Breaking Big Boxes: Learning from the Horse Whisperers

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The Horse Whisperer, a novel by Nicholas Evans, is the story of how a physically and emotionally damaged horse is retrained and brought back to usefulness.[1] It became a popular movie starring Robert Redford and Kristin Scott Thomas.[2] The book and the movie brought public awareness to a method of training horses by speaking softly, lovingly, and cajoling a wild animal into obedience, rather than by the common, brutalizing approach of strapping on a saddle and riding the bucking horse into submission. The hero in the story is based on real-life trainer Buck Brannaman, who lives on a 1,200-acre ranch near Sheridan, Wyoming. You can read more about the story on the Smithsonian Museum's Web site.[3] The basic philosophy, at least as I understand it from a Public Broadcasting System piece on the subject, is that a horse whisperer does not fight the horse, but works to make clear what is expected.[4]

Domesticating big box retail seems much the same. Most opponents use coercion; the better approach, however, may be to work with big box retailers to redirect their inherent and, I submit, ultimately irresistible power in more constructive ways. For our purposes, let us assume that big box retail is a large-format store, more likely than not of the discount variety. The American Planning Association defines them as stand-alone stores of at least 100,000 square-feet. They can be stores which are similar to department stores, such as Costco, Target, and Wal-Mart, offering a variety of merchandise, and sometimes even full-sized grocery stores within very large single store buildings of 175,000 to 235,000 square-feet or more.

Big box retail is sometimes generically used to include so-called "category killers"—and what an apt name that is—that are genetically disposed to completely dominate their category of sales within the market. Such stores include that behemoth of retailing, second only to Wal-Mart in

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1. *See generally* NICHOLAS EVANS, THE HORSE WHISPERER (1995) (detailing a gentle basis of training an unruly animal).

2. THE HORSE WHISPERER (Touchstone Pictures 1999) (on file with author).

3. The Horse Whisperer, *Legendary trainer Buck Brannaman relies on trust, not terror*, Smithsonian Magazine (May 1998), *available at* http://www.smithsonianmag.com/smithsonian/issues98/may98/horse_whisperer.html.

4. *See Horse and Rider*, NATURE, (quoting Mark Rashid: "[b]asically, I try to help folks get along better with their horses by finding some common ground so they can accomplish what they want to accomplish. I have two main messages—Don't fight; and be clear. If you can do those two things, it opens the door for pretty much everything else."), *at* http://www.pbs.org/wnet/nature/horseandrider/whisperers2.html (last visited Apr. 24, 2005).

sales, Home Depot.[5] Its archrival, Lowe's, is of the same type.[6] No one is going to be successful in the long run by trying to ride on the backs of these monsters and beat them into submission.[7] It is the hundreds of millions of bargain-hungry shoppers who feed these formats and cause them to grow to sumo-like proportions. As Robert Reich recently expressed in an editorial: "Wal-Mart has not become the world's largest retailer by putting a gun to our heads and forcing us to shop there."[8]

Let me suggest that some of those who rail against big box retail are out of touch with what mainstream America wants. It was Al Norman, in talking about Wal-Mart, who famously said: "Your quality of life is worth more than a cheap pair of underwear."[9] I suppose that argument means that getting decent goods at low prices is not all that is important to Americans, but that we want a variety of good quality merchandise, fair trade, respect and decent wages for those who work in such stores, and the preservation of existing businesses which the category killers and the discount department stores will otherwise crush.

I submit that if you were to ask Americans if they agreed with that last statement, the large majority would say they do; even the people who drink cheap domestic beer, listen to country and western music, and decorate their houses at Christmas time with electric icicles.[10] I know that this is an

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5. Home Depot has over 1500 stores and record Fiscal 2004 sales of $73.1 billion, up 12.8%, with net earnings of $5 billion in Fiscal 2004. The Home Depot Inc., *The Home Depot Announces Record Fourth Quarter and Fiscal Year Results*, *at* http://ir.homedepot.com/ReleaseDetail.cfm?ReleaseID=156400 (last visited Apr. 24, 2005).

6. "With fiscal year 2004 sales of $36.5 billion, Lowe's Companies, Inc. is a FORTUNE 50 company that serves approximately eleven million customers a week at more than 1,075 home improvement stores in forty-eight states. Based in Mooresville, N.C., the fifty-nine-year-old company is the second-largest home improvement retailer in the world." LOWE'S, *Investor Relations*, *at* http://www.lowes.com/lkn?action=frameSet&url=www.shareholder.com/lowes/index2.cfm (last visted Apr. 24, 2005).

7. Some writers do not distinguish discount department stores from the category killers, but the difference for our purposes may sometimes be important when we are looking for strategies to protect and enhance the existing retail base. *See* ROBERT SPECTOR, CATEGORY KILLERS: THE RETAIL REVOLUTION AND ITS IMPACT ON CONSUMER CULTURE (2005).

8. Robert B. Reich, *Don't Blame Wal-Mart*, N. Y. TIMES, Feb. 28, 2005, at A19.

9. Sprawl-Busters, *An International Clearing House on Big Box Anti-Sprawl Information*, *at* http://www.sprawl-busters.com (last visited Apr. 24, 2005). Even a single person can start a movement in his or her own right, as the irrepressible Al Norman has done. His Web site quotes from a CBS 60 Minutes interview which described him as "the guru of the anti-Wal-Mart movement." Al Norman, *The Case Against Sprawl*, Sprawl-Busters (1999), *available at* http://www.sprawl-busters.com/caseagainstsprawl.html. He has a special ability for putting these complex issues in rather straightforward terms. *See* Sprawl-Busters, *at* http://www.sprawl-busters.com for more information pertaining to Al Norman. *See also* Elizabeth Macdonald, *Giant Slayer* (Sept. 6, 2004), *available at* http://www.forbes.com/business/global/2004/0906/026.html (noting Al Norman has made a "mini-career" out of blocking Wal-Mart).

10. We must recognize that we are a diverse and pluralistic country with a wide range of tastes. Country music stations predominate in this country—they have 2088 stations (of 10,754), while

unfair caricature of middle America (especially for those of us who love those electric icicles),[11] and I offer it not as a truism, but as a means to provoke some plain thinking about the source of some of the opposition to big box retail. People who shop the stores cut across all social, cultural, ethnic, racial, and economic strata.

The absolute numbers speak absolutely about the dominance of this form of retailing in America today. Wal-Mart, the store many people love to hate, is simply without equal. Although it did not do quite as well on "Black Friday" 2004—the day after Thanksgiving when retailers are in the black (making money) as the year-end sales kick in—on Black Friday 2003 Wal-Mart sales of $1.43 billion exceeded the annual Gross Domestic Product (GDP) of 36 out of 183 ranked economies, including Tajikistan, Swaziland, Belize, Sierra Leone and Samoa.[12] In a single day's sales, Americans supported Wal-Mart with their purses and wallets, causing Wal-Marts sales to exceed an entire year's GDP in at least thirty-six countries.[13] In its Annual Report 2003, Wal-Mart reports total sales of $256.3 billion.[14] In terms of GDP this makes Wal-Mart the eighteenth largest economy in the world, just after Switzerland and ahead of Sweden, Norway, Finland, Argentina, and Greece.[15]

Wal-Mart is a dominant force in moving product to market.[16] To put this in some perspective, even if you took every man, woman, and child from Vermont, you would not be able to staff all of the world's Wal-Marts. If we added in every person from Wyoming and impressed them into Wal-Mart service to join those of us here from Vermont, there still would not be

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classical music stations rank a lowly twenty-ninth with just thirty-two stations. The industry identifies fourteen radio formats; 61% of the listeners tune into adult, contemporary, urban, Hispanic, country and rock music stations, while a mere 1.5% listens to classical. Radio Advertising Bureau, *Radio Marketing Guide & Fact Book for Advertisers* (2003-2004), *available at* http://www.rab.com/station/marketing_guide/rmgfb2004.pdf.

11. My family has lived in Vermont for generations, most recently in Glover, Barton and Lyndonville. I am now a "flatlander" with a second home in Ludlow. My practice takes me all across the country. I've been to forty-nine of the fifty states. I can tell you that there is no other state in the country where more houses remain lovingly adorned and lighted with these electrical icicles year-round. I wonder if it is because Vermonters like to be reminded of our winters or are proud of our ability to get through them.

12 *World Development Indicators database*, WORLD BANK (Sept. 2004), *available at* http://www.worldbank.org/data/databytopic/GDP.pdf.

13. *Id.*

14. Wal-Mart, *It's my Wal-Mart*, Annual Report (2004), *available at* http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf.

15. Worldbank Development Indicators database, *supra* note 12.

16. *See* Corporate Swine, Inc., *Wal-Mart: Downsizing or Supersizing?* (2005), *at* http://www.corporateswine.net/walmart.html (indicating that 28% of Dial Soaps' sales are through Wal-Mart). The name of this Web site alone says much about the vehemence of the attitude towards Wal-Mart and its smaller siblings.

enough people for all the stores.

Costco is also a retailing behemoth, as shown by its stock price which reflects not only the success of its low price strategy, but carefully controlled overhead and its strategy of using high-end merchandise to attract well-to-do customers.[17]

The impact of big box department stores with food sales has been evidenced most recently in the Chapter 11 filing by Winn-Dixie, which has secured an $800 million credit facility as part of its reorganization.[18] It plans on improving customer service and merchandising, and will also cut costs.[19] Home Depot, the king of the category killers, has similarly startling statistics.[20]

I. WHAT IS THE PROBLEM WITH BIG BOX RETAIL?

Beyond the totally subjective perceptions, such as: "I just don't like shopping there" or "there's something about them I don't like," we can identify several more or less objective, substantive issues.

1. They damage and destroy local, small businesses.

This is unquestionably true. The deep discount big box department stores and the category killers are virtually impossible to meet or beat on price. I say "virtually impossible" because I can attest personally to the fact that the price points on some products at Home Depot, such as fasteners (like nuts, bolts, and washers) are extraordinarily high compared to the local franchise hardware stores, such as True Value, and the independents. Big box retailers are sophisticated and know where to set price points to maximize profits.

Regardless, the plain fact remains that on price alone, the big box department stores and category killers are going to damage and destroy local businesses across the board—unless those local businesses morph into more competitive versions of their former selves.

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17. Kortney Stringer, *Costco's Deep Discounts Don't Extend to Its Share Price*, WALL ST. J., Feb. 22, 2005, at C1.

18. Constance L. Hays, *Winn-Dixie Files for Bankruptcy Protection*, N.Y. TIMES, Feb. 22, 2005, at C4.

19. Wal-Mart is of course the retailer that just about everybody likes to blame when things go bad for other retailers. *See* Working Life, *Bad News Day for Wal-Mart*, (Feb. 24, 2005), *available at* http://workinglife.typepad.com/daily_blog/2005/02/bad_news_day_fo.html (stating that "Wal-Mart's low prices were blamed for this week's bankruptcy filing by southern grocery chain Winn-Dixie Stores Inc.").

20. *See supra* note 5 (noting Home Depot's operating statistics for 2004).

2. Big box retail is too big visually for many of the settings where they are proposed or located.

This is also true. The formats of these stores are profoundly different than what has been planned for and developed previously. They stand out like a sore thumb. Does this mean that they should be prohibited entirely; remembering that to do so is likely to be futile in all settings in the long run because of the irrepressible forces of the market?

3. Big box retail is bad because it treats those who work there badly, pays them low wages, and uses devious methods to avoid having to provide health care and other basic benefits.

While there have been plenty of reports and many scholarly treatments of this issue, the question is whether this a basis for the use of police power regulation to prohibit these stores as a matter of land use. If child labor were used illegally in automobile assembly plants, would we seek to prohibit such plants through our comprehensive planning process and zoning regulations? Probably not. Yet much of the opposition to big box retail and the efforts to keep them out of our cities and towns through plan amendments and zoning strategies are based on the idea that some of these retailers, some of the time, treat their workers poorly.[21]

4. Big box retail, with Wal-Mart the worst among them, is so powerful that it creates issues for vendors and causes loss of American jobs to producers overseas.

The stories of undue pressure on vendors are legion, though sometimes these dominant big box retailers work through partnerships with producers to create new efficiencies.[22] Unquestionably, many American jobs have been driven overseas, particularly to China. For example, Levi Strauss, which had sixty clothing plants in the United States twenty-two years ago, does not make clothing in the United States anymore—it just imports what it sells.[23] Again, is this a land use issue to be addressed through planning

21. Neil R. Peirce, *Wal-Mart: Limits to Its Power?*, THE WASH. POST, Nov. 1, 2003, *available at* http://www.napawash.org/resources/peirce/Peirce_11_4_03.html.

22. Charles Fishman, *The Wal-Mart You Don't Know*, 77 FAST COMPANY 68 (2003).

23. *Id.*

and regulation?

II. WHAT IS THE ROLE OF PLANNING AND REGULATION WHEN IT COMES TO BIG BOX RETAIL?

Public planning and regulation under the fundamental state police power to protect the public's health, safety, and general welfare seem to work best where there is market failure. Growth management is a good example. Growth management controls the rate and the sequencing (location) of development when the market fails to properly allocate land to development and conservation.

Growth management can encourage as well as discourage development. It can stimulate the rate of development or attempt to retard it. It can nudge developments into one area and seek to keep them out of others. Importantly, the market and the political and economic power of property owners in the development community can sometimes overpower the best designed and most broadly supported efforts to control growth. The Measure 37[24] debacle in Oregon is a case on point. The Oregon system of growth management—with its urban growth boundaries—has been the model of great planning and extraordinarily effective public regulation. It has now been torn asunder by Measure 37 with uncertain consequences.

I suspect that Measure 37 will not prove all that damaging in the end, but will force planners and regulators to negotiate the middle ground of cajoling development, rather than the binary system of "either-or" as dictated by the urban growth boundary. The government has at its disposal the power of acquisition through voluntary conveyance and eminent domain for both the fee simple interest and lesser interests in land where it is essential to preserve lands forever or for very long periods. Using its extraordinary powers of land acquisition for preservation is a good example of where government intervenes at points of market failure.

Affordable housing provides another example of how planning and regulation effectively deal with market failure. Developers necessarily and appropriately seek short and mid-term profitability. They sell to the market, and that market generally does not support the construction of low and moderate income housing. Government can gently prod that system by providing subsidies, density bonuses and even the override of local zoning under extraordinary circumstances where it wants to encourage such development. When none of those "nudges" has the needed effect,

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24. *See* Oregon Secretary of State, *Measure 37*, *at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Apr. 24, 2005).

government may be obligated at this point of market failure to step in and direct the preservation or construction of affordable housing. In every instance, government has the power to build affordable housing.

The reality is that the market is powerful and those who regulate should focus on ways to channel, not hold back, that force. Development will flow to areas of weaker planning and regulation. If the central city prohibits big box retail and the well-managed and carefully planned inner suburbs do likewise, you can be sure that big box retail will flow on past those closed doors and restricted lands to the fringe or some interstitial area of weak planning and regulation. It will not in the end be stopped; instead it will be driven to a sub-optimum location, which in the end may be worse than prohibiting it elsewhere.[25]

III. THE CONTEXT MATTERS

It matters whether we are talking about big box retail in the central city, the suburbs or rural areas, because as the United States Supreme Court said in *Euclid v. Ambler*: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[26]

Properly integrated big box retail in the central city might be appropriate for development.[27] As Mitchell L. Moss, professor of urban policy and planning at New York University and an adviser to the mayor of the city of New York, said: "Sooner or later, New Yorkers will want to have access to the shopping choices that other Americans have, rather than have to go to the suburbs."[28] Politics have thwarted Wal-Mart's attempts to

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25. A useful reference on all things Wal-Mart is the edgy weblog, theboxtank. *See* theboxtank, *theboxtank Launches* (Aug. 9, 2004), *at* http://www.theboxtank.com/walmartbox/2004/08/theboxtank_laun.html. Contributors to theboxtank describe it as follows: "Welcome to theboxtank, a weblog about big box urbanism, what we consider to be one of the major forces driving the development of the American city and how we live. The focus of this blog is Wal-Mart, the world's largest retailer, and its role in shaping American cities and culture. Though today marks our official launch, we have been posting for a while now. Material in the archives will give you a hint of what this site is about and where it may lead. In short, we are working from the belief that the essence of the American city isn't Manhattan, or Boston, or Chicago [a dense urban core that supports industry, work, pleasure, housing and retail]; but rather the sprawl of Knoxville, Houston, or Omaha, generic cities that look the same and feel the same. In the sprawl of these cities are where most Americans live, where you can find the same Ruby Tuesdays, TGIFs, and Jiffy Lubes. Most architects and urban planners don't spend enough time dealing with this part of the landscape; instead they are fixated with museums, high end residential houses, or downtown revitalization schemes. And it is here that you will find Wal-Mart." *Id.*

26. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

27. Michigan Land Use Institute, *Suburban Retailers Say Hello to Downtown: Home Depot Finds a Welcoming Market in Manhattan* (Feb. 2, 2005), *available at* http://www.mlui.org/growthmanagement/fullarticle.asp?fileid=16769.

28. Clyde Haberman, *Wal-Mart Is Rebuffed but Waiting*, N.Y. TIMES, Mar. 1, 2005, at B1.

be part of a new shopping mall in Rego Park, Queens, because of the usual concerns about traffic, damage to existing businesses, Wal-Mart's child labor practices, and its stubbornly anti-union stance.[29] Regardless, I think it is inevitable that Wal-Mart and other big box retailers will emerge as dominant forces in the central cities.[30] Now that they have developed the easy sites in the outer suburbs and rural areas, they will ultimately pay the price in land costs, high construction costs, and drawn-out permitting battles in order to get into city marketplaces.

In the suburban marketplace, the retail landscape is changing in profound ways. The traditional enclosed large shopping mall of over one million square-feet with two or more anchor stores is becoming an anachronism. There are about 1200 of these malls today and that number will be reduced to 900 in just a few years.[31] And just what do you think might save some of these failing malls? Adding big box retail discount stores is one thumb in the dike. Westfield Corporation recently announced plans to add Target as an anchor at its Topango Mall in the Woodland Hills suburb of Los Angeles where Neiman Marcus is an existing anchor. When you think about it, this is an extraordinary mix—a high-end retailer as one anchor and a discount big box retailer as the other.[32] The chairman of Costco Wholesale Club said he is now being courted by mall operators: "They like us now. They didn't like us before. We have become a much more known quantity for attracting the customer they are all dying to have."[33]

The fading of the traditional enclosed mall should not be looked upon with any particular regret. Changes in retailing have been with us for as long as trade has existed. Take a look at the history of The Great Atlantic and Pacific Tea Company, and how it radically changed forever the grocery business.[34]

I attended a Southeast Florida/Caribbean Chapter of the Urban Land Institute Conference on "Evolving Issues of 21st-century Development" on March 2, 2005, in Hollywood, Florida. What I learned, among many things, was that the business of development in South Florida is now

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29. *Id.*

30. Birmingham, Alabama, offered $10 million three years ago to entice Wal-Mart to build a 230,000-square foot supercenter at a former K-Mart site. Curt Hazlett, *Taking Aim at Wal-Mart*, Retail Traffic (Feb. 1, 2005), *at* http://retailtrafficmag.com/mag/retail_taking_aim_walmart/.

31. Terry Pristin, *Shopping Malls Adopting New Strategies to Survive*, N.Y. TIMES, Mar. 2, 2005, at C7.

32. *Id.*

33. *Id.*

34. The Great Atlantic & Pacific Tea Co., *A&P's History, at* http://www.aptea.com/history.asp (last visted Apr. 24, 2005).

substantially redevelopment and infill. The mixed-use development which is characteristic of this new era is enabled, in part, by the conversion of retail properties with passé formats.

Instead of big box retail causing sprawl, it may indeed prove to be a catalyst, a driver, for infill redevelopment, intensification, mixed-use, and a reorientation of low density sites to pedestrian-friendly design and transit-oriented development.[35] Shopping malls and strip centers are readily redeveloped as mixed-use sites with residential zoning, and can be made pedestrian friendly and transit oriented.[36] Mashpee Commons on Cape Cod is a successful example of how a smaller, failed open-air center can be revamped with a Main Street theme.[37]

Another trend in the suburban and rural context is the emergence of open-air centers, sometimes called strip centers, of several hundred thousand square-feet anchored by one or two big box retailers. The concept is similar to that of the large, enclosed traditional mall with in-line stores, but it is on a smaller scale and able to be developed at much lower cost through providing easier opportunities for adaptive reuse and conversion.[38]

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35. The Congress for the New Urbanism has two studies available from their Web site on greyfields development: "Greyfields into Goldfields" and "Greyfield Regional Mall Study." *See* Congress for the New Urbanism, *Greyfields into Goldfields: from failing shopping centers to great neighborhoods* (Feb. 2001), *available at* http://www.cnu.org/cnu_reports/Executive_summary.pdf; Congress for the New Urbanism, *Greyfield Regional Mall Study*, Global Strategic Real Estate Research Group (Jan. 2001), *available at* http://www.cnu.org/cnu_reports/Greyfield_Feb_01.pdf.

36. Jason Miller, *Time to Move on: Recycling "Greenfield" Sites, Dying Regional Malls, and Closed Airports* (2004), *at* http://www.realtor.org/SG3.nsf/Pages/winter04move?OpenDocument.

37. *See* Dom Nozzi, *Mashpee Commons, at* http://www.walkablestreets.com/mash.htm (last visted Apr. 24, 2005). This emerging type of retail is called a "hybrid center" with elements of lifestyle and power centers, and regional malls. *See also* Bob Hirschfeld, *Mixing It Up* (Feb. 2002), *available at* http://retailtrafficmag.com/mag/retail_mixing_2/; Debra Hazel, *Three In One: Omnicenters blend aspects of malls and power and lifestyle centers* (Mar. 2005), *available at* http://www.icsc.org/srch/sct/sct0305/dev_lease_1.php?region=.

38. There is so much innovation in the business of retailing that it is hard to keep track of it. In a recent issue of "Shopping Centers Today," published by the International Council of Shopping Centers, it was reported that the Northline Mall in Buffalo, New York, was going to be redeveloped into an 850,000 square-foot power center. *Development in Brief*, SHOPPING CENTERS TODAY, Mar. 2005, at 42. DeBartolo Development and a residential developer, New River Associates, will develop a three million-square-foot project eighty miles west of Orlando, which will include 690,000 square-feet of retail and office, and two thousand residential units. *Id*. A $125 million mixed-use project in suburban Fort Worth, Texas will include a 204,000 square-foot Wal-Mart, and a 135,000 square-foot Sam's Club, as part of the 700,000 square-foot project, which will also have 150,000 sq. ft. of offices and—here is the ringer—a 6,500 square-foot town hall; the Plaza Hotel in New York City is being converted from a hotel to mixed-use with stores, condominiums, and some of the floors reserved for hotel use; and, finally, the developers of a 1.7 million square-foot retail-entertainment center in Aurora, Colorado, have bought 407 acres of adjacent land to build a complementary residential project. *Id*. at 40.

IV. "WHISPERING" TO BIG BOX RETAIL

I submit that it is unnecessary to try and bludgeon big box retail into submission, and such efforts are ultimately doomed for several reasons.

First, as I previously suggested, the market is all-powerful. Bit by bit, the buying public's desire for cheap underwear, or whatever else it is that they want from such stores, will come to rule, just like the constant pounding of the ocean with small waves and big waves alike will eventually bring down the strongest sea wall.[39] Regardless of the rhetoric, the public wants to shop in these stores.

Second, the "over-our-dead-bodies" approach to siting big box retail only raises the ire and resolve of developers. Media attention exacerbates the strong feelings on both sides and creates a gestalt of winning by attrition, not reason. The winner of the contest is the one who gives up the most and spends the most, much like the semi-myth of the potlatch Indians.[40] I have seen this phenomenon from both sides of the fence in representing developers of controversial retail projects and in representing opposition groups against such projects. In one instance some years ago, a popular fast food restaurant wanted to locate in a town that was notoriously tough on zoning issues. The town of 23,000 did not have a single franchise fast food restaurant in it. The chain was eager to be there and I thought it would be blood sport to get the approval on a commercially-zoned strip along a state highway. We were ultimately successful without having to litigate and with little neighborhood opposition. I believe the success was due in large measure to a concerted and consistent effort by the entire development team to do everything it could to address each and every concern of the town, rather than fighting.[41] Developers and retailers are, after all, people, and they enjoy a challenge like anyone else.

Third, we do not have and will not have in our lifetimes the necessary statewide, sub-state regional, and coordinated inter-local planning and

39. Wal-Mart is constantly reinventing itself to gain profits. It is reported that Wal-Mart is going into the financial services business with potential impacts on mortgage lenders, banks, auto lenders, credit card companies, check cashers, and payday lenders. Kevin Coupe, *Will Wal-Mart Cash In?* (Mar. 7, 2005), *available at* http://www.morningnewsbeat.com/archives/2005/03/07.html#MNB5.

40. "The Tlingit potlatch has been described as a ritualized competition in which clan leaders increase their status through the opulent consumption and distribution of goods and the destruction of property. While these activities were part of the traditional ceremonial activities of a potlatch, they are not its central elements." ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, *Tlingit, at* http://college.hmco.com/history/readerscomp/naind/html/na_039100_tlingit.htm (last visited Apr. 24, 2005).

41. I came to like that town and moved there myself four years ago, several years after we got the restaurant approved. My younger children are thoroughly embarrassed by the restaurant chain's decision to place an engraved stone plaque by the front door identifying the twenty or so people on the development team, including myself, who contributed to the efforts to get the store approved.

regulation that can stop big box retail—or any other disfavored land use—from getting its teeth into that soft underbelly of the regulatory landscape. These uses will eventually find a local government so poorly planned and regulated that it will allow anything.

One may argue that some states like Vermont have actually done a good job with statewide planning and regulation, and indeed our state has done far better than most. Yet, Vermont still struggles to address the issues. You might also say that using a statewide and sub-state regional approach, such as Developments of Regional Impact (DRI), as Florida has done, could effectively regulate regardless of local weaknesses. Regrettably, the DRI experience in Florida has not proved adequate in controlling larger developments.

While we must continue to make efforts to improve our planning and regulatory systems, the plain fact is that most land-use regulation will remain a local issue and one that necessarily must be addressed at that level of government.

V. A RADICAL IDEA?

How about this radical idea? We actually allow big box retail stores in enough places that consumer demand will be met, and we carefully design them so they are not gut-wrenchingly ugly.

Christopher Duerksen, a planner and lawyer and a friend of mine for virtually all the time I have practiced law, was one of the first, if not the first, of the sensible writers to tell us how we could greatly improve site planning for big box retail. His first short piece, just four pages long and published as a Planning Advisory Service PAS Memo by the American Planning Association in April 1996, was based on his experience with Fort Collins, Colorado's success in integrating big box retail into its landscape.[42] He reiterated the basic scheme, which he developed, in a later issue of APA's Zoning News.[43] What follows is my somewhat glib summary and critique of those suggested regulatory provisions.

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42. *Site Planning for Large-Scale Retail Stores*, PAS Memo (Apr. 1996).

43. Christopher Duerksen & Bob Blanchard, *Site Planning for Large Retail Establishments*, ZONING NEWS, Feb. 1999, at 2. *See also* Chris Duerksen & Robert Blanchard, *Belling the Box: Planning for Large-Scale Retail Store*, Proceedings of the 1998 National Planning Conference (1998), *available at* www.asu.edu/caed/proceedings98/Duerk/duerk.html (continuing argument for community development that does not change the community's physical character). The American Planning Association has on its Web site the summary of a student's master's thesis which outlines most of the big box retailer planning issues. Laura Altenhof, *Coping with Big box Retailers*, American Planning Association, *available at* www.planning.org/hottopics/bigbox.htm (last visted Apr. 24, 2005).

1. Regulate the architectural character of the building so it looks smaller.

- Break up the facades so they do not look so linear. This can be done with windows, awnings and arcades. Sometimes a big box can be skinned with smaller retailers, with the big box lurking unseen, for the most part, behind.
- Vary the roof lines with parapets, eaves, sloped roofs and multiple roof planes.
- Add interest by repeating patterns of color, texture and materials.
- Clearly define customer entrances.

All of this costs money, and big box developers want to build cheap buildings because containing costs helps their low-margin profitability. They will resist such redesign. They cannot pull out Plan #345 and build when a local government imposes custom features, such as Duerksen suggests—no, they will need an architect and this costs time and money. If the floor-plan changes, the store cannot be laid out on the usual template. Standardization is central to profitability and customer satisfaction.

I have been involved in the acquisition and conversion of big box retail stores, and the biggest complaint the retailer gets in such conversions is from the customers who are used to finding a particular item in one spot and cannot find it in the same place in the new store. When the floor plan changes and this changes the layout of the store, it creates serious problems for the retailers. On the other hand, retailers are constantly tweaking their formats to maximize sales and profits. Adjustments can be made, but planners should be careful to recognize and minimize the impacts on standardized layouts.

In-line small stores skinning the big box are odd ducks, hard to rent and not always profitable. The concept is that rather than looking at a long wall of a big box, shoppers will see a line of small stores along a street front, imitating a traditional street scene. Best Buy wants to sell televisions, not be the landlord for an ice cream shop and craft store. The last thing a retailer wants is a market competitor in the same shopping center. Leases contain provisions prohibiting market competitors. When you have a big box store like Wal-Mart or Costco, it is quite difficult to find retailers for the smaller façade stores who are not competitors. Still, it is a good concept for many developments. Planners and regulators ought to be ready to sweeten the pot for developers to facilitate the economic success of in-line small stores by easing development restrictions, offering density bonuses, providing fast-track permitting, giving tax abatements, and even providing direct subsidies to the small retailers.

There is hope here, however. The trend in big box development is to make them anchors for open air centers with connecting in-line stores and some smaller, free-standing uses on pad sites, such as fast food restaurants. It would not take much to move this format to get what Fort Collins and Duerksen want.

2. Mandate color and material to get away from the cheaply constructed appearance of the typical big box.

- Requiring high quality brick, stone, wood and split faced block, and prohibiting smooth faced concrete, tilt-up panels, and metal sheathing, can increase the attractiveness of big box stores.
- Using subtle, earth tone and nonreflecting colors will also increase the attractiveness of big box stores.
- While building trim may have bright accent colors, no neon accents, please.

It is all about money in the end, and these ideas can be quite expensive, especially for a retail format that may last twenty or thirty years at the most. Would those of you over forty years old have ever believed that the enclosed shopping mall would become a retailing dinosaur, driven toward extinction by the decline of shopping as sport (itself caused by more people working more hours) and, yes, competition from the new big box formats?

Try that earth tone color scheme on Home Depot, unless you consider bright orange to be an earth tone. . . While some retailers are willing to give on some of their architectural identity to get approval on a great site, it is not the norm, and will be vigorously opposed. With the Internet and people like Al Norman who project and amplify small (and big) victories over big box retailers, I can tell you as someone who represents retail developers that they weigh these choices carefully against the mischief that will be created for them all across the country.

The often-touted McDonald's in Freeport, Maine, next to L.L. Bean—the one that looks like a colonial house—is not a favorite of the company.[44] The building and its standard colors are part of the corporate identity and when they are altered by regulation, the retailer gives up some of its recognition from the street. When you ask a retailer to alter its architectural scheme and change its colors, you are quite literally asking them to give up part of a substantial investment they have made in branding.

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44. *See* Cyburbia, *Photo of Freeport McDonalds* (2004), *at* http://www.cyburbia.org/gallery/showphoto.php?photo=327. The first time I went there, I could not find it—as Yogi Berra might say.

I readily concede that small changes can be made with little or no impact on corporate identity. Some years ago the City of Alpharetta's planning director and I were waiting our turn at the zoning board of appeals, when I heard a variance request from a Waffle House—they use a rectangular building, yellow, with a fake mansard roof.[45] The company's representative explained that they needed relief from the sign size limitations to put up a bigger sign. Why? Because it was going to be hard for the public to recognize this particular Waffle House as a Waffle House in that the design included black aluminum rail fencing around the heating, ventilating and air-conditioning (HVAC) equipment in the center of the roof, simulating a widow's walk. A widow's walk, as you may know, is a roof top area at an ocean side home where a sailor's wife can look out to sea for her returning husband. The idea of a sailor's wife walking on the Waffle House roof next to the HVAC engulfed in the odor of waffles and sausages in Alpharetta hundreds of miles from the sea looking out for a lost husband left the town planner and me fighting to suppress a fourth grader's giggles.

3. Make the big box relate better to surrounding uses and spaces.

- All sides of the building should relate to any streets on which they face. Any street sides should have at least one customer entrance.
- The minimum setback in any building façade should be thirty-five feet and, where retail is next to residential, require an earthen berm of at least six feet in height, planted with evergreens.
- Make the retailer provide at least two community amenities such as a patio/seating area, water feature, clock tower, or pedestrian plaza with benches.

Customer entrances at other than the "standard" entrance, present great problems for the retailer in terms of store layout and security. I have been involved in many negotiations where this was suggested, but proved simply unworkable. This does not mean street-oriented entrances should not be considered, but it often presents insurmountable problems for the retailer.

The idea of larger setbacks and earthen berms works against the integration of the retail and residential uses when they are abutting. It might be better, especially as we move toward more mixed-uses, to have

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45. *See* Waffle House Homepage, *at* http://www.wafflehouse.com (providing a sample of the Waffle House logo and normal colors used) (last visited Apr. 24, 2005).

some transitional uses between the retail and residential areas, which might be residential above retail or higher density residential around portions of the perimeter of the retail development.

Regrettably, mandating community amenities will do little to make most auto-oriented retail developments places where people want to come and socialize. A better approach, where it can be implemented, is to do like Mashpee Commons and create a walkable main street format.

4. Require design that makes them pedestrian friendly.

- Stores should have sidewalks at least eight feet wide on all sides of the parcel abutting a public street, and should have a continuous internal pedestrian walkway from that perimeter sidewalk to the main entrance. Walkways must be landscaped and have benches along at least 50% of their length.
- Sidewalks should be provided along the building faces to the parking areas, and internal pedestrian walkways should provide weather protection within thirty feet of the entrances and be distinguished from other surfaces with special papers.

Most of these suggestions are workable for the majority of sites, but the perimeter sidewalks are going to reduce the area available for parking and in some instances are simply not going to be used. Rather than hard and fast rules for design elements such as this, more flexible approaches might be used, particularly those that provide for the conversion of parking spaces to sidewalks at some time in the future when adjacent developments warrant.

5. Limit front-field parking to get the big boxes to relate better to the street.

- No more than 50% of the parking spaces shall be located between the front of the building and the street.

This standard appears to be a compromise of sorts (I imagine Duerksen appropriately wanted to reduce front-field parking even more) and is going to be strongly resisted by most retailers. Why? Because the perception of shoppers, when they see the parking area available to them largely filled with cars (presumably they are not going to see the parking area behind as they approach the store), is that the store is busy and their shopping trip will be protracted if they go there now. Also, and we all have observed and even done this ourselves, shoppers will cruise the parking lot looking for the absolutely best space close to the front entrance. Admit it—we all get a little rush when a space by the front door opens up and we slip in. When front-field parking is reduced and moved elsewhere, it makes it more difficult for shoppers to get that "prized" spot close to the front entrance.

Finally, there is a phenomenon of perception that a parking lot is "full," when it is not. I had a parking study done for a supermarket parking lot after the local zoning authority told me it was concerned that the site did not have adequate parking because the parking lot often seemed to be "full." The peak use of that parking lot at the busiest hour never exceeded seventy percent, but the genuine perception of the local zoning authority, and one can assume of the shopping public, was that when the parking lot was at seventy percent occupancy, it was "full." In short, reducing front-field parking to some percentage of the spaces may be too simplistic. Site design is a complex business and, again, some flexibility in standards may yield better results for the community and for the retailer.

This concludes the review and critique of Duerksen's work on design. His principles and Fort Collins' regulation have been influential and followed elsewhere. The Georgetown-Scott County Planning Commission in Georgetown, Kentucky, for example, has issued a guidebook on big box retail design review.[46] These are good ideas, but one size does not fit all. They should not be adopted uncritically. More flexible techniques may yield better results.

VI. IMPACT REVIEW

At least a half dozen municipalities around the country have adopted regulations requiring comprehensive economic and community impact review prior to approving new big box retail.[47] The approach varies widely,

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46. Georgetown-Scott County Planning Commission, *Big Box Design Standards*, *available at* http://www.gscplanning.com/big_box_design_standards.htm (last visited Apr. 24, 2005). *See also* Constance Beaumont & Leslie Tucker, *Big box Sprawl (And How to Control It)* (Mar./Apr. 2002) (reproducing a guide book published by the "Municipal Lawyer" on how to control sprawl), *available at* http://www.nationaltrust.org/issues/smartgrowth/big_box_sprawl.pdf; *What is Growth Management?* (describing smart growth techniques), *at* http://growthmanagement-icsc.org/smartgrowth/default.aspw.icsc.org (last visted Apr. 24, 2005); Ross Moldoff, *Controlling Strip Development: Case Studies from New England* (presenting case studies of communities that have tried to contain the spread of strip development), *at* http://www.asu.edu/caed/proceedings98/Moldf/moldoff.html (last visited Apr. 24, 2005).

47. The "New Rules" project is one created by the Institute for Local Self-Reliance. The New Rules website is a good and largely objective resource for those interested in big box retail regulation at the local level. *Economic & Community Impact Review*, The Hometown Advantage, *at* http://www.newrules.org/retail/impact.html (last visited Apr. 24, 2005). "The Institute for Local Self-Reliance (ILSR) is a nonprofit research and educational organization that provides technical assistance and information on environmentally sound economic development strategies. Since 1974, ILSR has worked with citizen

but for one close to home, here is how Bennington, Vermont conducts its impact review:

Bennington, Vermont's Large Scale Retail Bylaw - January 24, 2005

A) Limitation of Floor Area. . .

B) Community Impact Study. In all Zoning Districts except the CB District, no new or expanded single retail store (including, but not limited to, a retail establishment as defined in Article 2) located in a single building, combination of buildings, single tenant space and/or combination of tenant spaces, that exceeds 30,000 (thirty thousand) gross square-feet of floor area in the aggregate, shall be permitted, unless the Development Review Board finds that the project will not have an undue adverse impact on local wages, housing costs or on the ability of the town to provide municipal services and facilities through the diminution of property values and/or tax revenues resulting from the loss of economic viability of existing commercial enterprises. To this end, upon receipt of an application to the Development Review Board for such a retail store, the Town shall retain, at the applicant's expense, a consultant to perform an evaluation (Community Impact Study) of the projected costs and benefits to the community resulting from the project, including:

1) projected costs arising from the demand for and required improvements to public services and infrastructure, including roads;
2) value of improvements to public services and facilities to be provided by the project;
3) projected tax revenues to be generated by the project;
4) projected impact on property values in the community (especially those located in the VC, CB, UMU and OA Districts) and the potential loss or increase in municipal tax revenues resulting from the proposed project;
5) projected net job loss or creation caused by the project and the resulting potential loss or increase in tax revenues; and
6) estimate of how much revenue generated by the project will be retained and re-directed back into

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groups, governments and private businesses in developing policies that extract the maximum value from local resources." *See* Institute for Local Self-Reliance, *Welcome to ILSR*, *at* http://www.ilsr.org (last visited Apr. 24, 2005).

> the economy of Bennington.
>
> No application for a retail store shall be deemed complete until 60 days after the applicant has submitted to the Town the following: a) funds sufficient to pay the estimated fee for the Town's consultant to perform the Community Impact Study; and b) all information deemed necessary by the Town's consultant to complete the Community Impact Study.[48]

Impact review seems a good way to create a dialogue. Could it be used improperly, however, to protect local businesses from competition? My experience with similar studies is that they can lead to a frustrating battle of the experts. The studies are expensive and when replicated three times over—the developer, the municipality, and the opposition (after all, who trusts the applicant?)—they cost three times what you might assume.

VII. LIMITATIONS ON STORE SIZE

Many communities have adopted maximum store size limitations—ranging from San Francisco's prohibition on stores greater than 4,000 square-feet in certain neighborhoods to New Mexico's prohibition on new stores over 80,000 square-feet.[49] Initiative wars have been waged in California to limit big box retail to 100,000 square-feet probably to prevent nonunion Wal-Marts from taking grocery business away from conventional union grocers.[50] Calvert County, Maryland, last year debated a limitation of 150,000 square-feet.[51] Ultimately, the county adopted restrictions with

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48. The Hometown Advantage, *Store Size Cap and Community Impact Assessment—Bennington, Vermont* (Apr. 07, 2005), *at* http://www.newrules.org/retail/sizebennington.html.

49. The Hometown Advantage, *Store Size Caps, at* http://www.newrules.org/retail/size.html (last visited Apr. 24, 2005). The Maryland Department of Planning has an excellent monograph, "'Big Box' Retail Development," with a summary of statutes and regulations from around the country. Maryland Department of Planning, *Managing Maryland's Growth: Models and Guidelines* (Oct. 2001), *available at* http://www.mdp.state.md.us/mgs/bigbox/bigbox_v3.pdf. The Land Use Clinic of the University of Georgia School of Law has prepared another resource. *See* Land Use Clinic, *Controlling Big Box Retail Development in Georgia*, (Dec. 2004), *available at* http://www.law.uga.edu/landuseclinic/research/bigbox3.pdf.

50. Elliott Zwiebach, "Wal-Mart's Next Weapon," SUPERMARKET NEWS, Mar. 7, 2005 at 14. (Wal-Mart has a strategy to go after conventional supermarkets directly with a new concept called the neighborhood market that, at 45,000 sq. ft., is claimed to have the same variety as a 60,000 to 70,000 square-foot supermarket plus a pharmacy and an expanded health and beauty care assortment). A Washington state grocery store chain has announced it plans to sell eight of its 31 stores, describing its company as "roadkill" from Wal-Mart's inroads into the supermarket business. *State Grocery Chain to Sell 8 Stores, Blames Wal-Mart*, SEATTLE TIMES, Mar. 2, 2005, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=browncole02&date=20050302.

51. Raymond McCaffrey, *Calvert Seeks Input on Big box Stores*, WASH. POST, Jun. 13, 2004, at SM03.

variations depending upon the location of the development.[52] Not surprisingly, Wal-Mart found a gaping loophole and broke its proposed store into two parts to evade the limitation.[53]

Floor area limitations have been upheld by the courts in several instances, but responsible planners need to do a "reality check" of such limitations to determine whether they truly are intended to ensure compatibility with the scale of their communities, or whether such limitations are designed to keep out retailers for reasons unrelated to good planning.

A. Moratoria

As a stop-gap measure, many communities have imposed development moratoria, particularly after the United States Supreme Court validated moratoria as a planning tool in its 2002 Lake Tahoe decision.[54] Creating a defensible moratorium can be difficult.[55] In the end a moratorium is still

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52. "Took the following action on the big box regulations (Text Amendment #03-5): approved the recommendation of the Planning Commission accepting the four areas defined as sites suitable for big commercial retail stores: all of the Dunkirk Town Center, portions of the Prince Frederick Town Center, portions of the Lusby Town Center, and portions of the Solomons Town Center; approved the recommendation of the Planning Commission regarding maintenance agreements, co-location and appearance standards and that co-location is 20% of the total square-footage rather than using a formula; approved the recommendation of the Planning Commission regarding definitions of "Commercial Retail Establishment," "Commercial Retail Building," and "Shopping Center;" approved limiting the size of big boxes in the Prince Frederick Town Center to 120,000 square-feet (Entry and Village Districts) with co-location a minimum of 20% for a total of 144,000 square-feet; approved limiting big boxes in the Solomons Town Center to 75,000 square-feet plus a minimum of 20% co-location; approved limiting big boxes in the Dunkirk Town Center to 75,000 square-feet, plus a minimum of 20% co-location; approved limiting big boxes in the Lusby Town Center to 75,000 square-feet plus a minimum of 20% co-location; approved limiting retail stores in the Huntingtown and St. Leonard Town Centers to 25,000 square-feet in accordance with the Town Center Master Plans and that no co-location be required; and approved the recommendation of the Planning Commission to restrict big boxes from the Rural Commercial areas, and limit retail development in Rural Commercial areas to a combined total square-footage of 25,000 square-feet of development per lot or parcel of record effective August 10, 2004." Calvert County Government, Board of Commissioners, *Summary of Action Taken* (Aug. 10, 2004), a*vailable at* http://www.co.cal.md.us/gov/previous%5Fagendas/2004%5Fprev%5Fagenda/08%2D10%2D04%5Fprevious%5Fagenda.htm.

53. just-food.com, *Wal-Mart Plans Adjacent Stores to Beat Planning Rule* (Mar. 8, 2005), *available at* www.just-food.com/news_detail.asp?art=60125. The article quotes Mia Masten, community affairs manager for Wal-Mart's eastern region: "As these big box bills come up, all retailers will just have to be flexible. In this case, we developed a model that allowed us to reach our customers." *Id.* To get past the 75,000 square-foot limit, Wal-Mart is proposing to build a 74,998 square-foot store next to a 22,689 square-foot garden center.

54. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

55. Matthew St. Armand & Dwight H. Merriam, *Defensible Moratoria* (Apr. 1, 2003), *available at* www.caed.asu.edu/apa/proceedings03/MERRIAM/merriam1.htm.

just a moratorium—eventually, regulation must be adopted in some form.

B. Taxes

One of the latest and most provocative ideas available to states is to levy taxes on Wal-Mart and other big box retailers to offset what is perceived to be the additional costs of providing health care and other public benefits for workers in big box retail who are believed to be economically disadvantaged by their employers.[56] A University of California at Berkeley study suggests that $86 million of labor costs from Wal-Mart employees are being shifted to that state's taxpayers every year because the employees are poorly paid and have inadequate health insurance. Wal-Mart contests the findings.[57]

Conventional tax strategies may be useful. Regional tax base sharing can be helpful to avoid geographic distortions. Tax abatements are a tried-and-true incentive. Relief from part of the sales tax burden can effectively put money back in the pockets of retail developers and retailers.

Special taxes—in realistic, limited amounts—might be levied on big box retailers for the purpose of creating sinking funds and trust funds for the reuse of parcels at the end of their useful lives.[58] Big box retail might contribute in some fashion economically to small business assistance programs to help existing, small retailers gain efficiencies, such as through computerization, and to reposition themselves in the marketplace so that they can not only survive, but perhaps thrive, when big box retail comes to town.[59]

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56. Reuters, *Montana to levy tax on Wal-Mart?* (Feb. 16, 2005), *available at* http://www.againstthewal.com/#Montana_to_levy_tax_on_Wal-Mart. Lawmakers in Connecticut are considering requiring employers to provide health care benefits to all full-time employees or pay the government to do it for them. California enacted similar legislation in 2003 which was later rejected by a referendum. *Bill: 'Pay or Play' Health Care—Employers Could Be Required To Fund or Provide Coverage*, HARTFORD COURANT, Mar. 8, 2005.

57. James Temple, *Study: Wal-Mart hurts taxpayers*, CONTRA COSTA TIMES, Aug. 3, 2004, *available at* www.contracostatimes.com/mld/cctimes/business/9307743.htm.

58. On March 9, 2005, the day before our Symposium at Vermont Law School, at the Third Annual Symposium on Sprawl hosted by the Albany Law *Environmental Outlook Journal*, Michael Allan Wolfe, the Richard E. Nelson Chair in Local Government Law, Levin College of Law, University of Florida, described in some detail this concept of requiring rehabilitation or reuse through mandatory covenants and fees. It is apparently not an entirely new idea.

59. Dale Mulartrick & David Silver, *The Wal-Mart Challenge*, URB. LAND, Jan. 2005. Smaller competitors, for example, might step up their marketing efforts, when Wal-Mart comes to town. Building up market share, segmenting customers, adopting more rigorous pricing strategies, and developing greater efficiency in operations can all contribute to success when Wal-Mart is a competitor. Darrell Rigby & Dan Haas, *Outsmarting Wal-Mart*, HARV. BUS. REV. 22 (Dec. 2004).

VIII. CONCLUSIONS

From this review of the literature and my practical experience of dealing with big box retail, we can draw some conclusions.

The planning for and regulation of big box retail use is in many ways contextual. It matters whether it is within the central city, suburbs, or rural areas. The acceptability and the propriety of this retail format depends on the scale of existing development and the availability of infrastructure. A one-size-fits-all approach to planning and regulating big box retail generally will not work.

Big box retail carries with it some heavy baggage. Issues of unionization, wage scales, benefits for workers, and adverse impacts on existing retail uses are real and important, but must be questioned as a basis for land-use planning and regulation.

Getting big box retail in the right place is frustrated and often precluded by weak or nonexistent systems of state planning and regulation, a lack of adequate substate regional planning and governance, and the reality that many local jurisdictions are virtually unplanned and unregulated. This lack of an effective institutional infrastructure and the Balkanization of the land-use decision-making process will not change sufficiently and quickly enough to address the continuing proliferation of this retail format.

Planning and regulation are most effective, and absolutely needed, where they address market failure. In the case of big box retail, the market often fails in locational decisions in part because of tax structures and infrastructure designed to meet other needs but equally supportive of this format. Regional tax base sharing, perhaps coupled with an approach involving developments of regional impact, would be helpful in overcoming some of the tax-driven factors and might have a limited effect on the infrastructure-based locational decisions, though developments of regional impact regulation have not proven particularly effective.

A better process of capital improvement programming to extend infrastructure to locations desirable for big box retail development, and to limit infrastructure in other areas, would be a helpful adjunct to planning and regulation at all levels of government.

To the extent that planning and regulation is more effective when market forces are channeled rather than blocked, it may be that incentive programs could "nudge" big box retail to better locations. Some relief from standards, such as lot coverage maximums and open space minimums, as well as parking ratios, might be sufficient to extract from developers concessions on the mix of retail uses and design in ordinary developments.

Mixed-use commercial developments with big box retail as one or more of the anchors and a substantial residential component seems to have much promise for reducing sprawl, while driving the economic redevelopment of weakened and failed retail centers.[60] There is much experimentation to be done here if we are to understand how redevelopment can be effective without compromising good planning and regulation.[61] Retail developers with whom I have worked are largely disinterested in bringing housing to their commercial projects. Some separation on site is likely to be required to get developers to accept the idea. However, where growth rates are high and land economics support it—I have in mind South Florida—the development of open centers at substantially higher intensities with pedestrian friendly, transit-oriented design and a true mix of residential and retail uses will become the norm during the next two decades, rather than the exception. This so-called "greyfields" development will dominate the action in coming years.

The demise, probably exaggerated, of the enclosed mall should be looked at as an opportunity, not as an intractable problem. If the old expression "when you get lemons, make lemonade" has any meaning, it is certainly here. The economic collapse of large, enclosed malls offers the chance for redevelopment; converting some to open centers, some with new big box retail as additional anchors and some with substantial residential components, and all potentially with a mix of these variations.

A moratorium is an ultimately ineffective substitute for good planning and regulation, but might be used for a "planning pause" of limited duration, say six months to one year at the most, during which plans and regulations can be put in place.

Plans and regulations should recognize the public demand for the value shopping opportunities provided by big box retail, whether it is of the general merchandise variety such as Wal-Mart, or category killers like Best Buy or factory outlets.

Big box retail developers and retailers should be involved in the

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60. A variation on this is the proposal to finance a new baseball stadium in Washington, DC, on the Anacostia waterfront in part by building a mixed-use retail/residential development anchored by big box retailers such as Wal-Mart or Costco. Dada Hedgpeth & Neil Irwin, '*Big Boxes' Part of Stadium Pitch*, WASH. POST, Feb. 11, 2005, at E03.

61. The Brookings Institution has issued an excellent report of general interest regarding redevelopment. *See* Christopher B. Leinberger, *Turning Around Downtown: Twelve Steps to Revitalization* (2005), *available at* http://www.brookings.edu/metro/pubs/20050307_12steps.pdf (capture the vision; develop a strategic plan; forge a healthy private/public relationship; make the right thing easy; establish business improvement districts and other non-profits; create a catalytic development company; create an urban entertainment district; develop a rental housing market; pioneer an affordability strategy; focus on for-sale housing; develop a local-serving retail strategy; and re-create a strong office market).

planning process from the outset so that appearance codes and site design can be optimized. There is much that can be done to make sites and buildings better, but the fundamental economics of this type of development must be understood and respected, and planners should be open to discussing the need for merchants to maintain building configurations and their distinctive architectural features.

Much bargaining remains to be done in getting these projects optimized. If local regulators feel compelled to require natural stone, wood siding, pitched roofs, articulated building fronts, public amenities, and additional landscaping—and all of us can add another two dozen items to this list—then some consideration must be given to the adverse impacts on the retail developer's and retailer's economics. In return for certain concessions by the developer and retailer, the municipality might extend utilities or participate in road infrastructure improvements or give tax abatements or give credits on impact fees or. . . If state law permits development agreements, many of these developments are going to be ideal candidates for that negotiation. If development agreements are not enabled, extra efforts must be made to invite pre-application reviews and to reach out to retail developers as they come to the community. A good working relationship is necessary for give-and-take on both sides. Time is money in most of these projects and the more a community is willing to do in expediting review and approval, the more the community is likely to see generosity from the retail developer and retailer.

The literature has little to say about the reuse of big box retail structures at the end of their useful lives. It is reasonable to assume that some of these formats will last twenty to thirty years, more or less, based on other trends. How these buildings and sites are to be reused is an issue that might be addressed during the design and permitting stage, as part of an impact analysis. It might be useful to consider whether big box retailers should be required to pay something (remembering that margins are small with these value retailers) to a sinking fund that would be used for that retailer at that site, or as part of a larger state or substate regional trust fund for repositioning these real estate assets at the inevitable end of their physical, functional, and economic lives. Even in the last twenty years we have seen too many big boxes go dark and stay that way for too long. They are relatively inexpensive to build and it may be that the redevelopment process in many cases will involve demolition. Under certain circumstances, should some of these buildings and some of the sites pay the equivalent of the deposit found on bottles to create sufficient funds with their reuse?

The big box retail beast will not go away. It is loved by consumers who are quick to feed it. We cannot beat it into submission. We must recognize when it is contextually appropriate and orchestrate many techniques to nudge it into compliance with the public's interest in promoting and protecting the health, safety, and general welfare. Properly guided in the right direction, and willingly obedient because its needs have been recognized, big box retail need not exacerbate sprawl and may in the end prove to be the ultimate sprawl-buster by providing opportunities for intensification and mixed-use redevelopment of properties previously developed at too-low densities.