

Foreword: The Big Box Challenge

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Across America large retail chains are gaining an ever-increasing share of the retail market, from clothing, pharmaceutical products and hardware to books, videos, groceries and household appliances.¹ The compound annual rate of growth in sales for supercenters has averaged 28.5 percent for the last decade,² and Wal-Mart sells “more than one-quarter of the shampoo, disposable diapers, and toothpaste bought nationwide.”³ Smaller, independently owned businesses still survive in many areas. Vermont has more than 250 country stores,⁴ seventy independent bookstores, and about 200 independent hardware stores.⁵ Nevertheless, the challenge for the future is clear. Large retail chains presumably will continue to grow, and communities around the country will continue to be faced with questions about the impact of this growth on their communities and whether they should use their governmental land use powers to influence the nature of future growth.

In a two-day symposium in March 2005 on “Small Town America in an Era of Big Box Development,” the *Vermont Journal of Environmental Law* at Vermont Law School brought together experts in land use planning from around the nation to explore how communities, regions, and states should or could respond to the trend toward big box stores. This volume contains many of the papers delivered at the symposium, and we hope it will provide useful information and guidance for those who are interested in this issue in Vermont and across the country.

Vermont is a logical setting for a gathering designed to analyze the options available to people who are thinking about the big box trend. Although it is a small, rural state, it led the nation in the “quiet revolution”⁶ in land use regulation with the enactment in 1970 of Act 250,⁷ a unique land use and environmental law that requires state review of developments that

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1. See STACY MITCHELL, 10 REASONS WHY VERMONT’S HOMEGROWN ECONOMY MATTERS 1 (2003).

2. ROBERT SPECTOR, CATEGORY KILLERS 93 (2005). During the same period, the department store sector produced a 0.5 percent growth rate. *Id.*

3. Steven Greenhouse, *Opponents of Wal-Mart To Coordinate Efforts*, N.Y. TIMES, Apr. 3, 2005, at 16.

4. See MITCHELL, *supra* note 1, at 35.

5. *Id.* at 1.

6. See generally FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 54-89 (1971).

7. 10 VT. STAT. ANN., tit. 10, §§ 6001-6092 (1997 & Supp. 2004).

exceed certain thresholds.⁸ Over twenty-five years later, when Wal-Mart sought to enter the Vermont market, the Vermont Supreme Court held that Act 250 allows the state decision-makers to consider the effect of the proposed store on market competition,⁹ and it allows them to require economic studies quantifying the local and regional costs and benefits of the secondary growth that the store will cause.¹⁰ Vermont's approach was a harbinger of the concept of looking at local and regional impacts.

Big box stores provoke strong, conflicting views, whether the debate is over Wal-Mart or other retailers or whether the debate is in Vermont, Georgia, or California. Consequently, the first challenge in thinking about policy options is determining whether a community, region, or state has a prevailing view about what it wants to accomplish. Does it want to encourage or restrain the growth of big box stores?

This is not an easy task. A recent event in Vermont illustrates the tension between these competing views. In January 2005, the select board of the small town of Bennington voted to adopt a zoning bylaw that limited the size of single retail stores to either 50,000 or 75,000 square feet of floor area, depending on the zone.¹¹ This measure effectively prevented the existing Wal-Mart from pursuing its plan to double its size to 112,000 feet.¹² When the issue was put to the voters at a special election in April following a petition, however, the voters in the town rejected the measure by a vote of 2,189 to 1,724, giving Wal-Mart supporters a victory with 56 percent of the vote.¹³

The factors involved in reaching a decision can be many and complex: transportation patterns, aesthetics, opportunities for the creation of new jobs, wage scales and health benefits, impacts on existing businesses and

8. *Id.* § 6001(3) (definition of "development" covered by act).

9. *In re Wal-Mart Stores, Inc.*, 207 A.2d 397, 402 (Vt. 1997).

10. *Id.* at 402. In reaching these determinations, the court was interpreting Act 250's Criterion 9(A), which provides that the decision-maker can consider "whether or not the proposed development would significantly affect [the town and region's] existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved." VT. STAT. ANN. tit. 10, §6086(a)(9)(A)(1997). Thus, the court used the issue of financial capacity to find that local and regional impacts are relevant. See *In re Wal-Mart Stores Inc.*, 702 A.2d at 402. In the face of the court's decision, Wal-Mart ultimately withdraw its application, but Wal-Mart now has four stores in Vermont and has renewed its efforts to build on the site that was subject to the previous litigation. Elizabeth Courtney, *Vermonters: Doing It Our Way*, VT. ENVTL. REP. (Vermont Natural Resources Council, Montpelier, Vt.), Winter 2004, at 2.

11. Bennington, Vt., Large Scale Retail Bylaw, § A(1)-(2) (Jan. 24, 2005). This bylaw elaborated on an interim bylaw adopted in April 2004. Bennington, Vt., Interim Bylaw (Apr. 12, 2004).

12. David Gram, *Vermont Voters Back a Bigger Wal-Mart*, VALLEY NEWS, Apr. 6, 2005, at A1.

13. *Id.*

employment, fiscal implications (positive and negative, local and regional), consumers' access to goods in the local market, the prices consumers pay for goods, the effect on national industries, the conditions of labor and the environment in other countries, and more.

People's views on the relative significance of these factors in any particular situation will help define whether the goal is to prevent big box stores from coming to town, to regulate their locations, design and impacts, or to follow the prevailing tradition of strip development outside town centers. In addition, the reasons for choosing the particular goal will provide the policy basis for deciding what government can do through the exercise of its police power. At the same time, thoughtful exploration of the factors can shed honest light on whether the instruments of land use planning will be used to achieve purposes that fall within the legitimate domain of land use planning or to serve as a surrogate for achieving other purposes.

If some governmental action is deemed appropriate, the next challenge is to determine which level of government should take the lead—local, regional, or state. Land use regulation traditionally has fallen into the local domain, often causing results that may be discordant at a regional level, but the pages that follow contain numerous examples of how these issues can be addressed by various levels of governments, such as:

- Amendments to local comprehensive plans and zoning ordinances;
- Voluntary cooperation among towns;
- Inter-jurisdictional agreements on infrastructure;
- Regional or state goals with which local actions must be consistent;
- Regional approval requirements subject to a local veto;
- State technical assistance for planners;
- State review of development proposals;
- State incentives for directing growth to certain locations; and
- State regulation of environmental issues that have a direct effect on big box development.

A legislative proposal in Vermont this year illustrates the sensitivity of the balance of power between local and state governments in this traditionally local arena. A bill introduced in the Vermont Senate in early 2005 proposed a 50,000 square foot cap on retail floor area (75,000 square-foot in designated areas).¹⁴ After hearing from the representatives of some

14. S.B. 153, 2005 Leg., 69th Sess. (Vt. 2005) (amending VT. STAT. ANN., tit. 24, § 4412). The bill proposed a cap that would stay in effect until municipalities adopt compatible bylaws. *Id.* It

municipalities, including those considering larger stores, the primary sponsor is considering withdrawing the bill to allow the debate about cap size to occur first at the local level.¹⁵

A parallel challenge is finding the approach that will address the particular concerns that the community, region, or state has identified. Some approaches are more suitable to the local level while others require higher levels of government; hence, the questions of which level of government and the choice of specific mechanism are inherently linked. This volume contains a wealth of approaches, only some of which are highlighted here.

If citizens and the government are concerned about directly regulating or influencing the location of big box stores, they can consider a range of options, including:

- Requiring impartial economic impact studies;
- Requiring mixed use developments;
- Imposing area caps;
- Requiring concurrency with transportation infrastructure;
- Encouraging infill in the downtown area;
- Using big box retailers to infill vacancies in malls;
- Limiting retail uses in areas that should be retained for industrial development; and
- Using government spending power to guide growth.

Other, more indirect techniques can also have a significant effect on the location of retail activities, even though they do not appear to be directly targeted toward the big box issue. For example:

- Negotiating tax base sharing agreements among communities to avoid competition for new tax base that may have adverse regional impacts;
- Enhancing traditional downtowns as magnets for economic growth to deter sprawl;

gave municipalities the option of enacting a lower cap and applying the 75,000 cap to developments in downtown development districts, village centers and new town centers designated under an existing provision of Vermont law. *Id.* The bill also would have allowed municipalities to require applicants to provide an analysis of the costs and benefits to the community. *Id.*

15. Patrick McArdle, *Proposed Vt. Big-Box Law Withdrawn*, BENNINGTON BANNER, Apr. 7, 2005. The sponsor, who cited in particular one community that is looking at a 240,000 square-foot store, is considering introducing a bill that would provide a default cap if a community does not set its own cap. *Id.*; see also John P. Gregg, *The Debate over Big Stores*, VALLEY NEWS, March 25, 2005, at A1 (cosponsor states no intention to substitute state judgment for local judgment).

- Using strategic land conservation to guide growth patterns; and
- Educating people about issues and alternatives.

If the concern is the physical appearance of the building, there are ways to regulate the appearance of the building, some of which may also affect the location of the building or the retailer's view of the desirability of the market. These techniques include:

- Using area caps that limit the footprint of the structure;
- Requiring design and other aesthetic specifications, such as roofline detailing and landscaping requirements; and
- Imposing fees or taxes to provide funding for reuse of the site at the end of its useful life so that it does not become a blight on the landscape.

A final challenge is not to forget issues that may seem dully procedural but which may have a significant effect on the outcome in any given situation—issues involving who makes the decision and how that decision is made. These issues include:

- Whether the decision-makers are elected or appointed;
- The use of supermajority votes;
- The role of referenda;
- The choice of counsel;
- The role of negotiation;
- The barriers created by the costs of the public decision making process, such as the cost of studies and the cost of attorneys' fees if the case goes to litigation;
- The role of citizens as members of their community and constituents of state legislators; and
- Ultimately, the preferences we express each day as consumers.¹⁶

This foreword captures only some of the facets of the big box challenge and some possible responses, and as readers will find, there is no one prescription for the right answer. The ultimate solutions will depend on the determination that each community—local, regional, or statewide—makes

16. Upon returning to the United States after twenty years in Britain, best-selling author Bill Bryson wrote, "Most people think they want Main Streets but won't make the small sacrifices in terms of time, cost, and footpower necessary to sustain them. The sad fact is that we have created a culture in which most people will happily—indeed, unthinkingly—drive an extra couple of miles to walk thirty less feet." BILL BRYSON, *I'M A STRANGER HERE MYSELF* 264 (1999).

about what it wants to become, and the solutions will depend on the creativity and skill of the individuals who will work with existing laws and shape new ones. We hope that this volume will assist those who are thinking about these issues.

Before closing, thanks are owed to the editorial board and staff of the *Vermont Journal of Environmental Law* for organizing the symposium and preparing this volume, the numerous participants in the symposium, including the authors of these articles, and the continued commitment of Vermont Law School to enhancing the knowledge and understanding of the environmental, human, and legal landscape of Vermont and the United States.