or
  - Offer for sale gasoline or diesel fuel



## Key Findings

Based on the review of practices in other communities and the analysis of the current situation in New Orleans, the following key findings informed the proposed Small Box Retail Diversity Study recommendations:

### Small Box Discount Store Findings

- Small box discount stores are prolific in New Orleans. There are 36 stores citywide, including 12 in New Orleans East. Small box discount stores tend to cluster.
- All retail uses, including small box discount stores, fall into the retail goods establishment category; small box discount stores are permitted or conditional anywhere that the retail goods establishment use is permitted or conditional.
- Small box discount stores such as Dollar General, Family Dollar, and Dollar Tree range in size from 7,800 to 12,000 square feet in floor area.
- With the 2008 economic recession, small box discount stores began to attract more customers outside of the low-income demographic.
- Major small box discount store chains are continuing to open new stores and develop new types of store formats.
- Some small box discount stores poorly manage store exteriors, resulting in litter, uncontained refuse in the dumpster area, and poorly maintained landscaping.
- With one exception, existing small box discount stores in New Orleans that sell food products do not provide fresh fruit and vegetables.<sup>1</sup>
- A retail goods establishment may not sell alcoholic beverages unless retail sales of packaged alcoholic beverages is allowed within the district or if it is conditional upon receiving conditional use approval. Only four districts (C-3 Heavy Commercial, LI Light Industrial, HI Heavy Industrial and MI Maritime Industrial) allow retail goods establishments to sell packaged alcoholic beverages by right.

### Grocery Stores

- Full-line grocery stores generally range from 25,000 to 60,000 square feet, though smaller versions are also located in New Orleans.
- Larger retail goods stores, such as grocery stores, are prohibited in districts such as HMC-1 and other districts with low maximums for total floor area. The HU-B1, HU-B1A, HU-MU, S-B1, S-LB1, S-LB2, and S-MU Districts permit uses up to 5,000 square feet of total floor area, but uses exceeding that threshold are subject to conditional use approval. In HMC-2, non-residential uses over 10,000 square feet, such as a grocery store, are conditional uses. HU-B1, HU-B1A, HU-MU, S-LB1 and S-LB2 prohibit uses over 10,000 square feet, effectively eliminating larger full-line grocery stores from those districts.
- Grocery stores have a wide range of location selection criteria in determining the best areas to locate, including area demographics, existing and planned food sale developments, median home sales price, median incomes, location and size of competitors, traffic counts, violent and property crime, and policy presence.

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<sup>1</sup> Dollar General Market at 2001 St. Bernard Avenue

## Public Health & Food Access

- Obesity and associated diseases such as diabetes have increased threefold since 1990 as a result of increased consumption of calorie-dense foods paired with insufficient physical activity. African Americans are disproportionately more obese and suffer from associated diseases than their white and Latino counterparts.
- Many New Orleans residents have low access to healthy, nutritious food.
- Studies are mixed when it comes to the linkage between availability of fresh food and overall health as well as the availability of fresh food and the purchase of fresh food.
- Stores can implement changes to the in-store environment to influence purchasing behaviors, such as placing particular items in prime locations and promotional advertising within the store.
- All store types, including traditional, full-line grocery stores, devote more shelf space to unhealthy items than to healthy items.
- Local small box discount retailers such as Family Dollar, Dollar General, and Dollar Tree all accept SNAP, but none accept WIC.
- No causal link has been found between childhood obesity and the existence of small box retail stores in their communities
- Toxic chemicals have been found in the products of major small box discount store chains. While many of these companies have yet to implement comprehensive chemical management policies, unfortunately the presence of hazardous chemicals in retail products is not limited to these types of stores.

## General Land Use

- New Orleans East, Gentilly, and parts of Algiers are more suburban and automobile-centric in their development pattern than older parts of New Orleans; therefore, any policy changes may need to be tailored to different areas of the city.
- Current Comprehensive Zoning Ordinance regulations prevent retail sales associated with an agricultural use not located in an Open Space, Rural Development, or non-residential districts despite the fact that agriculture is permitted or conditional in several residential districts, including the historic core, historic urban, and suburban residential districts.
- There is a discrepancy in the interpretation of Section 21.6.A, which prohibits detached accessory structures from being constructed prior to construction of the principal building to which it is accessory. As agricultural uses typically rely on “accessory” structures such as sheds and chicken coops and do not typically require a traditional principal structure, this interpretation could negatively impact agricultural uses.

## Case Studies

- With the implementation of Tulsa’s Healthy Neighborhood Overlay, which requires at least a one mile distance between small box discount stores, several small box discount stores have located just outside the boundary of the overlay in order to avoid this restriction.
- Zoning is one tool that can assist in increasing the availability of healthy food in areas with low access; however, for best results other initiatives or incentives should be incorporated.

- Research shows that Minneapolis' Staple Foods Ordinance has not increased the purchase of healthy "staple" foods. In addition, it has not been linked to an increase in healthy food availability as retailers in St. Paul, which does not have a Staple Foods Ordinance, are also getting healthier.
- Programs with financial incentives, such as the Fresh Food Retailer Initiative and the Healthy Corner Store Collaborative are providing access to fresh food in low-access areas.

## **Enforcement**

- Existing small box discount stores are currently classified under four different occupational license categories which may create inconsistencies with enforcement especially if the City desires a change in policy that would specifically target this use.
- Code Enforcement and the Department of Sanitation can also only enforce the City Code on property owners and cannot write violations to the tenants of a property. This is an issue, specifically as it relates to small box discount stores, because small box discount stores are typically not the property owners of the buildings where they operate in New Orleans.

## **Crime**

- Crime data retrieved from the New Orleans Police Department indicates that perceptions of crime in New Orleans East may be more based on concentrated, high-profile violent crime whereas crime statistics actually show a more nuanced situation. While the violent crime rate per 100,000 residents is higher in New Orleans East than in Orleans Parish as a whole, the property crime rate for this area is lower.



# Executive Summary Kansas City, Kansas Healthy Food Assessment

Wyandotte County, Kansas — Crossroads Resource Center — October 2017



## EXECUTIVE SUMMARY

“Good bones” is a phrase residents use to describe the neighborhoods and communities in Kansas City, Kansas. They say the neighborhoods are “well-built,” with deep commitment and pride in their own community. Yet the city is disparate, varying greatly from one side of town to the next, with distinct enclaves of African-Americans, Latinos, and Asian-Americans amidst a majority white population. One of the most diverse in the state, the city hosts residents who speak more than 50 different languages.

Neighborhoods hold unique and individual identities centered upon cultures that persist today. Although this contributes to Kansas City’s<sup>1</sup> rich and diverse identity, it also contributes to a pervasive sense of “us and them,” which challenges broad investment efforts. Poverty and food insecurity are ever-present, with 46% of county residents earning less than a living wage.

Wyandotte County has a relatively rich food retail environment, boasting many culturally identified groceries, stores and food manufacturers of all sizes, five farmers’ markets, a solid cluster of productive urban farms, dozens of community gardens, and orchards that are open for community members to freely harvest.

Further, the county is home to a substantial cluster of food enterprises. Federal data show that there are 435 food-related businesses in the county, hiring more than 12,093 employees, who earned more than \$491 million in 2015. This amounts to about 14% of all firms in the county, 17% of the employees, and 15% of payroll.

### Independent Grocers are Strong

Quite unique to Kansas is the city’s concentration of locally and/or independently owned grocery stores. Of the 10 largest national grocery retailers chains, only 2 — Wal-Mart and ALDI — have locations in Kansas City, Kansas. Instead, smaller chains, such as those operated by Balls Food (Hen House, Price Chopper, and Sun Fresh), dominate the market.

Yet despite this proud tradition of independent ownership, we heard considerable concern that national chains such as Wal-Mart were taking over and compromising the viability of independent stores. Simultaneously, as in many urban centers, grocers are considering opening smaller-format stores that appeal to urban professionals who wish to walk to stores near their homes, and who shop several times a week to get the freshest possible selection. Home delivery is competing with large retailers.

### Residents Seek Cultural Gathering Spaces

Yet Wyandotte County residents do not feel their needs are being met. In interviews we held with 56 residents and experts, respondents expressed deep disappointment they could not shop at stores that were also cultural gathering places.

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<sup>1</sup> In this report, the name “Kansas City” refers to Kansas City, Kansas, unless specifically stated as Kansas City, Missouri, or as the broader Kansas City metropolitan area.

Latinos we interviewed named El Torito, Bonito Michoacan, and Sun Fresh Market as the primary places where they shop for their culturally relevant groceries, but one pointed out that while these are important gathering spaces, their size is limited. One Latino grocer, we were told, hopes to build an entire Mercado that would provide more of such space and a stronger ambience.

African-Americans mentioned that they often are not comfortable shopping in stores with Spanish language signage, and would prefer stores that offer an African-American cultural feel. Many simply looked for stores that are neighborhood gathering points where they can meet others who live nearby. One group of African-American leaders called very pointedly for a cooperatively-owned grocery (See Appendix K).

#### **Kansas City is a National Leader in Urban Food Production**

Kansas City residents are not limited to purchasing food. Indeed, the city has become a national leader in urban food production. This is a strength upon which the UG can build.

Cultivate Kansas City has drawn national attention for its persistent efforts to build a base of food production inside city limits. The New Roots for Refugees Farm Training Program at Juniper Gardens, a collaboration between Cultivate Kansas City and Catholic Charities of Northeast Kansas, currently hosts farmers from the Democratic Republic of Congo, Burma, and Bhutan. To date, Juniper Training Farm has graduated 20 farmers, 17 of whom farm commercially. The farms sell food directly to about 300 households through a Community Supported Agriculture (CSA) program. The program has developed a “Veggie ID” resource page to help consumers make use of the items they find at market and in CSA shares. Unfortunately, the CSA shares are largely distributed outside of the urban core to more prosperous clients, to Kansas City, Missouri, or to group pick-up sites. Program leaders think that offering delivery options has proved important to increasing CSA enrollment.

When including sales from the Gibbs Road Farm, Cultivate Kansas City farms reports that its farms sold \$304,000 worth of produce and CSA shares in 2016. Similar to the New Roots program, most of their produce is sold outside of Wyandotte County, with produce going to Kansas City, Missourians and northern Johnson County, KS residents. This may seem like a relatively small amount, but it is nearly triple their 2007 sales. Moreover, it constitutes 10% of all farm product sales reported by county farms. In 2012, the year of the most recent Census of Agriculture, Cultivate Kansas City’s two farms sold 61% of all produce sold by farms in the county.

Kansas City, Kansas, also hosts 24 community garden sites, where dozens of residents grow their own food. Gardeners can draw upon a metropolitan-wide network of support in their endeavors.

#### **Significant Gaps Remain**

Despite these strengths, significant gaps exist in the Wyandotte County food system. One of the key gaps is a lack of physical and other infrastructure that creates efficient community food trade, and connects farmers more closely with consumers, as prior reports have noted.

Given income inequalities, however, such investments will not in themselves address the food needs of lower-income residents. Federal data show that 32,723 county residents collected

SNAP benefits in 2011, or 20% of the population. This was a substantial rise from 12,516 (8%) in 2000 (Federal Census 2011-2015).

The food bank, Harvesters, along with its partner pantries, works diligently to reduce food insecurity. 36,200 unique residents (11,200 households) of Wyandotte County rely on the Harvesters network for some food assistance. Another 40,000 residents are vulnerable because they earn less than a living wage. What were once considered “emergency” programs have become a permanent part of the food landscape.

#### **Residents Suffer from Significant Food-Related Disease**

A lack of proper food and exercise is costly to county residents. As of 2015, 13% of Wyandotte County residents had been diagnosed with diabetes (Kansas Department of Health and Environment, 2015). This stands as the ninth-highest rate for any county in Kansas, and is considerably above the state rate of 10% (Kansas Department of Health and Environment, 2015). The American Diabetes Association estimates that the medical costs for treating diabetes and related conditions in the state of Kansas are \$2 billion per year (American Diabetes Association, 2012).

#### **Resident Purchasing Power is Substantial**

Current market conditions favor the importation of food from distant places. County residents spend at least \$450 million (conservatively estimated) each year buying food sourced outside the region.

This spending represents both a community asset and a liability. At the current time, this contributes to a weakened county economy by siphoning money to other regions of the U.S. and globally. Yet it simultaneously represents a significant market for food that Wyandotte County farmers and food processors could strive to reach.

#### **Commodity Farms Struggle**

Most of the 164 commercial farms left in the western section of the county are having difficulty, as well. One adjusted for inflation, Wyandotte County farmers earned \$6.5 million less in net cash income in 2015 than they had earned in 1969. Some have sold their land for development, while those that remained doubled their farm productivity, but the economic strength of the farm sector as a whole declined. Since 1994, the most reliable way of earning net income as a farm owner has been to rent out land for someone else to farm — not by producing crops or livestock.

#### **Food Stamps Have Become an Important Economic Engine**

In a bizarre twist, a county with a strong agricultural heritage now finds that food stamps (Supplemental Nutrition Assistance Program, or SNAP) benefits have become more important in sourcing food than farming. SNAP recipients brought \$40 million into Wyandotte County in 2015, much of which was spent buying groceries at local stores and farmers markets.

This suggests that building local food trade is an exceptional economic development opportunity. If Wyandotte County were able to connect more local residents directly to local farms, impacts could be quite large. Even if each resident spent only \$5 each week buying food directly from any farm in the county, this would result in an additional \$42 million of income for those farmers. This is fourteen times current sales made by county farms.



### Emerging Initiatives

Responding to resident concerns about food access, Wyandotte County has implemented several programs and policies that effectively create access to healthy food and promote self-sufficiency. It has adopted zoning codes that deem agriculture a permitted use in residential districts, established special use permits for backyard hen keeping, classified farmers' markets as accessory uses in many districts, and launched the H2O to Grow program offering grants to increase water access for community gardens.

Mayor Holland's initiative to form a public-private partnership to build a grocery store as part of a Healthy Campus near downtown would serve as a dramatic expansion of these efforts. The UG hopes to invest as much as \$16 million (Reno, 2017) to achieve this vision, offering to pay for construction of a new grocery store that would be operated by a private firm. This store would be adjacent to other organizations and businesses that promote healthy lifestyles.

Taking such a step to invest in a cluster of firms addressing health would place Kansas City and Wyandotte County in a position of bold leadership nationally. Furthermore, this action holds the potential for creating equitable access to healthy, affordable, and culturally appropriate foods for low-income residents, if additional steps are taken.

### Comprehensive Vision and Action Required

This will require that the UG adopt more comprehensive initiatives. During interviews addressing the possibility of expanding food production in the county, UG leaders took the position that they are waiting for a developer to come forward that would both establish a vision and invest in it. Our experience suggests that such a strategy will fail. The changes that need to be made are systemic and long-term, not suited to the rapid return on investment that developers typically seek. These changes will only come about if UG officials become proactive, working with residents to frame an effective, pragmatic, and inclusive vision, and then crafting proper incentives so that developers and other investors find financial reasons to promote the civic vision.

Leaders of Healthy Communities Wyandotte have proposed that one effective way for the UG to establish a lasting commitment to food access is to amend the 2008 City Wide Master Plan. Indeed, this plan mentions food only once and only as it pertains to providing food and habitat for fish and wildlife. Yet the Plan's stated vision (page 1) is to support healthy neighborhoods; A fundamental aspect of healthy neighborhoods is consistent access to healthy food.

One of the Plan's intentions is "to recognize, reinforce, and enhance established neighborhood identity and sense of place." What a healthy neighborhood or community looks like is never defined or detailed in a way that accounts for food, food access, nutrition, or food production (with the exception of agriculture being an acceptable use in some areas). Moreover, since the 2008 Plan was constructed under the vision of former Mayor Joe Reardon, it does not reflect current Mayor Mark Holland's priorities on improving local health outcomes.

However, residents we interviewed do not perceive that the lack of access to grocery stores is the biggest issue they face. Almost everyone involved in focus groups readily named three or more stores where they shop routinely. Each knew the strengths and weaknesses of each store

quite vividly. Many mentioned that they have difficulty getting to these stores, or eating well, for a variety of reasons.

The largest concern residents expressed was about being marginalized. Most felt they had little access to political power to shape the public discourse, little commitment from public officials to address their needs, and limited responsiveness from food businesses.

Moreover, low-income and marginalized residents face multiple issues at once, and these cannot be resolved simply by launching a new program. This was eloquently portrayed by one resident we interviewed: “Families and households are so marginalized already. We need a whole systems approach. We can’t just chip away at one thing, it’s so layered. Is the gas and electricity on at the house? Do they have cutlery? Pots and pans? Cooking skills? It’s all present. It’s all urgent. We need to serve the whole person. We need more collaboration.”

#### **Our Recommendations**

A. First and foremost, the UG must assert civic leadership that is committed over the long haul to ensuring safe and healthy neighborhoods that include access to healthy foods — as well as the freedom, and connectedness, to shape public policy and to live healthy lifestyles based on community values.

Specifically, we suggest that the UG Master Plan be amended to reflect this commitment and to establish long-term political will. We suggest specific language below.

B. Food system leaders in Wyandotte County should commit themselves to building a community-based food system, not simply a “local” food system. See page 7. This food system should be centered upon efforts to grow more food within the County, with priority on urban parcels, and priority in ensuring that marginalized residents can own and operate emerging food businesses. Efforts to train new farmers must be made permanent, with economic incentives appropriate for new small to larger scale farms, as well as for farmers wishing to expand their operations. Ongoing support must be given to immigrant farmers who wish to engage in local food trade. Wherever possible, food trade should connect Wyandotte County farms with Wyandotte County residents to build stronger economic, cultural, and social networks.

C. Persistent outreach efforts must engage Wyandotte County residents — at all income levels — to support community food businesses. Specifically, we encourage campaigns such as the “Buy Five Dollars from a local farmer each week campaign, as adopted in other states, which could bring \$42 million to county farmers.

D. Wyandotte County food system leaders, in collaboration with the UG, and business leaders should host an annual community-based food summit. Hosting such an annual gathering will raise the visibility both of community foods efforts and the need to eat better to attain better health outcomes. In turn, this will hopefully encourage more residents to place a priority on purchasing food from local farms and improving their nutrition practices.

E. Wyandotte County must raise funds to specifically invest in community-food-system development. This might be accomplished internally by issuing municipal bonds, or creating a special sales tax levy, or expanding allocations for small business development funds to specifically incentivize health initiatives. External sources of money, such as New Market Tax



Credits, philanthropic dollars, federal and state funds, should also be raised. Public and private funds should be dedicated to ensure that local businesses are informed of and take advantage of local investment opportunities.

F. With regard to the Healthy Campus, our team recommends that any store that may be invited to locate in conjunction with the YMCA be invited to open up two stores — one at the campus, and another that is located in Northeast in a smaller format.

G. Local food system leaders should build a solid leadership network that effectively coordinates local foods activity in an inclusive manner.

H. Wyandotte County food system leaders, in collaboration with the UG, should coordinate with Greater Kansas City efforts to brand foods that are grown in the region. As one example, the UG might wish to launch “Best in Wyandotte” awards that showcase community health and wealth practitioners. More on branding is mentioned in the Northeast Kansas Food Hub Feasibility Study (Flaccavento, *et al.*, 2014).

I. Revise the Mobile Vending ordinance to specifically allow for mobile food retail in residentially zoned areas. Additional policy actions are outlined in Appendix I.

J. **Maximize Use of Federal Food Assistance Programs.** In particular, foster SNAP (Supplemental Assistance Nutrition Program, formerly called food stamps) enrollment so that all those eligible receive benefits. While these benefits are a stopgap measure, they are an important safety net. SNAP brought \$41 million into the Wyandotte County economy in 2015, directly benefitting low-income residents, farmers, and grocers. This program already involves a significant part of the county population: 20% of county residents currently receive food stamps. Additional benefits are extended to seniors through the Seniors Farmers Market Coupons, and use of these should also be maximized.

Our recommendations might be summed up as follows: Wyandotte County needs to have the political will to operate in a proactive manner to achieve a long-term vision. If the political will doesn’t exist, it needs to be created.

As noted above, our team recommends that this initiative be framed as a “community-based food initiative,” rather than as a “local food initiative.” This is because the competitive advantage any local effort to produce and distribute food to local consumers is based on the loyalties the initiative builds among community members. This is most clear when the price of locally grown produce exceeds the price a consumer could pay for a similar product that is imported. At such times, will a consumer purchase a green pepper raised in her community over one that was imported from Mexico, Canada, or Holland? Will a consumer opt to purchase primarily products from sources in their community, or will they favor other attributes?

As a community-based food initiative, then the initiative itself must build community capacities and resilience as it moves toward its goals.

## Letter in Opposition to previous ordinance

**JOHN L. PETERSON, P.A.**  
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December 17, 2018

Ken Moore, City Attorney  
Unified Government of WyCo/KCK  
Municipal Office Bldg.  
701 N. 7th St., 9<sup>th</sup> Floor  
Kansas City KS 66101

Re: Discount Dollar Retail Stores Ordinance #03-13-16

Dear Ken:

I represent Colby Capital, a limited liability company that develops discount dollar retail stores across the U.S. So far, Colby has been the "point guard" in Kansas City, KS, addressing the validity of Ordinance #03-13-16. Our intention is to ask that this ordinance be repealed, voided in its entirety. We would like to see this accomplished with no fanfare, no publicity; in essence, as quietly as possible.

Toward that end, we retained the Lawrence law firm of Stevens & Brand to completely review the constitutionality of the ordinance on behalf of Colby. Attached is the culmination of their investigation and research embodied in their letter opinion. Personally, when I first learned of the prohibitions contained in the ordinance, I thought, "What is the difference between *dollar stores* and *convenience stores*?" Neither Colby nor I can guess the intention of the discount dollar store company given the contents of this letter opinion.

Once you have had an opportunity to review, please let me know the UG's response. Naturally, if you want to meet with my client and me to discuss this, we would be very happy to oblige. My thanks to you, the Mayor, the Commissioners, and your staff for your anticipated cooperation.

With kindest personal regards, I remain sincerely,



John L. Peterson

JLP/cp

cc: UG Mayor David Alvey  
UG City Administrator Doug Bach

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December 17, 2018

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Colby Capital, LLC  
c/o John L. Peterson, PA  
748 Ann Avenue  
Kansas City, Kansas 66101

Re: Regulation of "dollar stores" by the Unified Government of Wyandotte County/  
Kansas City, Kansas

Dear Mr. Peterson:

You requested that we evaluate the legality and enforceability of an ordinance enacted by the Unified Government of Wyandotte County/Kansas City, Kansas ("UG") regulating "dollar stores" seeking to locate in Wyandotte County, including Kansas City, Kansas. For the reasons stated below, we conclude that the ordinance violates the Commerce Clause of the United States Constitution, and is also vulnerable to legal challenge under Kansas law.

## The Ordinance

The regulation in question, Ordinance No. 0-13-16, was passed on March 31, 2016, and signed into law by then-mayor Mark Holland. The ordinance provides that a "dollar store," as defined in the ordinance, is only permitted following the issuance of a special use permit. The ordinance further provides for "separation requirements" between dollar stores and between a dollar store and nearby residential properties. In particular, "no dollar store shall be located within 10,000 feet of any other dollar store or within 200 feet of any property used primarily for a single-family residence, a two-family residence, a town home, or any apartment building." Sec. 27-593(c)(21)(a).

The ordinance defines "dollar retail store" as follows: "[A] store with a wide variety of new merchandise for sale for five dollars or less, limited fresh produce, and buildings of less than 15,000 square feet. Examples include but are not limited to Family Dollar, Dollar General, Dollar Tree, 99 Cent Deals, Five Below, dime stores, or 5 & dime stores." Sec. 27-340.

**Applicable Legal Standards: An Ordinance Enacted With Discriminatory Intent or Effect Against Interstate Commerce Violates the Commerce Clause**

The Commerce Clause of the United States Constitution “not only expressly empowers Congress to regulate commerce among the states, but it also impliedly confines the states’ power to burden interstate commerce.” *Blue Cir. Cement v. Bd. of County Comm’rs*, 27 F.3d 1499, 1511 (10<sup>th</sup> Cir. 1994), citing *Oregon Waste Sys. v. Dept. of Energy Quality*, 114 S. Ct 1345, 1349 (1994). This law applies with equal force to measures adopted by political subdivisions of the states. *See id.*, 27 F.3d at 1511, n. 13.

The dormant commerce clause prohibits direct burdens on interstate commerce resulting from discrimination between local and interstate commerce. *Id.*, 27 F.3d at 1511. As explained by the Tenth Circuit Court of Appeals, “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *Id.*, quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). “Such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” *Id.*, 27 F.3d at 1511, quoting *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992).

As one scholar has pointed out, when local “ordinances primarily affect out-of-state economic actors, and not their in-state competitors, those ordinances violate [the dormant commerce clause doctrine].” Bobrowski, Mark. *The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine*, 44 Urb. Law. 227 (Winter, 2012) (hereinafter, “Bobrowski”). As Professor Bobrowski explains, courts find discriminatory purpose when a legal enactment “is allegedly motivated by an intent to discriminate against interstate commerce.” *Id.*, quoting *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 13 (1<sup>st</sup> Cir. 2010). “The ‘methodology’ to determine legislative purpose looks ‘to the statute as a whole’ . . . including statutory text, context, and legislative history . . . [and] also consider[s] whether the statute was ‘closely tailored to achieve the legislative purpose the state asserted.’” *Id.*, quoting *Family Winemakers of California*, 592 F.3d at 13, quoting *Alliance of Auto Mfrs. v. Gwadosky*, 430 F.3d 30, 37-38 (1<sup>st</sup> Cir. 2010).

The Kansas Supreme Court has also offered guidance on the application of these legal standards: “[A] court asks whether the challenged law discriminates on its face against interstate commerce. ‘In this context, “discrimination” simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Zimmerman v. Board of County Comm’rs*, 293 Kan. 332, 357-58 (2011), quoting *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007). “A discriminatory law is “virtually *per se* invalid,” [citation omitted] and will survive only if it “advances a legitimate local interest that cannot be adequately served by reasonable nondiscriminatory alternatives.” [Citations omitted.]” *Id.*, quoting *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008).

A law creates a discriminatory effect “when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring

advantages upon in-state interests.” *Brodbrowski*, 44 Urb. Law 227, quoting *Family Winemakers of California*, 592 F.3d at 10, citing *Oregon Waste Sys.*, 114 S. Ct. at 1350.

As the Kansas Supreme Court has noted, the argument that a particular regulation may also burden in-state competitors does not insulate the regulation from challenge under the dormant commerce clause. “[A] burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.” *Id.*, 292 Kan. at 311, quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

If the challenged law does not facially or effectively discriminate against interstate commerce, but nonetheless burdens interstate commerce, a different analysis applies. We will turn to that analysis later; first, we will address how Ordinance 0-13-16 facially and effectively discriminates against interstate commerce and is, therefore, invalid.

#### **The Ordinance Intentionally and Effectively Discriminates Against Interstate Commerce**

As explained above, to determine whether the ordinance reflects discriminatory intent or effect, we must consider the text, context, and legislative history of the ordinance.

The ordinance defines “dollar retail store” by calling out specific examples of such stores as follows: “Examples include but are not limited to Family Dollar, Dollar General, Dollar Tree, 99 Cent Deals, Five Below, dime stores, or 5 & dime stores.” Significantly, all of the specifically-identified companies are out-of-state businesses. To illustrate:

- Family Dollar, Inc., is incorporated in North Carolina, with its principal office address in Matthews, North Carolina;
- Dollar General Corporation is incorporated in Tennessee, with its principal office address in Goodlettsville, Tennessee;
- Dollar Tree Stores, Inc., is incorporated in Virginia, with its principal office address in Chesapeake, Virginia;
- 99 Cents Only Stores, LLC is organized in California with its principal office address in City of Commerce, California; and
- Five Below, Inc. is incorporated in Pennsylvania, with its principal office address in Philadelphia, Pennsylvania.

As this list makes clear, these dollar stores entities are out-of-state companies that engage in interstate commerce. Indeed, Dollar Tree and Dollar General are publicly traded Fortune 500 companies. Dollar stores in general are a significant national economic enterprise. To illustrate, in the year 2017 there were 1,700 new dollar stores opened in the United States.<sup>1</sup> At the end of 2017, Dollar Tree had 14,610 stores in the U.S.<sup>2</sup> Dollar General had had a total of 14,609 U.S.

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<sup>1</sup> Hughes, C.J., “The Indestructible Tenant?” *The Real Deal—New York Real Estate News*, May 2018, [http://therealdeal.com/issues\\_articles/the-indestructible-tenant/](http://therealdeal.com/issues_articles/the-indestructible-tenant/).

<sup>2</sup> *Id.*

stores in 2017.<sup>3</sup> Five Below had 625 stores nationwide as of 2017.<sup>4</sup> CNN Business reported that as of mid-2018, both Dollar Tree and Dollar General had marked their 15,000<sup>th</sup> store opening.<sup>5</sup> Investor's Business Daily reported on August 30, 2018 that Dollar General reported quarterly revenues in the amount of \$6.44 billion.<sup>6</sup>

These illustrations demonstrate that the dollar stores listed in the ordinance are a significant nationwide (and out-of-state) source of interstate commerce. The ordinance expressly and specifically targets these companies. Thus, the text of the ordinance facially discriminates against out-of-state economic concerns, in violation of the dormant commerce clause.

Looking also at the context and legislative history of the regulation, we see further evidence of discrimination against out-of-state economic interests. The ordinance was presented to the Planning Commission on February 8, 2016.<sup>7</sup> The ordinance had originally been placed on the agenda for January 11, 2016, but had been held over so that additional research could be completed.<sup>8</sup> By February 8, 2016, that research had been completed and was attached to the staff report. The Memo from City Staff to the City Planning Commission dated February 8, 2016, included six exhibits, which were articles related to chain stores, dollar stores, and food environment.<sup>9</sup> The Planning Commission minutes described these articles as providing information "as to why the city might want to do further regulation on dollar stores within the community."<sup>10</sup> (These articles were also presented to the UG Board of Commissioners, as discussed in greater detail below.)

During the Planning Commission meeting, it was noted that the ordinance would apply to dollar stores like Family Dollar, Dollar Tree, Dollar General, "99 center," "\$5.00 below," etc.<sup>11</sup> One planning commissioner pointed out that "no other stores would be affected."<sup>12</sup> Another commissioner sought clarification that this ordinance would not affect existing local thrift stores and, accordingly, the word "new" was added before "merchandise" in the definition section.<sup>13</sup> There was also a discussion of the impact dollar stores might ostensibly have on efforts to secure a new grocery store in the northeast area.<sup>14</sup> Based upon its review of the staff report, attached articles, and other information, the Planning Commission voted 5 to 1 to recommend approval of the ordinance

The ordinance came before the UG Board of Commissioners on February 25, 2016. The minutes of the Planning Commission were presented to the Board as part of the staff report. The

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> <https://money.cnn.com/2018/08/30/news/companies/dollar-general-tree-walmart-target-economy/index.html>, August 30, 2018.

<sup>6</sup> <https://www.investors.com/research/ibd-industry-themes/dollar-tree-earnings-dollar-general-earnings/>.

<sup>7</sup> See Memo from City Staff to Unified Government Board of Commissioners, February 25, 2016, at 5, incorporating February 8, 2016 Planning Commission Minutes.

<sup>8</sup> *Id.*

<sup>9</sup> See Memo dated February 8, 2016, at 4, and attached exhibits..

<sup>10</sup> Memo to Board of Commissioners, February 25, 2016, at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



staff report also presented the Board with copies of the articles that had previously been presented to the Planning Commission, advising the Board of Commissioners that the articles provided information “as to why the city might want to do further regulation on dollar stores within the community,” and expressly making those articles “part of the record for this case.”<sup>15</sup>

According to the minutes of the Board of Commissioners’ consideration of the proposed ordinance, Director of Planning Rob Richardson told the Commissioners that the proposed ordinance would effectively prevent any new dollar stores from coming into the area. He said: “[T]his is an ordinance to limit the spacing of the dollar stores within the community *which essentially will limit the number, especially in the urban area to about what we have now.*”<sup>16</sup> This shows that the intent behind the ordinance, and its anticipated effect, would be to prevent any new dollar stores from opening in the affected area.

Mr. Richardson also told the Commissioners about “several articles included in your packet that give various reasons for limiting these types of stores in our community.”<sup>17</sup> Because these articles are part of the context and legislative history of the enactment of the ordinance, it is worth examining whether these materials reflect a bias in favor of local businesses and against out-of-state economic interests. As previously noted, a law that evinces a discriminatory intent in favor of local businesses, and against out-of-state companies, violates the dormant commerce clause.

The first article, entitled “The Impact of Chain Stores on Community,” emphasizes the purportedly harmful effects of chain stores on locally-owned businesses and the community as a whole.<sup>18</sup> For example, the article asserts that chain stores are harmful to a “vibrant local retail economy.”<sup>19</sup> The author expresses concern that national stores with “limited ties and no long term commitment to the community” will displace “businesses owned by our neighbors.”<sup>20</sup> The author laments the “loss of locally owned stores,” accusing national chains of wanting to be “the only game in town.”<sup>21</sup> The article maintains that this is a “battle that local merchants cannot win,” making it “only a matter of time before the local business will be forced to close.”<sup>22</sup> The author additionally asserts that chain stores “contribute far less to the local economy than independent businesses.”<sup>23</sup> The author advances many other arguments in favor of discriminating against out-of-state businesses and in favor of local businesses, such as: “Local stores keep profits circulating within the local economy”; “a community that loses its local businesses to national chains also risks losing other economic development opportunities”; and “locally owned businesses build strong communities.”<sup>24</sup> The article concludes by urging readers to support land use laws “that deter chain stores and foster local ownership.”<sup>25</sup>

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<sup>15</sup> Memo to Board of Commissioners, February 25, 2016, at 5, listing six articles.

<sup>16</sup> Minutes of February 25, 2018 Board of Commissioners Meeting, at 21 (emphasis added).

<sup>17</sup> *Id.*, at 21.

<sup>18</sup> Exhibit 1 to Staff Memo, at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, at 6-7.

<sup>22</sup> *Id.*, at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, at 7-10.

<sup>25</sup> *Id.*, at 10.

The next article, Exhibit 2 to the staff report, is entitled “As Dollar Stores Proliferate, Opponents Worry for Small Towns.”<sup>26</sup> This article cites arguments against dollar stores, noting that “opponents say the proliferation of dollar stores poses a greater threat to the economy and character of many more towns than big box stores.”<sup>27</sup> The author favors local businesses that the dollar stores “would compete with unfairly,” having the effect of “undermining...downtown and village centers.”<sup>28</sup> One individual cited in the article opined that “protecting locally owned businesses is important because they provide more and better jobs and give a community its identity.”<sup>29</sup>

The third article cited in the Staff Report is entitled, “Food environment and childhood obesity: the effect of dollar stores.”<sup>30</sup> Although perhaps intended to bolster the argument for limiting the “proliferation” of dollar stores in Kansas City, Kansas and Wyandotte County, the article actually concludes that dollar stores do not, in fact, contribute to childhood obesity: “While dollar stores lack the breadth of healthy food options typically found in supermarkets, our results suggest that they are not a contributor to the childhood obesity problem.”<sup>31</sup> On the contrary, the researchers concluded that “it could be that dollar stores may actually play some role in facilitating healthy food consumption behaviors.”<sup>32</sup> “[W]hen residents have ready access to dollar stores, they may be in a better position to procure supplies for at-home meals. These meals, even if not perfectly balanced, are likely to be healthier and lower-calorie than the fare found on fast-food menus.”<sup>33</sup>

The fourth article attached to the staff report is entitled “4 Reasons Shopping at Dollar Stores Costs More.”<sup>34</sup> This article compares volume and pricing of items for sale at dollar stores with comparable items for sale at a “regular grocery store.”<sup>35</sup> The article also compares the quality of household furnishings purchased at a dollar store with items purchased at a “furniture store.”<sup>36</sup> Most significantly, the author of this article argues that “dollar stores take money out of the community.”<sup>37</sup> The author writes: “Non-local businesses suck money out of a community and only leave about 14% of the money behind,” and “without local businesses getting local dollars, they eventually die.”<sup>38</sup> The author argues for protecting local businesses against “companies that are based elsewhere.”<sup>39</sup>

The fifth article attached to the staff report is entitled, “What Dollar Store Locations Reveal About America.”<sup>40</sup> Although mostly about geographical distribution of dollar stores in the United States, the author ultimately concludes: “Though some affluent shoppers might enjoy

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<sup>26</sup> Exhibit 2 to Staff Report, at 11.

<sup>27</sup> *Id.*, at 12-13.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 13.

<sup>30</sup> Exhibit 3 to Staff Report, at 15.

<sup>31</sup> *Id.*, at 22.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 23.

<sup>34</sup> Exhibit 4 to Staff Report, at 28.

<sup>35</sup> See *id.*, at 28-29.

<sup>36</sup> *Id.*, at 29.

<sup>37</sup> *Id.*, at 31.

<sup>38</sup> *Id.*, at 31.

<sup>39</sup> See *id.*, at 32.

<sup>40</sup> Exhibit 5 to Staff Report, at 33.



searching for bargains in their cluttered aisles, dollar stores are overwhelmingly the retail choice of the economically left behind.”<sup>41</sup>

The sixth and final article attached to the Staff Report is entitled, “UG to look at limiting number of dollar stores in community.”<sup>42</sup> This article asserts that “[s]ome dollar stores are replacing other stores that have exited neighborhoods.”<sup>43</sup> It further states: “The planning department wants to study the issue and potentially limit the number of new dollar stores in the community.”<sup>44</sup> The article also reports: “According to UG documents, the issue was brought forward by Mayor Mark Holland.”<sup>45</sup>

These six articles, offered by staff and relied upon by the Commission as part of the record in adopting the ordinance, disclose a clear bias against interstate commerce. These materials repeatedly urge policy-makers to protect local business from national chain stores, in general, and dollar stores, in particular. They cite purported adverse impacts that local businesses will sustain if dollar stores are permitted to “proliferate.” The discriminatory intent of these “research” materials, offered as ostensible justification for restricting dollar stores in Kansas City, Kansas and Wyandotte County, could not be more apparent.

It is also significant that then-Mayor Mark Holland was the instigator of restrictions on the development of new dollar stores in Wyandotte County while, at the same time, he was actively working to cut a deal with a local company to open a grocery store in Kansas City, Kansas. As part of his Downtown Central Parkway Plan “and its signature ‘healthy campus,’” Mayor Holland was working hard to “convince the Charles Ball SunFresh Market to build a \$15 million to \$18 million grocery store” in downtown Kansas City, Kansas.<sup>46</sup> KCPT’s digital magazine, Flatland KC, reported that “Holland has identified a grocery partner in SunFresh, which has done well with its store at I-70 and 18<sup>th</sup> Street.”<sup>47</sup> Describing his efforts, Holland stated: “We are still working on the grocery store, which is problematic because a grocery store wants a lot of households with a lot of money.”<sup>48</sup> The Kansas City Business Journal reported that the “city has attempted to land a Charles Ball SunFresh Market,” which would occupy 30,000 to 35,000 square feet, and would cost \$15 million to \$18 million to develop.<sup>49</sup> Holland was enthusiastic about partnering with this Kansas-based company, calling them an “urban savvy grocer,” and stating: “They’re the right operator. We just haven’t gotten to the right deal yet.”<sup>50</sup> Holland also disclosed that he intended to offer financial support to the local grocery company through tax-increment financing.<sup>51</sup>

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<sup>41</sup> *Id.*, at 38.

<sup>42</sup> Exhibit 6 to Staff Report, at 39.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> McLean, Jim. “Healthy campus in downtown KCK another step closer to reality.” December 8, 2014. <https://www.khi.org/news/article/healthy-campus-downtown-kck-another-step-closer-re>. SunFresh is owned by Four B Corp., a Kansas Corporation.

<sup>47</sup> Orendorff, John. “Awaiting An Oasis, in KCK’s Food Dessert [sic].” October 3, 2015. <https://www.flatlandkc.org/new-issues/awaiting-oasis-kcks-food-desert>.

<sup>48</sup> *Id.*

<sup>49</sup> Roberts, Rob. Kansas City Business Journal, October 7, 2015.

<sup>50</sup> Orendorff, *supra* note 47.

<sup>51</sup> McLean, *supra* note 46.

This context demonstrates Mayor Holland's intent to promote a local business by restricting out-of-state dollar stores. It also provides context for discussion by the Planning Commission and the UG Board of Commissioners reflecting their desire to secure a grocery store for Kansas City, Kansas, and the perceived need to limit dollar stores in order to do so. To illustrate, at the Board of Commissioners meeting on February 25, 2016, Commissioner Johnson expressed the view that "we really need to have a grocery store in that area."<sup>52</sup> He also asserted that the reason dollar stores "are here, are coming into our town, is because there are no places to get groceries. I mean a full-scale grocer."<sup>53</sup> Commissioner Philbrook expressed the view that "we don't have food supply, good food supply, for folks in parts of town."<sup>54</sup> In response to information concerning the number of dollar stores in the community, Commissioner Philbrook stated: "I guess we need to stop them now, slow it down."<sup>55</sup> Commissioner Murgia stated that dollar stores make it "more difficult to bring in a higher quality grocer because their fear is they won't be able to sell enough in that neighborhood. Therefore, that the business will not be sustainable."<sup>56</sup> Planning Director Richardson pointed out that dollar stores "do count against the square footage of the grocery store that we could build and against the marketability of those stores."<sup>57</sup>

Thus, it is clear that a significant motivation of the UG in preventing new dollar stores from coming into the community was to create a more favorable business environment for an in-state, locally-based grocery store company. The UG, therefore, enacted a discriminatory law to protect a local business by burdening out-of-state economic interests.

The plain language of the ordinance, along with the context and legislative history, establish that the intent of Ordinance 0-13-16 is to discriminate against interstate commerce, in violation of the Commerce Clause. As such, the ordinance is invalid.

The effect of the ordinance is likewise to burden out-of-state businesses. All of the companies targeted by the regulation are out-of-state companies. As Planning Director Richardson readily acknowledged, the effect of the ordinance is to preclude any new dollar stores from developing in the area. Knowing this, and desiring this effect, the Board of Commissioners enacted a *de facto* ban on future development of this form of interstate commerce in Kansas City, Kansas. This action is unlawful discrimination against interstate commerce. Accordingly, the ordinance is invalid.

#### **The Ordinance Is Also Invalid Under the *Pike* Balancing Test**

Although we have concluded that the ordinance is unlawful due to its facially discriminatory intent and effect, we also consider whether the ordinance can survive the balancing test established in the United States Supreme Court case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

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<sup>52</sup> Minutes, at 21.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, at 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

The *Pike* balancing test applies to an ordinance that appears to regulate evenhandedly between in-state and out-of-state businesses, but nevertheless has an impact on interstate commerce. As explained by the Tenth Circuit Court of Appeals, the Commerce Clause not only prohibits intentional or effective discrimination against interstate commerce, it also “prohibits a state or local ‘statute [that] regulates evenhandedly to effectuate a legitimate local public interest’ if it imposes a burden on interstate commerce that is ‘clearly excessive in relation to the putative local benefits.’” *Blue Cir. Cement*, 27 F.3d at 1511, quoting *Pike*, 397 U.S. at 142. To apply the *Pike* test, a court asks if the regulation advances a legitimate public purpose; if the answer is yes, the “question becomes one of degree.” *Id.* “The extent of the burden on interstate commerce that will be tolerated will depend on the ‘nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.’” *Id.*

The Tenth Circuit Court of Appeals has explained that a court applying the *Pike* balancing test must examine: (a) the nature of the putative local benefits advanced by the ordinance; (b) the burden the ordinance imposes on interstate commerce; (c) whether the burden is clearly excessive in relation to the local benefits; and (d) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Id.* However, “the mere ‘incantation of a purpose to promote the public health or safety does not insulate a state law from a Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.’” *Blue Cir. Cement*, 27 F.3d at 1512, quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981)(plurality opinion).

Examining the ostensible public purpose for the regulation in question, it appears that the primary—if not singular—motivation of the UG in enacting the law was to create a more favorable environment for local businesses, in general, and a local grocery store, in particular, by prohibiting future dollar stores in the area. This form of economic protectionism is not a legitimate government interest. The only slight deviation from this agenda was when Commissioner McKiernan noted that “a lot of the issues that continue to come up with these types of stores are upkeep . . . by how they are kept both outside and inside.”<sup>58</sup> Commissioner McKiernan asked if the UG could “just look at more stringent enforcement of the ordinances that we already have in place for the condition and the upkeep of these and other stores rather than some sort of density requirement.”<sup>59</sup> Planning Director Richardson dismissed this line of inquiry, stating: “I think it’s a matter of resources. . . . Voluntary compliance is very hard to achieve with these stores. When you can’t achieve voluntary compliance with a community business partner like this, it’s a matter of how you want to spend your resources.”<sup>60</sup> Apart from this very brief exchange on the subject of upkeep of existing dollar stores, it does not appear that any additional rationale for the ordinance was presented. Certainly, there is no indication that upkeep of existing stores was a substantial concern for the Board as a whole. Moreover, to the extent that concerns about upkeep were considered in enacting the ordinance, no potentially less restrictive alternatives were seriously considered, even though Commissioner McKiernan raised the prospect briefly before it was dismissed by Planning Director Richardson.

<sup>58</sup> Minutes, February 25, 2016, at 22.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

The burden on these out-of-state businesses is considerable (effectively, no new stores will be permitted). The ostensible benefit to the community is unlawful and inherently suspect. An effective ban of future dollar stores is plainly excessive and therefore violates the Commerce Clause. It is also readily apparent that the UG did not consider any alternatives that might have had less impact on interstate commerce—indeed, if the goal of the ordinance was to promote local businesses, including the recruitment of a large local grocery store to Kansas City, Kansas, it does not appear that any other approaches were considered in the context of the enactment of the ordinance. To the extent a goal was to promote better upkeep of the stores, there was virtually no discussion—and absolutely no exploration—of alternatives that would have had less impact on interstate commerce. Given these circumstances, the ordinance cannot withstand even the lesser scrutiny of the *Pike* balancing test.

### **The Ordinance is Additionally Unlawful Under Kansas Zoning Law**

The Kansas Supreme Court has explained that, in zoning matters, courts have the power to review whether an action taken by the local zoning authority was lawful, and whether it was reasonable. See, e.g., *Zimmerman v. Bd. of County Comm'rs*, 289 Kan. 926, 944 (2009); *Golden v. City of Overland Park*, 224 Kan. 591, 595-96.

For all the reasons stated above, the adoption of Ordinance 0-13-16 was neither lawful nor was it reasonable. This regulation was adopted with the intent and effect to discriminate against interstate commerce, in violation of the Commerce Clause. The ostensible rationale for its adoption was supplied by a handful of new articles from outside the area, and a food source study demonstrating that dollar stores actually have a *positive effect* on healthy eating and childhood obesity. Because the ordinance is not lawful or reasonable, it is vulnerable to a challenge under Kansas law.

### **Conclusion**

In summary, Ordinance 0-13-16 unlawfully discriminates against interstate commerce and thus violates the Commerce Clause of the United States Constitution. Additionally, it burdens interstate commerce to a degree that far exceeds any ostensible local benefits, rendering it invalid under relevant Supreme Court precedent. The ordinance represents the sort of discriminatory measure that courts routinely strike down as fundamentally incompatible with a nationwide system of commerce.

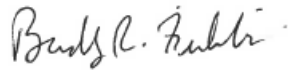
Moreover, the ordinance is unreasonable. The only purported “evidence” introduced regarding the effects of dollar stores consisted of a handful of news articles from outside of the community, and a scholarly study which established that dollar stores actually *promote* healthy eating habits, not to mention providing a source of affordable and accessible products to people who may not have easy access to alternative sources for their daily needs.

In short, the ordinance was enacted for an improper purpose, and impermissibly interferes with interstate commerce, in violation of the United States Constitution and the laws of the State of Kansas.

John L. Peterson  
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Please let us know if you have any questions or if we may be of further assistance.

Very truly yours,  
STEVENS & BRAND, L.L.P.

  
Bradley R. Finkeldei