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Volume 14, Issue 4

Summer 2013
Foreword: The Big Box Challenge

Janet E. Milne*

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. The compound annual rate of growth in sales for supercenters has averaged 28.5 percent for the last decade, and Wal-Mart sells “more than one-quarter of the shampoo, disposable diapers, and toothpaste bought nationwide.” Smaller, independently owned businesses still survive in many areas. Vermont has more than 250 country stores, seventy independent bookstores, and about 200 independent hardware stores. 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” in land use regulation with the enactment in 1970 of Act 250, a unique land use and environmental law that requires state review of developments that

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* Director of the Environmental Tax Policy Institute and Professor of Law at Vermont Law School.

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.
4. See MITCHELL, supra note 1, at 35.
5. Id. at 1.
exceed certain thresholds. 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, 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. 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. This measure effectively prevented the existing Wal-Mart from pursuing its plan to double its size to 112,000 feet. 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.

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

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8. Id. § 6001(3) (definition of “development” covered by act).
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.
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-feet in designated areas). After hearing from the representatives of some

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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 rooffline 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.
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. It became a popular movie starring Robert Redford and Kristin Scott Thomas. 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. 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.

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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* Dwight H. Merriam, FAICP, CRE, is a partner of the firm of Robinson & Cole, LLP. The views expressed by the author are his and not necessarily those of his law firm or its clients.


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


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. Its archrival, Lowe’s, is of the same type. 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. 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.”

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.” 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. I know that this is an


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).


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), 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. 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.

In its Annual Report 2003, Wal-Mart reports total sales of $256.3 billion. 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.

Wal-Mart is a dominant force in moving product to market. 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 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.

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.


Id.


Worldbank Development Indicators database, supra note 12.

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.\(^\text{17}\)

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.\(^\text{18}\) It plans on improving customer service and merchandising, and will also cut costs.\(^\text{19}\) Home Depot, the king of the category killers, has similarly startling statistics.\(^\text{20}\)

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.


\(^{19}\) 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

23. Id.
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 3724 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,

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

25. A useful reference on all things Wal-Mart is the edgy weblog, theboxtank. See
heboxtank launch.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.
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/growthmana
gement/fullarticle.asp?fileid=16769.
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. Regardless, I think it is inevitable that Wal-Mart and other big box retailers will emerge as dominant forces in the central cities. 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. 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. 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.”

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.

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

29. Id.
32. Id.
33. Id.
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. Shopping malls and strip centers are readily redeveloped as mixed-use sites with residential zoning, and can be made pedestrian friendly and transit oriented. 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.

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. 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

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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.hmc.o.com/history/readerscomp/aaind/html/na_039100_tlingit.htm](http://college.hmc.o.com/history/readerscomp/aaind/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. He reiterated the basic scheme, which he developed, in a later issue of APA’s Zoning News. 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).
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.

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. 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

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. 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. The approach varies widely,


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 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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\(^{50}\) 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.

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

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. Creating a defensible moratorium can be difficult. In the end a moratorium is still

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), available 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.


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. 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.

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. 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.

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56. Reuters, Montana to levy tax on Wal-Mart? (Feb. 16, 2005), available at http://www.agnosticsthewal.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.


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.

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.\(^6^0\) There is much experimentation to be done here if we are to understand how redevelopment can be effective without compromising good planning and regulation.\(^6^1\) 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

\(^6^0\) 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.

\(^6^1\) 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).
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.
REGULATING BIG BOX STORES: THE PROPER USE OF THE CITY OR COUNTY’S POLICE POWER AND ITS COMPREHENSIVE PLAN

CALIFORNIA’S EXPERIENCE

Daniel J. Curtin, Jr.*

I. INTRODUCTION

In the last few years, there has been a great deal of controversy relating to land use controls over big box retail development. Most of this recent controversy has been prompted by a city or county’s action in processing applications by Wal-Mart in expanding its retail empire.1 However, not all applications have come from Wal-Mart: there are other similar big box retail applicants, such as Costco, Target, K-Mart, and others. In addition to the normal land use issues—such as location, design, size, environmental impacts, and traffic issues—there are many other secondary issues. For example, the proposed big box retailer might not be paying an adequate wage, they might not offer affordable health insurance coverage, or the developer might not be concerned with the end of “Ma and Pa” type small store ownership in the region. Some of these issues were discussed recently in an appellate court case in California, Bakersfield Citizens for Local Control v. City of Bakersfield,2 where the court held that a city must assess both individual and cumulative environmental impacts on two shopping centers, each of which included a Wal-Mart Super Center and were located 3.6 miles apart.

In Bakersfield, two different developers, Panama 99 Properties and Castle and Cooke Commercial-CA (C&C), applied for project approvals in early 2002, including general plan amendments and zoning changes for

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their respective retail shopping centers located 3.6 miles apart in the City of Bakersfield, California. Pursuant to state law, an Environmental Impact Report (EIR) was prepared for each project. On February 12, 2003, the Bakersfield City Council certified both EIRs and, after a public hearing, approved both projects. In March 2003, the Bakersfield Citizens for Local Control (BCLC) filed two CEQA actions challenging the sufficiency of the EIRs. While the suit was pending, construction began at both sites. The trial court decertified the EIRs, but left the project approvals intact. Both BCLC and C&C partially appealed the judgment to the appellate court. In ruling against the City, the Court of Appeals reversed and remanded. Before rendering its opinion, the court said “it [was] necessary to explicitly reject certain philosophical and sociological beliefs that some of the parties had vigorously expressed.” For the record, the court stated that “[it did] not endorse BCLC’s elitist premise that so-called ‘big box’ retailers are undesirable in a community and are inherently inferior to smaller merchants, nor did it affirm its view that Wal-Mart, Inc. [was] a destructive force that threatened the viability of local communities.” The court said, “Wal-Mart [was] not a named party in these actions and . . . rebuff[ed] BCLC’s transparent attempt to demonize [the] corporation.” The court “[did] not know whether Wal-Mart’s entry into a geographic region or expansion of operations within a region [was] desirable for local communities. Similarly, [it] did not know whether Wal-Mart was a ‘good’ or a ‘bad’ employer.” The court offered “no comment on Wal-Mart’s alleged miserly compensation and benefit package because BCLC did not link the asserted low wages and absence of affordable health insurance coverage to direct or indirect adverse environmental consequences.” The court said, “[it] would not dignify with extended comment C&C’s complaint that BCLC [was] just a ‘front’ for a grocery worker’s union whose disgruntled members [felt] threatened by nonunionized Wal-Mart’s entry into the grocery business.”

The court further stated that it “had no underlying ideological agenda

3. Id. at 211.
4. Id; see also California Public Resources Code (CEQA) §§ 21000-21177 (West 2005).
5. Id at 211.
6. Id.
7. Id. at 212.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
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and had strictly adhered to the accepted principle that the judicial system had a narrow role in land use battles that were fought through CEQA actions.” The court said that “[t]he only role in reviewing an EIR was to ensure that the public and responsible officials were adequately informed of the environmental consequences of their decisions before they were made.”

In this situation, the court was absolutely correct. It should only look at whether the city of Bakersfield complied with the law. However, if the city had definitive, mandatory criteria in its general plan as to the placement and regulation of big box-related development, including impacts of secondary effects, and the city had not complied with those in its approval process, then a citizens group might be successful in court to have the approvals overturned.

This controversy has spread nationwide; in Vermont, California, and elsewhere, much publicity has been given to this subject. As mentioned in a May 24, 2004 news release, “[o]ver 70 percent of Vermonters prefer to shop in their neighborhoods or in a nearby downtown or village center, according to a poll released . . . by the Center for Rural Studies on behalf of the Vermont Forum on Sprawl. Vermonters also most frequently say they want big box retail stores to be located in downtowns.” Further, the release noted that the National Trust for the Historic Preservation designated the entire State of Vermont—“its landscape, its historic villages and towns and strong sense of community—one of the nation’s eleven most endangered, historic places.” As the poll indicated, “Vermonters are not against Wal-Mart. . . They simply believe big box retailers should adapt their plans to fit into the Vermont landscape—not supplant it.”

Some of this discussion was earlier highlighted by the Vermont Supreme Court in In re Wal-Mart Stores, Inc., upholding the order of the Environmental Board denying Wal-Mart’s project. In doing so, the court held that the “project’s impact on market competition was a relevant factor” for consideration by the board. The court held: (1) the board did not err in

14. Id.
15. Id. (quoting Berkeley Keep Jets Over The Bay Com. v. Board of Port Comm’rs., 111 Cal. Rptr. 2d 598 (Cal. Ct. App. 2001)).
18. Id.
19. Id. (quoting Executive Director Beth Humstone, Vermont Forum on Sprawl).
21. Id. at 401.
requiring Wal-Mart to provide secondary-growth studies;\(^2\) (2) the term “growth,” within the meaning of impact of growth criterion includes economic as well as population growth;\(^2\) (3) the board was not bound by the Agency of Transportation’s (AOT) determination of acceptable traffic flow levels;\(^4\) and (4) “the board could properly require Wal-Mart to produce additional evidence demonstrating its plan to reduce or eliminate the burden” on regional education services.\(^2\) Therefore, the court rejected Wal-Mart’s application for the permit.

The big box controversy in California was highlighted in an article noting that many California cities and counties of all sizes adopted regulations limiting development by big box stores.\(^2\) The article discussed the land use and social concerns that arise when such applications are processed. It further discussed that “big boxes and even Wal-Mart supercenters are not meeting resistance everywhere in the state.”\(^2\) Wal-Mart’s first California supercenters are scheduled to open this spring in La Quinta and Palm Springs.\(^2\) That article, in also noting that “Wal-Mart projects have sparked controversy from Vermont to California,” discussed the recent processing and approval of a Wal-Mart supercenter in New Orleans.\(^2\)

The regulation of big box developments, like the regulation and control of all types of development, is based on the proper exercise of a city’s or county’s police power.

II. POLICE POWER

A. In General

The legal basis for all land use regulation is the police power of the city\(^3\) to protect the public health, safety, and welfare of its residents.\(^3\) A land use regulation lies within the police power if it is reasonably related to

\(^{22}\) Id. at 402.
\(^{23}\) Id. at 404.
\(^{24}\) Id.
\(^{25}\) Id. at 405.
\(^{26}\) Paul Shigley, Big Box Regulations Sweep the State: Proposed Wal-Mart Supercenters are at Center of Debate, CAL. PLAN. & DEV. REP., Vol. 19, No. 1 (Jan. 24, 2004).
\(^{27}\) Id.
\(^{28}\) Id; see also Historic Wal-Mart Controversy, 27 State & Local Law News, No. 4 (Section of State and Local Government Law, Summer 2004).
\(^{29}\) Id.
\(^{30}\) When the word “city” is used, it also means “county;” “city council” also means “county board of supervisors.”
As Justice William O. Douglas, speaking for the United States Supreme Court, stated:

The concept of the public welfare is broad and inclusive... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. Regulations are sustained under current complex conditions that at one time might have been condemned as arbitrary and unreasonable. In the 1970s, Justice Douglas, speaking for the United States Supreme Court, upheld a village’s zoning ordinance relating to land use restrictions on single-family dwelling units. His opinion identified the interests that supported the village’s exercise of its police power at the time:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker. The police power is not confined to elimination of filth, stench, and unhealthy places; it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Today, many cities face different needs and interests than those identified in Village of Belle Terre. Cities face concepts of "smart growth," "sustainable growth," "new urbanism," and "stopping sprawl." In addition, they are at times confronted with big box retail uses. Local regulations addressing those concepts are as proper an exercise of a city’s police power as were those in Village of Belle Terre, due to the elasticity of that power.

B. California

California courts recognize the above-cited U.S. Supreme Court statements as "a correct description of the authority of a state or city to

36. Id. at 9.
enact legislation under the police power.”

The police power, even though established by common law, is set forth in the California Constitution, which confers on cities the power to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.”

The California Supreme Court has stated:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation omitted]. Apart from this limitation, the ‘police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.”

Land use regulations are a manifestation of the local police powers conferred by the California Constitution, not an exercise of authority delegated by statute. For example, state zoning laws pertaining to the adoption of local zoning regulations are not intended as specific grants of authority, but as minimum standards to be observed in local zoning practices. Likewise, the California Supreme Court has held that: “a city’s or county’s power to control its own land use decisions derives from [its] inherent police power, not from the delegation of authority by the state.”

In exercising its police power, a city must act within all applicable statutory provisions so there will be no “conflict with general laws.” The city’s actions must also meet constitutional principles of due process: they must be reasonable, nondiscriminatory, and not arbitrary or capricious.

The police power is an elastic power. It allows cities to tailor regulations to suit the interests and needs of a “modern, enlightened and progressive community,” even as those interests and needs change. A full range of interests can support a city’s exercise of its police power. The California Supreme Court has held that aesthetic reasons alone can justify

41. See Scrutton v. County of Sacramento, 79 Cal. Rptr. 872, 876 (Cal. Ct. App. 1969); see, e.g., Candid Enters., 705 P.2d 876 (upholding a school facility’s impact fee imposed by a county without statutory authorization); Birkenfeld, 550 P.2d 1001 (upholding city’s rent control initiative despite lack of express statutory authority).
42. DeVita v. County ofNapa, 889 P.2d 1019, 1030-31 (Cal. 1995).
43. CAL. CONST. art. XI, § 7, supra note 39.
the exercise of the police power.\footnote{46}{See Metromedia, Inc. v. City of San Diego, 164 Cal. Rptr. 510, 514-15 (Cal. Ct. App. 1980) (upholding, in part, a city’s total ban of offsite advertising signs); Ehrlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996) (upholding the city’s public art fee ordinance).}

The United States Supreme Court has cited to aesthetics in supporting land use regulations. In upholding a local ordinance prohibiting the posting of signs on public property, the Court stated that aesthetic concerns are substantial governmental interests properly addressed under a city’s police power.\footnote{47}{See Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984).} Similarly, in upholding New York City’s Landmark Preservation Law, the Court approved the city’s use of its police power to enhance the quality of life by preserving “desirable aesthetic features of a city.”\footnote{48}{Penn Central Transp. Co. v. New York City, 438 U.S. 104, 129 (1978).}

Courts have also held that regulations affecting economic interests in real property are an appropriate exercise of the police power.\footnote{49}{See, e.g., Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1022 (Cal. 1976) (holding that regulations implementing local rent control laws are valid); Griffin Dev. Co. v. City of Oxnard, 703 P.2d 339, 340-42 (Cal. 1985) (holding that regulations relating to condominium conversions are proper).}

Protection of a city’s “character” and “stability” has served to justify a city’s invocation of its police power. In \textit{Ewing v. City of Carmel-by-the-Sea}, homeowners challenged the constitutionality of the city’s zoning ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days (basically renting your residence for less than 30 days).\footnote{50}{Ewing v. City of Carmel-by-the-Sea, 286 Cal. Rptr. 382 (Cal. Dist. Ct. App. 1991).} The homeowners claimed the ordinance amounted to a taking, was void as being arbitrary and vague, and violated their right of privacy.\footnote{51}{Id. at 383.} In ruling for the city, the appellate court held that the ordinance was a proper exercise of the city’s land use authority under its police power “to enhance and maintain the residential character of the city.”\footnote{52}{Id. at 387.} The court stated that this is a wholly proper purpose of zoning:

\begin{quote}
It stands to reason that the ‘residential character’ of a neighborhood is threatened when a significant number of homes—at least 12 percent in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days . . . [Transient] rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly resident. It is precisely for such reasons that the court upheld the zoning ordinance.
\end{quote}
neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.\textsuperscript{53}

In holding that the ordinance was related to a legitimate governmental goal, the Court continued:

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is ‘sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’\textsuperscript{54}

A city’s concern about appearances of a project is also properly a part of the police power. The leading case on this issue is \textit{Novi v. City of Pacifica}, where the court held that a city’s land use ordinance, which precluded uses that were detrimental to the “general welfare” as well as developments that were “monotonous” in design and external appearance, was not unconstitutionally vague—either facially or as applied—and upheld the city’s denial of the project.\textsuperscript{55} Novi was a developer who sought to construct a forty-eight unit condominium project.\textsuperscript{56} The project was turned down because it would have violated the city’s anti-monotony ordinance.\textsuperscript{57} Novi argued that the city’s ordinance lacked objective criteria for reviewing the element of monotony, and that such criteria are required for aesthetic land use regulations.\textsuperscript{58} However, the Court disagreed, stating:

\[\text{A substantial amount of vagueness is permitted in California zoning ordinances: ‘[I]n California, the most general zoning standards are usually deemed sufficient. The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety, and welfare standard. . . . California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the community’s zoning business is to be done without paralyzing the legislative process.’}\textsuperscript{59}

\textsuperscript{53.} \textit{Id.} at 388.
\textsuperscript{54.} \textit{Id.} at 388-89 [internal citations omitted].
\textsuperscript{56.} \textit{Id.}
\textsuperscript{57.} \textit{Id.}
\textsuperscript{58.} \textit{Id.} at 440.
\textsuperscript{59.} \textit{Id.} at 441 (quoting \textit{People v. Gates}, 116 Cal. Rptr. 172, 176 (Cal. Ct. App. 1974)).
The Court then proceeded to apply this California rule to the Pacifica city council’s anti-monotony ordinance:

Here, subdivision (g) of section 9-4.3204 requires ‘variety in the design of the structure and grounds to avoid monotony in the external appearance.’ The legislative intent is obvious: The Pacifica city council wishes to avoid ‘ticky-tacky’ development of the sort described by songwriter Malvina Reynolds in the song, ‘Little Boxes.’ No further objective criteria are required, just as none are required under the general welfare ordinance. Subdivision (g) is sufficiently specific under the California rule permitting local legislative bodies to adopt ordinances delegating broad discretionary power to administrative bodies.60

Similarly, another appellate court, relying on Novi, held that a view protection ordinance was not unconstitutionally vague, and that such an ordinance supported denial of a building permit.61

In Guinnane v. San Francisco Planning Commission, the Court provided support for a city’s concerns regarding neighborhood aesthetics.62 Guinnane sought “a building permit to construct a four-story, 6,000 square-foot house with five bedrooms, five baths, and parking for two cars.”63 The planning commission rejected Guinnane’s application during design review because the proposed building was too massive and thus “not in character” with the neighborhood.64 The board of permit appeals also denied the permit.65

The court upheld the city’s action. It stated that the planning commission and the appeals board had the authority to exercise discretion in deciding whether to issue the permit.66 The court noted that such a review is not limited to “a determination [of] whether the applicant has complied with [the city’s] zoning ordinances and building codes.”67 The San Francisco Planning Code specifically directed the commission to

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60. Id.
61. See Ross v. City of Rolling Hills Estates, 238 Cal. Rptr. 561, 564 (Cal. Ct. App. 1987); see also Briggs v. City of Rolling Hills Estates, 47 Cal. Rptr. 2d 29, 31 (Cal. Ct. App. 1995) (a “neighborhood compatibility” ordinance requiring that designs “respect the existing privacy of surrounding properties” was not void for vagueness); Echevarrieta v. City of Rancho Palos Verdes, 103 Cal. Rptr. 2d 165, 173-74 (Cal. Ct. App. 2001) (an ordinance that prohibited residents from significantly impairing a view by permitting foliage to grow to heights in excess of certain limitations was not unconstitutionally vague).
63. Id. at 743.
64. Id.
65. Id. at 744.
66. Id. at 747.
67. Id.
“protect the character and stability of residential... areas...”

Such concern for neighborhood aesthetics has long been justified as a legitimate governmental objective. Sufficient evidence existed in this case to uphold the commission’s finding that the proposed house would increase traffic, cause parking problems, and have a negative effect on the neighborhood.

Similarly, in Saad v. City of Berkeley, the court upheld the City of Berkeley’s denial of a use permit for a three-story home in a single-family zone because it would impair the view of neighboring property owners and have a towering effect.

Another court clarified that a city can regulate tree growth for aesthetic reasons alone. In Kucera v. Lizza, the court upheld the Town of Tiburon’s land use ordinance preserving access to views and sunlight by regulating obstructing trees and tree growth as a valid exercise of police power.

Judicial review of a city’s exercise of its police power is closely circumscribed. The California Supreme Court established the following rule:

It is a well settled rule that determination of the necessity and form of regulations enacted pursuant to the police power ‘is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity?’

Predictably, this test has resulted in substantial deference by courts reviewing cities’ decisions to exercise the police power. Indeed, so long as “it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare,” a land use regulation should withstand constitutional attack.

As can be seen from the above examples, cities, especially in California, have the upper hand in adopting land use regulations and

68. Id. at 745.
69. Id. at 748.
70. Saad v. City of Berkeley, 30 Cal. Rptr. 2d 95, 101 (Cal. Dist. Ct. App. 1994); Harris v. City of Costa Mesa, 31 Cal. Rptr. 2d 1, 6 (Cal. Dist. Ct. App. 1994) (denial of a use permit for second residential unit on one lot based on incompatibility with the neighborhood was proper).
72. Id. at 589.
74. See Remmenga v. California Coastal Comm’n, 209 Cal. Rptr. 628, 632 (Cal. Ct. App. 1985); Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993, 999 (Cal. 1999) (where the California Supreme Court advocated a hands-off policy for reviewing local legislative acts).
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processing land use applications in their jurisdictions to deal with all types of situations. Cities must properly exercise their police power, without infringing upon the Fifth Amendment, Equal Protection, or the Due Process clauses of the United States Constitution. These situations include the issue of whether big box development is appropriate in a city’s jurisdiction. In implementing its police power, a city is further guided by the use of the general plan—as discussed in the next section.

III. USE OF THE GENERAL PLAN

In the United States, more and more cities and counties are using the general plan to implement this land use planning process. Although practice varies from state to state, many cities view the general plan as the “constitution” for development within that jurisdiction. Therefore, all subsequent land use decisions must be consistent with a vision for growth and development as reflected in the plan.

A. California

The general plan has been declared by the California Supreme Court as the single most important document; the “constitution for all future development.”76 Since the general plan is the “constitution for all future development,” any decision of a city affecting land use, development, and public works projects must be consistent with the general plan.77 Under Government Code Section 65860(a), for example, a zoning ordinance is consistent with such plans only if: the city has officially adopted such a plan; and the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general uses, and programs specified in such a plan.78

In Lesher Communications Inc. v. City of Walnut Creek, the California Supreme Court struck down a growth management initiative that conflicted with the City of Walnut Creek’s general plan.80 Lesher thus marked the first occasion where the court squarely addressed the general plan’s position

76. CAL. GOV’T CODE § 65860 (2005). The term “general plan” sometimes is labeled “master plan” or “comprehensive plan.” Today, the term “general plan” is being more commonly used. In California, land use regulations and all approvals must be consistent with the general plan.
77. Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990); see CURTIN & TALBERT, supra note 36, ch. 2 (For a general discussion of General Plan Law and its effect in California).
78. Citizens of Goleta Valley v. Board of Supervisors of the County of Santa Barbara, 801 P.2d 1161, 1171 (Cal. 1990).
79. CAL. GOV’T CODE § 65860 (West 2005).
80. Lesher, 802 P.2d at 319.
in the planning hierarchy, and especially its interplay with the initiative process.\(^{81}\)

*Lesher* arose from a challenge to Measure H, a traffic-based growth management initiative adopted by Walnut Creek voters in 1985. The trial court had determined that Measure H was not a general plan amendment, but rather a zoning ordinance or other land use regulation.\(^{82}\) As a mere regulation, Measure H was required to be consistent with the city’s general plan.\(^{83}\) Because it was not consistent, the trial court declared it invalid.\(^{84}\) This holding was overturned on appeal.\(^{85}\) The Court of Appeals agreed that Measure H was inconsistent with the city’s general plan, but interpreted it as a general plan amendment in order to give the greatest possible protection to the initiative process.\(^{86}\) The California Supreme Court rejected this interpretation and struck down the initiative, thereby upholding the trial court’s decision.\(^{87}\)

The California Supreme Court began its decision by emphasizing that all laws are subject to the same constitutional and statutory limitations and rules of construction, whether enacted by the local legislative body or the electorate.\(^{88}\) Focusing on the absence of any ballot materials that labeled Measure H a general plan amendment, as well as the detailed scope and self-executing nature of its text (resembling a zoning ordinance), the court ruled that Measure H was a land use regulation subordinate to the city’s general plan and therefore invalid under the consistency doctrine.\(^{89}\) “The tail does not wag the dog,” pronounced the court.\(^{90}\)

Therefore, under *Lesher*, any subordinate land use action—such as a zoning ordinance, tentative map, or development agreement—that is not consistent with a city’s current and legally adequate general plan is “invalid at the time it is passed.”\(^{91}\) The court’s only task is to “determine the existence of the conflict.”\(^{92}\) Further, it does not matter how the conflict arises. If a conflict is present, under state law, the action is void.\(^{93}\)

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81. *Id.* at 317.
82. *Id.* at 320.
83. *Id.* at 319.
84. *Id.* at 320.
85. *Id.*
86. *Id.*
87. *Id.* at 326.
88. *Id.* at 322 (quoting *Legislature v. Deukmejian*, 669 P.2d 17 (Cal.1983)).
89. *Id.*
90. *Id.*
91. *Id.* at 324.
92. *Id.* at 325.
93. *Id.*
In *City of Irvine v. Irvine Citizens Against Overdevelopment*, the Court of Appeal held that a land use regulation “is consistent with [a] city’s general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment.” The Court of Appeals has also held that “[a] city’s findings that [a land use regulation] is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.”

**B. Other States**

Nearly all states require that zoning, and at times other related land use actions, take place “in accordance with” some sort of comprehensive or master plan. The states vary, however, in the use of the general plan as a significant or decisive factor in evaluating land use regulations or decisions; although over time there has been a slow and incremental increase nationwide in the quasi-constitutional status of the general plan. As labeled by one of the nation’s leading commentators on the general plan, the states currently fall into three major categories in terms of the role of the comprehensive plan in the land use regulatory process.

The first category, the “unitary view,” probably reflects the majority of the states. In this category, the general plan is accorded no special significance, meaning there is no requirement that local governments prepare a plan that is separate from the zoning regulation. Examples of states falling into this category with recent judicial decisions upholding the “unitary view” are Arkansas, Connecticut, Illinois, New York and Massachusetts.

States in the second category, termed the “planning factor,” give some

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97. Id.
100. See Sullivan & Michel, supra note 98, at 90 (for chart showing breakdown of states according to how their treatment of the General Plan).
significance to the general plan, if it exists, as a factor in evaluating land use regulations, but do not make it the exclusive factor. The weight to be given to the plan varies from state to state. Examples of states in this category are Missouri, Montana, New Jersey, and Vermont.

In Vermont, each city and county may develop a “municipal development plan” or “municipal plan.” The “municipal plan” includes (but is not limited to):

- a statement of objectives, policies and programs of the municipality to guide the future growth and development of the land, public services and facilities; and to protect the environment;
- a land use plan, consisting of a map and statement of present and prospective land uses, indicating those areas proposed for forests, recreation, agriculture . . . residence, commerce, industry, public and semi-public uses and open spaces reserved for flood plain, wetland protection, or other conservation purposes; and setting forth the present and prospective location, amount, intensity and character of such land uses and the appropriate timing or sequence of land development activities in relation to the provisions of necessary community facilities and service;
- a transportation plan, consisting of a map and statement of present and prospective transportation and circulation facilities, transit routes, terminals, bicycle paths and trails, scenic roads, airports, railroads and port facilities, and other similar facilities or uses, with indications of priority of need.

The third category of states, called “plan as the constitution or the law,” is made up of those states like California, which grant the general plan quasi-constitutional status regulating ordinances and other actions of the local government in implementing the plan. Other states within this category include Florida, Oregon, and Washington.

In California and the other states that treat the general plan as the constitution, the general plan is the most important legal planning tool for city and county officials to utilize in their efforts to regulate development. It is clearly the “constitution for all future development.” The goals and policies of the general plan can be used not only in managing growth, regulating development, and imposing land use regulations, but also in evaluating big box retail development.

102. Id. at § 4382.
103. Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 317 (Cal. 1990); see CURTIN & TALBERT, supra note 37, at ch. 2.
C. Implementation

In regulating big box retail development, a city should have proper goals and policies in its general plan relating to this issue of whether or not the city desires to have that type of development; or, if it does have such goals and policies, the city should indicate what design features it requires for big box retail development. Some cities might prefer to have a big box retail store to implement its general fund via sales tax income, business license tax, or similar taxes; others might like to have a modified, smaller big box retailer; and again others might not want a big box retailer at all. However, by the proper use of the police power and by properly having goals and policies addressed in its general plan, a city can act accordingly. It is especially true in California, where the general plan is the constitution for development. California courts have made it quite clear that there is no right to develop in California; development is merely a privilege.\(^\text{104}\)

In adopting or amending its general plan so as to regulate big box retail development, each city can address issues that are raised in considering whether or not a big box retail development is appropriate for its jurisdiction. According to the State of California: General Plan Guidelines (the Guidelines), the general plan is “made up of text describing development policy, including goals and objectives, principles, policies and standards, as well as a set of maps and diagrams.”\(^\text{105}\) These can include discussion of big box retail development. Together, these constituent parts paint a picture of the community’s future development.\(^\text{106}\) In adopting or amending a general plan, the city will focus on the following important points and adopt them to the situation at hand.

For example, the Guidelines state that “a development policy is a general plan statement that guides action.”\(^\text{107}\) In a broad sense, development policies include goals and objectives, principles, policies, standards, and plan proposals.

According to the Guidelines, “[a] goal is a general direction-setter. It is an ideal future end related to the public health, safety, or general welfare. [It] is a general expression of community values and, therefore, may be

\(^\text{104}\) See Associated Homebuilders etc., of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971).
\(^\text{105}\) See Governor’s Office of Planning and Research, STATE OF CALIFORNIA GENERAL PLAN GUIDELINES, ch. 1 “General Plan Basics” (2003), (hereinafter, the Guidelines) available at http://www.opr.ca.gov/planning/PDFs/General_Plan_Guidelines_2003.pdf (the author wrote and contributed to the Guidelines and has based a large part of this paper section on that writing).
\(^\text{106}\) Id. at 14.
\(^\text{107}\) Id. at 14-15.
abstract in nature." Examples of goals are: a diversified economic base for the city, an aesthetically pleasing community, and a safe community.

The Guidelines define an objective as: "a specified end, condition, or state that is an intermediate step toward attaining a goal. [It] should be achievable and, when possible, measurable and time-specific." A principle is "an assumption, fundamental rule, or doctrine guiding general plan policies, proposals, standards, and implementation measures." Principles are based on community values, generally accepted planning doctrine, current technology, and the general plan’s objectives. In practice, principles underlie the process of developing the plan but seldom need to be explicitly stated in the plan itself.

A policy is "a specific statement that guides decision-making. It indicates a commitment of the local legislative body to a particular course of action." A policy is based on and helps implement a general plan’s objectives. A policy is carried out by implementation measures. Examples of policy could be that the city shall not approve plans for the downtown shopping center until an independently conducted market study indicates that the center would be economically feasible, or that the city shall give favorable consideration to conditional use permit proposals involving adoptive reuse of buildings that are designated as "architecturally significant" by the cultural resources element.

A standard is "a rule or measure establishing a level of quality or quantity that must be complied with or satisfied." Standards define the abstract terms of objectives and policies with concrete specifications. Examples of some standards are: a minimally acceptable peak hour level of service for an arterial street is level of service C; the minimum acreage required for a regional shopping center is from fifty to sixty acres.

By having the above definitive and proper goals, objectives, principles and standards in its general plan, a city is then guided accordingly in reviewing and approving, as well as modifying or denying, all types of development—including a big box retailer’s application. In addition, and maybe more importantly, the developer knows up front what to expect. Moreover, such certainty allows citizens to know the rules that the city’s policy makers must follow to permit or deny certain developments.

In Families Unafraid to Uphold Rural El Dorado County v. County of

108. Id. at 15.
109. Id.
110. Id.
111. Id.
112. Id. at 16.
113. Id.
Regulating Big Box Stores

El Dorado,\textsuperscript{114} the appellate court declared invalid the County Board of Supervisors' approval of a residential subdivision since it was not consistent with the county's general plan.\textsuperscript{115} The court said that the County's findings of consistency were not supported by substantial evidence. In this situation, the land use policy of the general plan was fundamental, mandatory, and unambiguous, and the project's inconsistency was clear. Likewise, a well-drafted general plan will mandate what commercial development is consistent with that city's overall goals and policies for development.

IV. CONCLUSION

The regulation of big box development properly lies in the hands of the legislative bodies of the cities and counties, with the able assistance of the planning commission and staff. The police power, which is the power to regulate for public health, safety, and welfare, is the basis for such regulation. The cases cited in this paper clearly show how broad that power is even to the extent that a city could deny a monstrous development, as in the power to block development in the City of Pacifica, California.\textsuperscript{116} Further, by addressing the issues in their general plans, cities, towns, and villages are able to refer to their general plans to guide them in either permitting or denying proposed big box developments.

\textsuperscript{114} Families Unafraid to Uphold Rural El Dorado County v. County of El Dorado, 74 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998).

\textsuperscript{115} Id.

Supersizing Small Town America:
Using Regionalism to Right-Size Big Box Retail

Patricia E. Salkin*

I. INTRODUCTION

The rally to save our rural countryside in the 1980s was spearheaded largely from a coordinated effort of the environmental conservation and historic preservation movements, focusing on techniques to protect and preserve open space and significant environmental and natural land features. During the same era, however, the economic phenomenon of big box retail was developing across the country posing a new threat in the 21st Century to small town America. Armed with a corporate strategy that includes the siting of large-scale stores in small towns, Wal-Mart (and other large-scale retailers such as K-Mart, Lowes, Home Depot, IKEA, Sam’s Warehouse Club, COSTCO, Barnes & Noble, and Target) has literally placed its mark on the rural countryside; at times standing out as the noticeable development along empty stretches of land, often contrasted

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2. Big box retail has been defined in some regions as stand-alone stores of 100,000 square-feet or more. Laura Altenhof, Coping with Big Box Retailers (Jan. 1999), at http://www.planning.org/hottopics/bigbox.htm. In other regions it has been defined as “large industrial-style buildings with vast floorplates or footprints, up to 200,000 square-feet. Although single-story, they often have a three-story mass that stands more than thirty feet tall, allowing the vertical stacking of merchandise. Big box buildings in the range of 120,000 to 140,000 square-feet occupy the equivalent of two to three city blocks or 2 ½ to 3 ½ football fields.” Office of State Planning, Big Box Retail, OSPlanning Memo 1 (Dec. 1995), available at www.nj.gov/dca/osg/docs/bigboxretail120195.pdf. Another study identifies the following characteristics of big box retail: typically occupies between 90,000 and 200,000 square-feet; derives profits from high sales volume rather than mark-up; large, windowless, rectangular single-story buildings; standardized facades; relies on consumers with cars; has acres of parking; presents a no-frills site development that eschews any community or pedestrian amenities; seems to be everywhere but unique to no place. Texas Perspectives, Inc. & Gateway Planning Group, Big Box Retail and Austin: Prepared for the City of Austin (June 23, 2004), available at www.ci.austin.tx.us/redevelopment/downloads/Big%20Box.Austin.final.pdf.


4. Id. at 5.
against beautiful mountains and country landscapes. This development presents a new challenge for rural preservationists: balancing needed economic development and consumer buying preferences with goals of preserving small town character and a sense of community. This development has led the National Trust for Historic Preservation in 2004 to place the State of Vermont on its list of the 11 most endangered historic places.

There have been hundreds of Wal-Mart related litigated cases focusing on land use planning and zoning issues surrounding the siting of these mega-stores. This article explores how regionalism techniques can be used

5. A combination of space demands (both in terms of retail floor space and sufficient parking for cars) and traffic patterns/accessibility to major thoroughfares required by the big box retailers, lead them to seek locations outside of the traditional retail corridor in communities. Arthur W. Hooper, Jr. & Howard Goldman, Where the 'Big Boxes' Belong: City Planning Commission Have Devised Various Solutions to the Problem of Zoning Big Retailers, 18 NAT'L L.J. 29 (1996). The development patterns of big box retail have been described as “reproduced almost exactly in every location and are thus everywhere and nowhere at once: They are like pieces of 'ageographical cities.”’ MICHELE BYERS, SUBURBAN SPRAWL: CULTURE, THEORY AND POLITICS, WAITING AT THE GATE: THE NEW POSTMODERN PROMISED LAND (Matthew J. Lindstrom & Hugh Bartling eds., 2003).

6. Preservation of small town character has to do, in part, with how the residents feel who reside in a community. When it comes to big box retail, the debate often focuses on corporate brand development versus small locally owned businesses. See ANONYMOUS, MULTINATIONAL MONITOR, EVERYBODY COMPLAINS ABOUT SUBURBAN SPRAWL, OR AT LEAST ITS MOST OBVIOUS MANIFESTATION, WORSENING TRAFFIC, 5, (Oct. 1, 2003) (explaining that corporate-influenced policies support factory farms, making small family farms more likely to be sold to developers), available at 2003 WLNR 10012538. However, scale of development and aesthetic considerations are also of critical importance. Scott Wolf, executive director of Grow Smart Rhode Island, concerned about the growing number of Wal-Marts in Rhode Island, remarked that “‘Our calling card is our charm, our historic charm, our natural beauty . . . . That’s a critical part of Rhode Island. If we’re not vigilant about preserving that, we lose it.’” Ian Donnis, Is Wal-Mart Inevitable?, THE PROVIDENCE PHOENIX, May 7, 2004, available at www.providencephoenix.com/features/top/multi/documents/03809945.asp.

7. National Trust for Historic Preservation, America's 11 Most Endangered Historic Places (2004), available at http://www.nationaltrust.org/11most/2004/vermont.html. According to the National Trust, “During the 1990s Wal-Mart located three of its four Vermont stores in existing buildings and kept them relatively modest in size. Now, however, the world’s largest company is planning to saturate the state—which has only 600,000 residents—with seven new mammoth mega-stores, each with a minimum of 150,000 square-feet.” Id. The National Trust continues, “The likely result: degradation of the Green Mountain State’s unique sense of place, economic disinvestment in historic downtowns, loss of locally-owned businesses, and an erosion of the sense of community that seems an inevitable by-product of big box sprawl.” Id. The Vermont Natural Resources Council predicts that if Wal-Mart gets to site the seven proposed new stores in the State, “[n]ot only are the postcard views over, but the heart of Vermont’s [sic] economy is put in jeopardy as sprawl clutters the views that tourism depends on, eliminates local, livable-wage jobs, and poses a very serious threat to our environment.” Vermont Natural Resources Council, 7 More Walmarts? 7 new big box Wal-Marts are proposed in Vermont, at http://www.vnrc.org/article/view/5407/1/649 (last visited Apr. 24, 2005).

8. See Dwight H. Merriam, Nonplussed about Nonpareil: Wal-Mart as a Land Use Phenomenon, 27 No. 11 ZONING & PLAN. L. REP. 1 (2004). Merriam highlights roughly fifty cases identified as the “more important” cases where developers challenged town actions that inhibited Wal-Mart from locating on property they owned; challenges to the sufficiency of the legal description of
to guide big box development into regional centers to preserve small town quality of life and maintain local economic boosts\(^9\) that big box stores offer communities.

\[\text{A. Growth of the Big Box Retail Movement}\]

In 1993, Wal-Mart became the largest retail chain in the world, the 10th most profitable company in the United States, and 4th largest company in terms of net worth.\(^10\) Continued expansion was facilitated by the warm property used in a zoning referendum; where opponents of Wal-Mart development challenged government actions that would facilitate Wal-Mart development; challenges on environmental grounds; and situations where Wal-Mart intervened in proceedings to protect/promote their interests; as well as cases where citizen groups challenged federal actions related to Wal-Mart development. \(\text{Id;}\) see generally Sprawl-Busters, at www.sprawl-busters.com (last visited Apr. 24, 2005). Perhaps one contributing reason for the litigation has been Wal-Mart’s failure to communicate and work with the communities within which it desires to do business. As explained by Robert S. McAdam, Wal-Mart’s vice-president for state and local government relations, “I think there was a point in the company’s history when we were less sensitive to local needs, but we have gotten better . . . .” Robert McNatt, Who Says Wal-Mart is Bad / for Cities? Underserved Neighborhoods Welcome its jobs, low prices and tax revenue, BUS. WK., May 10, 2004, at 77. According to Professor Steven Ashby of the University of Indiana who teaches a course called “Wal-Mart,” “[w]ith 1.5 million employees, it is not only the world’s largest corporation, but also the world’s most sued corporation.” Lee Ann Sandweiss, ‘Big Box’ Retail 101 (2004), at http://www.homepages.indiana.edu/040904/text/workweekBigBox.shtml.

9. The issue of whether Wal-Mart truly brings economic development to a community is beyond the scope of this article; however, opponents of Wal-Mart strenuously advocate that “[b]ig box development is not a form of economic development, but a form of economic displacement.” \(\text{Id} ;\) see generally Sprawl-Busters, at www.sprawl-busters.com (last visited Apr. 24, 2005). Perhaps one contributing reason for the litigation has been Wal-Mart’s failure to communicate and work with the communities within which it desires to do business. As explained by Robert S. McAdam, Wal-Mart’s vice-president for state and local government relations, “I think there was a point in the company’s history when we were less sensitive to local needs, but we have gotten better . . . .” Robert McNatt, Who Says Wal-Mart is Bad / for Cities? Underserved Neighborhoods Welcome its jobs, low prices and tax revenue, BUS. WK., May 10, 2004, at 77. According to Professor Steven Ashby of the University of Indiana who teaches a course called “Wal-Mart,” “[w]ith 1.5 million employees, it is not only the world’s largest corporation, but also the world’s most sued corporation.” Lee Ann Sandweiss, ‘Big Box’ Retail 101 (2004), at http://www.homepages.indiana.edu/040904/text/workweekBigBox.shtml.

welcomes from many local chambers of commerce. Wal-Mart’s competitive strategy is to dominate every sector where it does business, and expand by beating out competitors. While some residents believed Wal-Mart benefited local economies by providing good products at low prices and new jobs, these supporters slowly discovered that this new business paradigm stifled competition from local mom and pop stores.

While some officials were laying out the red carpet for Wal-Mart, others were trying to set up roadblocks. As the company’s success continued to grow over the years, critics argued that it was at the expense of small businesses and local economies, and “[t]hose put out of business by the giant retailer are among its most ferocious critics.” They argue that Wal-Mart, and “big box” stores in general, “cannibalize” existing, in-town retail sales and jobs; essentially geographically shifting them from one location to another, and that this geographic shift promotes extreme levels of auto dependency for those who live in the region, creating a downward

11. Hayden, supra note 3, at 5.
12. Hayden, supra note 3, at 12. Wal-Mart competes by “build[ing] more stores, mak[ing] existing stores bigger, and [by expanding] into other [areas] of retail,” and they strive to make money through domination of the market place, thus inevitably putting others out of business. Id. at 15.
13. Id.
14. Often, supporters of big box retail are the same people and the same communities that desire to slow or halt residential development due to increasing school taxes and increasing demands on the public school infrastructure, preferring to attract larger-scale commercial development in the hopes of meeting these concerns. See Paula Stephens, Area Review: Squeezing into New England (July 1, 2001), at http://retailtrafficmag.com/markets/northeast/retail_area_review_squeezing (discussing New England towns’ desire for commercial, rather than residential development, to maximize their tax revenue). A study by Tischler & Associates about commercial development in Barnstable, Massachusetts found that big box retail (as well as shopping centers and fast-food restaurants) cost taxpayers more than they produce due to increased municipal costs for road maintenance and greater demands on public safety resources. Jennifer Rockne & Jeff Milchen, Local Ownership Pays Off for Communities (May, 2003), available at http://reclaimdemocracy.org/independent_business/local_ownership_pays.html. For example, the city of Pineville, North Carolina, had to raise taxes to subsidize the added public safety costs associated with big box retail, noting that commercial properties accounted for 96% of all police calls in the city. Id. Similarly, in East Lampeter, Pennsylvania, a district justice added two days to the monthly court calendar just to deal with crimes generated at a Wal-Mart, which accounted for about 25% of the town’s non-traffic citations, criminal misdemeanors, and felony complaints. Id.
16. Hayden, supra note 3, at 17. See also Texas Perspectives, Inc. & Gateway Planning Group, supra note 2. The authors point to a study by Iowa State University Economist Kenneth Stone whose twelve year study of Wal-Mart stores in small towns and rural communities in the mid-west concluded that local businesses that sell something different than what is in Wal-Mart stores suffer no economic harm by the presence of the big box retailer, and in fact they may experience an increase in sales due to increases in traffic going to the larger store; yet local businesses that sold the same merchandise as the big box retailer would lose sales unless they repositioned themselves. Id. at 3.
spiral toward sprawl and blight. In addition, critics assert that all sources of municipal tax revenues from new big box retailers fail to truly yield a net gain for the locality. This phenomenon results from the lost tax revenues from smaller vanishing businesses and, conversely, the enhanced levels of public funding needed to support local highways, police, fire, and other small-town services that are necessitated by the new big box retail.

Nationally, however, big box construction continues to grow. From December 2002 to February 2004, the general merchandise sector (including Wal-Marts, Targets, and K-Marts) increased almost twenty-nine percent. Not all planners view big box development as the enemy; some communities have effectively used big box retailers to accomplish re-development goals, and others have found creative re-use for vacant big box sites.

II. BIG BOX RETAIL HAS REGIONAL IMPACTS

Big box retail is intended to serve more than just the residents of the particular host jurisdiction. By their size, and through national advertising efforts, these giant retailers are siting area-wide or regional shopping destinations. It should be no surprise then that the negative impacts of big box development are often felt on a regional level. When a superstore

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17. Dom Nozzi, Big Box Retail: What Can a Community Do About Them? (2004), at http://user.gru.net/domz/bigbox.htm. Professor Patrick A. Randolph, Jr. explains, “[t]he big box business model is not based on sharing customers with those drawn by neighboring retailers, but rather on drawing customers through the store’s own reputation and advertising. Big box stores seek to provide direct and convenient access to their customers, and usually they are not interested in walking their customers past a mall full of lesser retailers using the big box as an anchor.” Patrick A. Randolph, Jr., Does a Shopping Center Landlord Have an Implied Operating Duty?, 17 PROB. & PROP. 26, 28 (2003).

18. See Will Lindner, The Advance of the Big Box and How Vermont Can Get What it Wants, VT. ENVTL. REP. 13 (Winter 2004), available at http://www.vermontwalmartwatch.org/ver_winter.pdf. See also Jennifer Barrios, Battling the Box: IKEA and the Future of East Bay Retail (July 18, 2001), available at http://www.galvins.com/reviews/review10-4.html (discussing the siting of an IKEA store in the California East Bay area and explaining that potential tax dollars from the City of Berkeley are lost when big box retail sites in neighboring jurisdictions). “One percent of sales tax goes into the city coffers to fix the potholes in front of your house. If you aren’t shopping Berkeley, then you can’t complain about your potholes.” Id.


zeros in on a specific location and decides to build, other local jurisdictions within the same region are inevitably affected (whether or not they participate in the decision-making process).\textsuperscript{22} The most commonly cited regional impacts associated with big box stores include changes in transportation patterns, increased noise and air pollution, and alterations of community aesthetics.\textsuperscript{23} Other impacts include adverse environmental effects on aquifers and other water bodies that may become contaminated by oil run-off from surface parking lots or improperly handled chemicals at stores that sell garden supplies.\textsuperscript{24} Furthermore, while communities that host big box stores generally derive some economic benefit from them (usually, in the form of increased sales tax revenue),\textsuperscript{25} smaller towns in the immediate vicinity usually see a marked decrease in sales tax revenue and the number of operating retailers.\textsuperscript{26} For example, one recent study found that sales in surrounding communities dropped by two percent after the first year Wal-Mart came to town, and continued dropping at a rate of over thirty-four percent over ten years.\textsuperscript{27} Another study commissioned by the Orange County (California) Business Council on the impact of big box grocers found negative regional economic impacts based upon wage gaps (decreases in wages paid by big box retailers to employees), and negative regional impacts in the real estate markets due to corporate restructuring and consolidation of big box retailers that leave large vacant retail space.

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Texas Perspectives, Inc. & Gateway Planning Group, supra note 2.
\textsuperscript{26} For example, a recent paper from the Canadian Institute of Urban Studies found that in Winnipeg, Manitoba:

The fallout from the wave of big box store expansion seems more conspicuous at lower levels of the retail hierarchy. Vacancy rates in smaller open-air strip malls were found to be in the range of fifteen to twenty-five percent or five to eight times higher than what is the case in the larger enclosed malls. Hence, as the average size of retail units increase and the number of smaller "mom and pop," non-chain retail businesses decrease, landlords of these smaller malls are finding it increasingly difficult to find tenants to fill the type of units they have for lease. Brian J. Lorch, Big Boxes, Power Centres and the Evolving Retail Landscape of Winnipeg: A Geographical Perspective 28-29 (2004) (unpublished Research and Working Paper #43, University of Winnipeg) (2004), available at http://ius.uwinnipeg.ca/pdf/bigboxes_lorch.pdf. See also Westbay Memorandum, supra note 25.
\textsuperscript{27} Cassidy, supra note 4.
which is often difficult to lease.\textsuperscript{28} Studies such as these have led many to question the wisdom of current municipal development practices and to begin to look toward advancing a regional approach to big box development.

\textit{A. Regional Impacts Demand Regional Strategies to Effectively Plan and Zone for Big Box Development}

While local governments may employ a variety of planning and zoning techniques to address concerns presented by the prospect of big box retail development,\textsuperscript{29} these techniques fail to take into account and effectively manage in a coordinated fashion the interconnectivity and impacts of such development on all neighboring municipalities. Examples of local planning and zoning regulations designed to control big box retail include: limitations on the size of the footprint of buildings and restrictions on the amount of space therein that can be used for the sale and display of certain products;\textsuperscript{30} site layout and development standards (including tract and lot

\footnotesize{\textsuperscript{28} Marlon Boarnet & Randall Crane, \textit{The Impact of Big Box Grocers on Southern California: Jobs, Wages and Municipal Finances}, at 57, 64 (1999), available at http://www.coalitiontlc.org/big_box_study.pdf. The report offered a set of policy issues and findings including: (1) “Supercenters, especially Wal-Mart supercenters, are often conversions of existing discount retail stores, and local officials should be aware of that possibility. In 1999, Wal-Mart estimated that 72\% of all new supercenters would be built by converting existing Wal-Mart discount centers . . . (2) [Since] the grocery industry in Southern California pays substantially higher wages, and better benefits, than Wal-Mart . . . Accounting for the multiplier effect as those wage and benefit cuts ripple through the economy, the total economic impact on the southern California economy could approach $2.8 billion per year. (3) The fiscal benefits of supercenters . . . are often complex” as they combine taxable and non-taxable merchandise/products and because the discount retail outlet will potentially shift sales from existing local retail to their outlet with an uncertain increase in net sales. \textit{Id.} at 94.

\textsuperscript{29} See, e.g., Daniel J. Curtin, Jr., \textit{Regulating Big Box Stores: The Proper Use of the City or County’s Police Power and its Comprehensive Plan}, 6 VT. J. ENVTL. L. 31 (2005). Municipalities may, through their police powers, use their comprehensive plans and accompanying zoning ordinances to address among other issues, traffic impacts and community character. \textit{Id. See also Gordon Harris, Less is More—The Evolution of Big Box Retailing}, 18 ONTARIO PLAN. J. 2 (2003), available at http://www.harrisconsults.com/links/articles/182%20Harris.pdf (“Planners also have an opportunity to help retailers find suitable suburban sites that not only have potential for a re-positioned retail offering, but which minimize burdens on the transportation system and which maximize the overall livability of the community.”).

\textsuperscript{30} For example, an October 1999 amendment to zoning ordinance for the City of Las Vegas states:

\begin{quote}
[1] If any business exceeds 110,000 square-feet of retail space then no more than two (2) percent may be used for the sale or display of food. For these purposes “business” shall be defined not only as a single store, but also two or more stores within the same shopping center which share check stands, management, controlling ownership interest or warehouse or distribution facilities. No business over 110,000 square-feet devoting more than two percent (2\%) to food at the time this restriction was enacted shall be required to reduce the amount of space
\end{quote}
size, coverage and site disturbance, and setbacks and buffers), parking standards, and aesthetic design standards to ensure that the buildings fit community character. In addition to typical land use and zoning regulations, the requirement of impact assessments (e.g., studies on economic impacts, traffic impacts, and fiscal impacts) can be a valuable community planning tool.

Because economic activity (and its environmental and social impacts) does not recognize jurisdictional boundaries, regional planning is a better way to accurately achieve the economic and environmental health of a region, while also providing for the needs of individual localities. By working together, municipalities can articulate and achieve common goals that include effective strategies for, among other things, protecting common resources, coordinating public infrastructure, sharing tax-base, and planning for commerce and industry.

1. Voluntary Inter-Jurisdictional Coordination and Agreements

The use of voluntary inter-jurisdictional coordination efforts and cooperative agreements is an example of an effective regional technique to plan for big box retail. One of the primary reasons for demanding a

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31. See Office of State Planning, supra note 2, at 6. The magnitude of parking required for siting a big box can be enormous. For example, a 250,000 square-foot supercenter in one California municipality would need at least a sixteen-acre parking lot to meet the minimal requirement of five parking spaces per thousand square-feet of store space. In at least one Georgia community, Wal-Mart worked with the municipality to address this concern by designing an underground parking lot. See Clayton, supra note 20, at 28-29.

32. Chris Duerksen & Robert Blanchard, Belling the Box: Planning for Large-Scale Retail Stores, 1998 NAT'L PLAN. CONF., at http://www.asu.edu/caed/proceedings98/Duerk/duerk.html. Duerksen and Blanchard highlight the experiences in Fort Collins, Colorado where they developed design guidelines for superstores that addressed, among other things, architectural features, building color and materials, building facades and other factors that relate to the surrounding community and streets, sidewalks and other pedestrian flow related standards and design of parking lots. Id.

33. See Office of State Planning, supra note 2.


36. See THEODIS L. PERRY, JR., MD. DEP’T OF PLANNING, MANAGING MARYLAND’S GROWTH:
coordinated regional approach is that individual local governments often lack control over the phasing, timing, siting, and funding of the public facilities or development outside of their municipal boundaries; all of which are critical in dealing with infrastructure to service big box impacts. Yet the impacts of these development decisions know no municipal boundaries. One method used to deal with this is found in Maryland, where, encouraged in large part by the state’s Growth Management programs, local governments are offered fiscal incentives to enter into inter-jurisdictional agreements for various types of public infrastructure, including roads, sewer, and water. By working cooperatively, local governments can assume a shared responsibility for how the region develops, ensuring adequate public infrastructure to meet all regional project impacts, not just those in the jurisdiction with the primary approval responsibility. There is precedent in New England for the use of voluntary cooperative agreements in areas other than big box retail, providing a template, for example, of how an intermunicipal planning district can be voluntarily established to assist with local and regional issues.

Most states have constitutional or statutory provisions that enable two or more local governments to work together to achieve common goals. In addition, states such as New York provide broad statutory authority to local governments, specifically to encourage these governments to work together to accomplish intergovernmental planning and zoning. Voluntary compact planning is another technique that has been used to develop a


37. Id. at 60.

38. See id. at 59 (citing to Annotated Code of Maryland, Finance and Procurement Section 5-707(a)(1), which provides: “Inter-jurisdictional Coordination Subcommittee ‘shall promote planning and coordination and interjurisdictional cooperation among all jurisdictions consistent with the State’s economic growth, resource protection and planning policy.’”). The report also recommends that, “[t]he State’s Inter-Jurisdictional Coordination Subcommittee can be used as a vehicle to assist local jurisdictions requesting assistance for project evaluation or inter-jurisdictional agreement regarding big box proposals.” Id. at 63.

39. HEART ET AL., supra note 35, at 18 (discussing how ski resort areas of Fayston, Waitsfield, and Warren (Vermont) created an intermunicipal planning district to hire staff to help address common issues).

40. See GEORGE CARPINELLO & PATRICIA SALKIN, LEGAL PROCESSES FOR FACILITATING CONSOLIDATION AND COOPERATION AMONG LOCAL GOVERNMENTS: MODELS FROM OTHER STATES (Government Law Center of Albany Law School 1990).

41. N.Y. GEN. CITY LAW § 20-g (McKinney 2003); N.Y. GEN. MUN. LAW § 119-u (McKinney 1999); N.Y. TOWN LAW § 284 (McKinney 2004); N.Y. VILLAGE LAW § 7-741 (McKinney 1996). These sections expressly provide authority for cities, towns, and villages to enter into voluntary agreements to accomplish joint comprehensive land use planning and to establish intermunicipal overlay districts. See GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, INTERMUNICIPAL COOPERATION IN LAND USE PLANNING (1994).
shared county-wide plan whereby participating municipalities then agree to adjust their local plans and land use controls to aid in the implementation of the county plan. While it is good public policy to enable inter-municipal cooperation to enact planning and land use control tools, because it is voluntary, this option requires the political consensus of all needed or participating local governments. For those regions that have conducted their studies and developed strategies for big box developments in advance, these options are most useful. For regions that have not been proactive, but are reactive to imminent big box applications, these options may not be practically feasible.

2. Tax-Base Sharing and Intergovernmental Revenue Sharing Agreements

There is no doubt that big box retail has many ramifications that cross municipal boundaries. One key dilemma is balancing the opportunity for additional tax revenue with the possibility of “over-storing” the region. When one municipality affects a retail cap or other land use control to curb big box development, avoiding negative secondary impacts such as traffic, pollution, and sprawl, there exists a possibility that the store will locate in a neighboring municipality. This provides the second town with the tax benefits and leaves the secondary effects to the town that specifically sought to avoid them. In other circumstances, neighboring localities competing for commercial tax base might attempt to separately attract the same big box retail to their jurisdiction, offering more favorable terms, public subsidies, and relaxation of land-use standards to the detriment of all municipalities in the region. By using tax-base sharing, all participating municipalities in the region agree to share tax proceeds from new development, thereby eliminating inter-jurisdictional competition.

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42. See generally Patricia E. Salkin & Paul Bray, Compact Planning Offers a Fresh Approach for Regional Planning and Smart Growth: A New York Model, 30 REAL EST. L.J. 121 (2001) (for more information on compact planning).

43. Altenhof, supra note 2. The author suggests the use of regional impact assessments and participation in the development of regional commercial policies and plans (and the consistency of such plans between regional and local agencies).

44. A retail cap limits the size of stores in a commercial district by placing limits on the square-footage a single store may occupy. See Community & Economic Development, Retail Caps, available at www.cdtoolbox.org/mainstreet_downtown_revitalization/000217.html (listing examples of local ordinances across the country that impose retail caps).


46. STUART MECK, GROWING SMART LEGISLATIVE GUIDEBOOK 14-16 (American Planning Association 2002).
and encouraging cooperation on regional economic goals.\textsuperscript{47}

Tax-base sharing among municipalities has also proven to be an effective way to manage the inequality created when local communities compete with one another for big box revenue.\textsuperscript{48} Local governments in a metropolitan area may choose to form contracts with one another in order to offset the regional burdens created by local land use decisions, and to ensure that everyone shares in the benefits derived from new development projects.\textsuperscript{49} Such intergovernmental contracts can be problematic, however, as it has been suggested that the sovereign power doctrine might prevent their enforcement in the event of a controversy.\textsuperscript{50} States can overcome this obstacle by enacting legislation that facilitates efficient and enforceable tax-base sharing agreements among municipalities.

For example, Maine had enacted legislation that authorizes the creation of tax sharing districts among local communities.\textsuperscript{51} The law stipulates that “[a]ny [two] or more municipalities may, by vote of their legislative bodies, enter into an agreement to share all or a part of the commercial, industrial, or residential assessed valuation located within their respective communities.”\textsuperscript{52} The law states that municipalities entering into such agreements are free to adopt their own allocation formulas, and to make agreements with other, non-adjacent municipalities.\textsuperscript{53}

Similarly, Minnesota enacted a landmark statute in 1971 that requires municipalities in the Minneapolis-St. Paul region to share tax-base revenue.\textsuperscript{54} The legislation was enacted “to establish incentives for all parts


\textsuperscript{49} Id.

\textsuperscript{50} Id.


\textsuperscript{52} ME. REV. STAT. ANN. tit. 30-A, § 5752 (West 1996) provides in part that “[a]ny 2 or more municipalities may, by a vote of their legislative bodies, enter into an agreement to share all or a specific part of the commercial, industrial or residential assessed valuation located within their respective communities. Municipalities that vote to enter into an agreement pursuant to this section are not required to have borders that are contiguous.” Id.

\textsuperscript{53} Id.

\textsuperscript{54} MINN. STAT. ANN. §§ 473F.01-473F.13 (West 2001). It was enacted, in part, “(1) to provide a way for local governments to share in the resources generated by the growth of the area, without removing any resources which local governments already have; (2) to increase the likelihood of orderly urban development by reducing the impact of fiscal considerations on the location of business and residential growth and of highways, transit facilities and airports; (3) to establish incentives for all parts of the area to work for the growth of the area as a whole; (4) to provide a way whereby the area’s resources can be made available within and through the existing system of local governments and local decision making . . . .” Id. § 473F.01.
of the area to work for the growth of the area as a whole." The law requires local governments who are experiencing "above average industrial and commercial property tax growth . . . to share a percentage of the increment with other localities . . . " The size of these inter-local payments varies depending on the population and needs of the recipients. Minnesota’s leading proponent of tax-base sharing, former Representative Myron Orfield, Jr., acknowledges that "[t]ax-base sharing is a strong public policy . . . [that] is highly controversial and remains so even after [twenty-five] years in Minnesota."

In New Jersey, a tax-base sharing approach was enacted by the legislature for the Hackensack-Meadowlands area. Also, a bill was introduced in the California legislature to authorize tax-base sharing in the Sacramento area. A number of states have authorized intergovernmental revenue sharing agreements that offer municipalities a voluntary, flexible option to devise creative revenue-sharing arrangements, which could work to address the challenges in the siting of big box development. The Wisconsin Task Force on State and Local Government recently made tax-base sharing its number one priority, noting that such a program would encourage communities to talk about “what is good for us rather than me.”

In California, the City of Modesto and Stanislaus County entered into an agreement to share one percent of the sales tax for the purpose of reducing the “fiscalization of land use” that presents itself when cities and counties compete for big box retail development. This authority was

55. Id.
56. Saxer, supra note 48, at 676 (citation omitted).
57. Id.
60. A.B. 680, 2001 Gen. Assem., Reg. Sess. (Cal. 2002) would have established a tax-base sharing system for eighteen municipalities in seven counties in the Sacramento area. However, “the bill sparked heated opposition from critics who argue that it’s an effort to steer funds away from wealthy suburbs and redistribute them to less-affluent areas.” California Center for Regional Leadership, Starting to Think Outside the Big Box, Apr. 29, 2002 (reprinted from Evan Halper, Starting to Think Outside the Box, L.A. TIMES, Apr. 29, 2002), available at www.calregions.org/news/item.php?id=24.
61. See MECK, supra note 46, at 14-10-14-12 (for a review of the state authorizing statutes).
granted through Proposition 11 in California that enables cities and counties to enter into sales tax sharing agreements with a super-majority vote of the legislative bodies of both municipalities. Among the successes resulting from this arrangement was a recent land use decision that favored a business park development over a big box retail proposal.

3. Regional or County Level Review

Due to the regional effects that such development carries with it, "[c]ritics of big box developments argue that . . . large-scale retail projects should be subject to review by regional planning boards." There are a growing number of regional attempts to control big box development. For example, in Pennsylvania, four villages and two townships entered into a regional plan that "steers new residential and retail development into the villages and preserves outlying areas for farms and open space." Any new zoning change requires the unanimous approval of a twelve-member regional planning commission comprised of two representatives from each regulated town or village. Through this approach, local leaders are attempting to steer big box development into vacant department stores to avoid urban sprawl.

Acting pursuant to Oregon State policy, the City of Hood River executed an Urban Growth Management Agreement with the County of Hood River, requiring the county to adopt regulations similar to those of the city. The city’s big box ordinance includes tree-planting requirements intended to break the "sea of asphalt" look in parking lots, and a ban on stores with footprints over 50,000 square-feet. As is true elsewhere in Oregon, city policy prohibits sewer line extensions outside designated urban growth boundaries unless a health hazard exists.

The American Independent Business Alliance has adopted as part of their legislative platform a position on regional cooperation that encompasses much of the prior discussion. The alliance proposes to: "Provide incentives to encourage neighboring communities to collaborate on land use planning; to develop a joint process for reviewing developments

64. Id.
65. See Wack, supra note 34.
67. Id.
68. Id.
70. Id.
of regional impact, including large-scale retail projects; and to implement tax-base sharing.\textsuperscript{71}

\textbf{B. Role for States in Promoting Regionalism Approaches to Aid in Big Box Development Decision-making}

Regional planning may be voluntary and “bottom-up:” it may begin with the local political will of each participating municipality, or it may include mandated reviews and coordination emanating from state governments.\textsuperscript{72} State approaches to regionalism may be contained in growth management or smart growth policies, and may address a wide array of approaches for accomplishing intergovernmental cooperation to advance regional land use decision-making, including but not limited to: the articulation of statewide plans and goals that include a consistency requirement for regional and local plans; designation of growth and conservation areas; and special development and area concerns.\textsuperscript{73} In addition, states may create special regional planning commissions with jurisdiction over a specific significant natural resource area—such as the Adirondack Park Agency in New York—which possesses certain regulatory responsibilities with respect to land use and environmental matters. These matters can effectively control the prospects of big box development within their territory.\textsuperscript{74}

As evidenced by recent state-level studies of big box development, there is an interest by some state governments in providing research, training, and technical assistance to help foster better planning and better regional economic impacts of big box retail.\textsuperscript{75} Within New England, both the states of Rhode Island\textsuperscript{76} and Vermont\textsuperscript{77} require by statute a certification process that local plans are consistent with regional and state plans.

\begin{footnotes}
\item[71.] American Independent Business Alliance, \textit{Legislative Platform to Strengthen America's Independent Businesses} (2005), available at www.amiba.net/platform.html.
\item[74.] N.Y. EXEC. LAW § 801 (McKinney 1996).
\item[75.] Peter G. Pan, Legislative Reference Bureau, \textit{“Big Box” Retailing} (2003), available at http://www.hawaii.gov/lrb/; see generally Perry, \textit{supra} note 36, at 8; New Jersey Office of State Planning, \textit{Big Box Retail}, at 8 (Dec. 1995), available at www.nj.gov/daa/osg/docs/bigboxretail120195.pdf. All of the above listed have published big box reports.
\item[76.] R.I. GEN LAWS § 45-22.2-9 (1999) (requiring consistency with the State Guide Plan and the Comprehensive Planning and Land Use Regulation Act).
\item[77.] VT. STAT. ANN. tit. 24, § 4350 (2004) (requiring that at the request of towns, regional planning commissions approve local plans for consistency with state and regional goals and plans).
\end{footnotes}
Similarly, in Maine, where local governments accept planning grants from the state, there is a state level certification requirement.\textsuperscript{78}

In November 2004, a bill was introduced in the New Jersey legislature that would require, among other things, regional cooperation when dealing with proposed big box development.\textsuperscript{79} The proposal requires that cities and towns commission a regional economic impact study prior to the siting of a big box, and that municipalities must notify neighboring towns of a proposed big box development, allowing these neighboring jurisdictions to issue a “resolution of intermunicipal concerns” that would be addressed by a board composed of representatives from each of the surrounding towns.\textsuperscript{80}

A second legislative proposal in New Jersey addressing big box development “would require a revenue sharing agreement between . . . two taxing authorities.”\textsuperscript{81}

A recent report examining the economic impact of Wal-Mart construction by the Policy Research Institute at the University of Kansas observes that:

One important implication is the need to form regional-level planning committees that assess the strengths and weaknesses of each community in the region and develop plans that are mutually beneficial. State policy makers should take into consideration how they can encourage such community cooperation. The smaller markets could encourage businesses they need the most and create niches for customers in the trade region. This mutual exchange of customers would be market collaboration, not competition, and would keep customers from all the communities in the region.\textsuperscript{82}

Perhaps these recent activities suggest that states might be receptive to considering anew provisions to address developments of regional impact (DRIs), initially introduced as a model regulation in the ALI’s 1976 A

\textsuperscript{78} ME. REV. STAT. ANN. tit. 30-A, § 4347 (West 1996).
\textsuperscript{79} A.B. 3504, 2004 Leg., 211th Sess. (N.J. 2004); S.B 2080, 2004 Leg., 211th. Sess. (N.J. 2004). Hearings were held on the proposal in November and additional hearings are expected in early 2005. Id.
\textsuperscript{80} Big box is defined in the bill as retail stores over 130,000 square-feet that sell at least 25,000 items with a minimum of ten percent of store revenue in nontaxable groceries. Id. A project may then only be sited where the host municipality determines that such action would not cause “substantial detriment to the general welfare of the adjoining municipality based on the specific areas of intermunicipal concern raised” and that it would not impair the “intent and purpose of the master plan or zoning ordinance of the adjoining municipality.” Id.
Model Land Development Code. DRI approaches offer “an effective tool for managing large-scale developments that have impacts outside local borders [by permitting state and regional governments] to interject the public’s interest into development matters that may be of benefit to the host community but have spillover effects that outweigh those benefits.”

III. REGIONAL STRATEGIES TO BIG BOX DEVELOPMENT IN ACTION – CASE STUDIES

Many state and local governments have advocated regional strategies to counter the negative impacts of big box development. In California, legislators concluded that subsidies for big box retailers resulted in the loss of public funds for public purposes, and in response, passed a law in 1999 that would discourage retailers from creating competition between local governments. The law prohibits redevelopment agencies, cities, or counties from providing financial assistance to a big box store larger than 75,000 square-feet relocating from one community to another in the same market area unless it “enters into an agreement with the affected community to apportion sales tax revenues.” Several states have also enabled regional commissions or districts to evaluate the impact of regional-scale developments. This notion of regional impact review provides a forum to weigh the region-wide costs and benefits of large-scale retail development, and typically requires approval from both the host municipality and the regional planning agency.

A. Cape Cod Commission

In Massachusetts, a state with a strong home rule regime, local governments traditionally exercise power to levy property taxes and manage local services, leaving officials on the county level “largely irrelevant.” In 1990, Massachusetts passed the Cape Cod Commission

84. Id. at 122.
85. AB 178 was passed by the legislature in 1999, and remained in effect until January 1, 2005. CAL. GOV'T CODE § 53084 (West 2004); Curran, supra note 21, § 4.6.
86. Id.
87. Id.
89. New Ecology, Key Arguments, at 1 (Feb. 2002), available at http://www.newecology.org/docs/KeyArgumentsofRobertSmith.PDF (The paper discusses the work, Regional Land Use Planning and
Motivated by the desire to prevent unwanted big box developments, and to increase open space throughout Barnstable County, the state created a regional planning agency, the Cape Cod Commission, to work with the region’s fifteen towns.\textsuperscript{90}

The commission's responsibilities include the preparation of a regional land use plan and the regulation of proposed development that has regional impacts.\textsuperscript{91} The commission is tasked with weighing the benefits of the proposed development projects against the expected regional impacts before deciding whether to accept the proposed projects or to reject them.\textsuperscript{92} Where the commission decides to reject a development project, no town may subsequently approve it. However, if the commission decides to approve a project in a specific town, the local government maintains the power to reject the proposal.\textsuperscript{93} In accordance with the regional land use plan adopted by the commission and large scale review process, permits have been denied to several big box retailers from developing on Cape Cod, including Wal-Mart, Sam’s Club, Costco, and Home Depot.\textsuperscript{94}

\section*{B. Mandated Regional Review}

\subsection*{1. Vermont’s Act 250}

Vermont’s Act 250 and Act 200 are cited as a successful growth management framework requiring state review and permitting of projects of regional significance, such as big box retail outlets.\textsuperscript{95} The state strategy allows local government to consider regional impacts when deciding

\begin{quote}
\textit{Regulation on Cape Cod: Reconciling Local and Regional Control}, written by Robert W. Smith, Department of City and Regional Planning, University of California, Berkeley).
\end{quote}

\textsuperscript{90} Id. See also Donald L. Connors & Anne Rickard Jackowitz, \textit{A New Regional Commission for Cape Cod}, \textbf{STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT: POLICY ISSUES AND PRACTICAL CONCERNS} Ch.6 (Douglas Porter, ed.) (The Urban Land Institute 1992); see \textit{Commonwealth of Massachusetts, An Act Establishing the Cape Cod Commission} (1989), http://www.capecodcommission.org/act.htm.


\textsuperscript{92} Id. § 1(d).

\textsuperscript{93} Id.

\textsuperscript{94} CURRAN, supra note 21, at § 4.6.

whether or not to allow permits to big box retailers by setting forth an integrated system of state, regional, and local planning, including direct state-level review of large building projects.\(^{96}\) Two key features of the legislation are the ability of local governments to designate “growth areas” where new growth will be concentrated in a mixed-use land use pattern, and project review by the district commissions based on statutory criteria, which can be appealed to the Environmental Court.\(^{97}\)

In 1993, Wal-Mart applied for an Act 250 permit to construct a new 120,000-150,000 square-foot store on agricultural land located outside of the Town of St. Albans.\(^{98}\) After the district commission issued a permit for the store, the decision was appealed because—among other things—the project did not meet the Act 250 criteria for “impact of growth.”\(^{99}\) The Vermont Environmental Board reversed the commissioner’s determination and denied the permit.\(^{100}\) On appeal, the Vermont Supreme Court upheld the Environmental Board’s “broad analysis of the potential impacts of the big box store under the Vermont regime,” including loss of business in commercial districts.\(^{101}\) The court endorsed the Environmental Board’s analysis incorporating secondary regional impacts such as “the growth that would be induced by the big box store, recognizing that these stores attract secondary development that increases servicing costs for local governments and shifts retail activity outside of established commercial areas.”\(^{102}\)

2. New Jersey

The New Jersey State Development and Redevelopment Plan offers a number of plan policies to better regulate the siting of big box retail.\(^{103}\) For example, in the area of economic development, the plan calls for a coordination of economic activities both horizontally and vertically among different governments, as well as the provision of adequate capital facilities to meet the economic objectives of the plan, whether the facilities are publicly or privately owned.\(^{104}\) With respect to comprehensive planning, the state plan requires a coordinated review of any plans, ordinances,

\(^{96}\) VT. STAT. ANN. tit. 10, § 6086 (1997).
\(^{97}\) CURRAN, supra note 21, at § 4.6.
\(^{98}\) Id. See also, In re WalMart Stores, Inc., 702 A.2d 397, 400 (Vt. 1997).
\(^{99}\) Id.
\(^{100}\) Id.
\(^{101}\) Id.
\(^{102}\) CURRAN, supra note 21, at § 4.6.
\(^{104}\) Id.
programs, and projects that have a "greater-than-local" impact. The goals of this process are to: minimize regional and local impacts; encourage active participation in multi-jurisdictional planning programs to help achieve fiscal efficiencies in the delivery of public services and compatibility with plans of adjacent communities; and to integrate and coordinate plans at all levels of government.

IV. CONCLUSION

Although local governments possess a variety of planning and zoning tools to manage the location and appearance of big box developments, residents and taxpayers in a region are ill-served when individual municipalities consider applications for new big box retail without conducting critical regional impact assessments. These assessments include economic and planning studies because the regional residents will suffer unintended consequences of inadequate public infrastructure, causing economic impacts that could result in job losses and diminution of the tax base, as well as significant environmental harms. Big box development is meant to draw consumers from a wide region to support its super-size. So too, it must attract a region-wide effort to ensure that the resulting impacts are right-sized to ensure the best possible quality of life and sense of place for the region.

While there are many optional techniques that municipalities may use to accomplish these ends (with variations from state to state), state governments have an opportunity to proactively adopt policies and implement new planning programs. These programs should provide technical assistance, and provide effective regulatory frameworks and funding to ensure that area-wide impacts are equitably addressed in the local and regional decision-making process for the siting of big box development.

105. Id.
106. Id. In fact, the Maryland State Office of Planning issued this as a recommendation for state government to help address some of the planning strategies for big box retail. See Perry, supra note 36, at 63 ("The State can amend Smart Growth legislation and language in Article 66B to provide for increased coordination of the review of plans, ordinances, programs and projects that potentially have a 'greater-than-local' impact.").
Cudgels and Collaboration: Commercial Development Regulation and Support in the Portland, Oregon-Vancouver, Washington Metropolitan Region

Edward J. Sullivan*

I. INTRODUCTION

The Portland-Vancouver Metropolitan Region often appears to be a planner’s heaven. The area sits on both sides of the Columbia River and includes four counties with thirty-two cities.¹ From a planning perspective, the region contains two fairly sophisticated state planning systems:² (1) a regional planning system that applies only on the Oregon side of the

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1. Population breakdowns for each county in 2003 are:
   - Clackamas County, OR: 353,450
   - Multnomah County, OR: 677,850
   - Washington County, OR: 472,600
   - Clark County, WA: 363,400

Population breakdowns for the five largest cities within the Portland-Vancouver Metropolitan Region in 2003 are:
   - Portland, OR: 545,140
   - Vancouver, WA: 148,800
   - Gresham, OR: 93,660
   - Hillsboro, OR: 79,340
   - Beaverton, OR: 79,010


2. In an effort to preserve the state’s resource-based economy, particularly farmland, in 1973 the Oregon Legislature adopted Senate Bill 100. Senate Bill 100 created a state agency, the Land Conservation and Development Commission, charged with adopting state planning standards—called goals—and determining whether local plans and their implementing regulations were consistent with state policy. See OR. REV. STAT. §§ 197.010, 030 (1987).

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River—and allowing sufficient freedom for most local governments to undertake creative planning and land use regulation; and (2) a second state planning system which, in the case of Clark County’s cities, requires plan consistency and conformity with state policy.

Nevertheless, this region has not been immune from commercial and retail marketing phenomenon that tends to change commercial patterns towards large-scale malls and big box stores. The first of the large malls in the region, the Lloyd Center, began in the early 1960s as the product of an urban renewal project. Since 1960, four large shopping malls in excess of approximately 4.5 million square-feet have been established in the region. More recently, the area has also seen a proliferation of big box stores.

The arguments for and against big box stores and large shopping malls are no different in the Portland-Vancouver Metropolitan Region than they are elsewhere. The arguments concern such diverse topics as the role of regulation in the marketplace, provision of public services and facilities, social and economic displacement of residences and jobs, and the provision of goods and services created by retail marketing techniques.

This paper catalogs the response of the Portland-Vancouver region to these phenomena. The reader will note that this response is not limited to the regulatory side of planning, but contains a fairly high quotient of “positive planning,” i.e., planning and regulations designed to give the

3. The Metropolitan Planning Commission was organized by Portland and the three urbanized counties in 1957. The modern Metro is an expanded version of the original Metropolitan Service District that area voters approved in May 1970. Voters approved the present-day Metro in May 1978. See OR. REV. STAT. Ch. 268. art. XI, Section 14(4) of the Oregon Constitution provides that Metro “shall have jurisdiction over matters of metropolitan concern as set forth in the charter of the district.” OR CONST. Article XI, Section 14(4). The expanded agency went into operation on January 1, 1979. See CARL ABBOTT & MARGERY POST ABBOT, A HISTORY OF METRO: HISTORICAL DEV. OF THE METRO. SERV. DIST., at http://www.metro-region.org/article.cfm?articleid=2937.

4. Lloyd Center, the largest shopping mall in the Portland Metro area, contains 1.5 million square-feet of retail space. GLIMCHER REALTY TRUST, GLIMCHER PROPERTIES, at http://www.glimcher.com/pages/properties/state.jsp (last visited Apr. 24, 2005). Washington Square was constructed in 1974 with 800,000 square-feet and expanded in 1993 to include 1.3 million square-feet. WASHINGTON SQUARE MALL, ABOUT US, at http://www.shopwashingtonsquare.com/controller/site/about_us. Clackamas Towne Center opened in 1981 and contains 1.2 million square-feet. CLACKAMAS TOWN CENTER, ABOUT US, at http://www.clackamastowncenter.com/html/Mallinfo.asp (last visited Apr. 24, 2005). Pioneer Place opened in 1992 and contains 313,000 square-feet of retail space. See PIONEER PLACE, SHOP & DINE, at http://www.pioneerplace.com (for details on the retail opportunities) (last visited Apr. 24, 2005). These suburban regional malls preceded Metro’s current version of regional planning and have been designated “regional centers” as a concession to reality, even though they would not likely be approved as such had they not already been in existence.

commercial landowner the option to be creative in framing a development. On the Oregon side of the river, the regional planning authority, Metropolitan Service District (Metro), has generally striven to limit large scale retail development to certain “regional centers” designated in conjunction with the cities and counties that make up the region. 6 Moreover, Metro has prohibited large stores in areas where they might damage the economic development of the region. 7

Within these broad parameters, some cities in the Portland portion of the region 8 have developed their own plans and regulations to deal with targeted commercial development. Collaboration between governments and entrepreneurs facilitates quality development consistent with the market. This collaboration often includes the choice of a consultant to propose a detailed plan and land use regulations for the area. Following the preparation of the consultants report, the city will hold a hearing on the draft plan and proposed regulations. Assuming that the hearing goes well, the plans and regulations will ultimately be adopted. If the market is well researched, it is time for the implementation, photo opportunities, and articles in planning journals.

That is not to say that there have not been any conflicts in Portland. Recently, Home Depot challenged the authority of Portland to regulate the minimum floor size—a challenge that proved unsuccessful. 9 The City of Hillsboro turned down a Wal-Mart development for non-compliance with its zoning regulations and Wal-Mart was unsuccessful on appeal. 10 Finally, there was a well publicized battle between the Cities of Tualatin and Lake Oswego over the impacts of the Bridgeport Village Development. 11 While

7. As part of Metro’s 2040 Urban Growth Management Functional Plan, adopted in 2002, Metro required local governments to plan to accommodate seven regional centers. See PORTLAND, OR., URBAN GROWTH MANAGEMENT FUNCTIONAL PLAN § 3.07.610 (2004), available at http://www.metro-region.org/article.cfm?ArticleID=274. These areas were to be the focus of compact development, containing no less than 60 persons per acre, redevelopment, high-quality transit, and multi-modal street connections. See generally id. §§ 3.07.610-650 (2004). The prohibition of big box stores has been limited, however, to Regionally Significant Industrial Areas and Industrial Areas.
8. Although counties may allow for development of urban areas, the lack of a tax base to provide public facilities and services for urban uses has militated towards inclusion of urbanized sites within cities. This is often done through urban services agreements between cities and counties so that, as a practical matter, most such developments are undertaken within cities.
11. The Bridgeport Village Development was a collaborative effort through an intergovernmental agreement between the cities of Tualatin, Tigard, and Washington County. The City of Lake Oswego elected not to participate. See Part IV, infra.
resolved, the controversy illustrates what can happen even in a coordinated system.

Vancouver, Clark County, and the other cities of that county recently have been the fastest growing portion of the region. This has particularly been true following the construction of the I-205 freeway around Portland, which included a much needed second bridge across the Columbia.\footnote{A new era dawned for Clark County when the Interstate 205 Glenn Jackson Bridge opened on December 15, 1982, after five and a half years of construction. On opening day, the governors of Oregon and Washington joined ribbons to mark completion of the 11,750-foot bridge of gracefully curved concrete. Suddenly, remote parts of east Clark County were within minutes of a freeway link to Oregon. Attracted by lower housing costs, people started moving into the county in droves. The explosive growth continued in east Vancouver during the 1990s. In 1997, the average number of daily crossings on the I-205 Bridge eclipsed the I-5 Bridge for the first time. With the annexation of a large chunk of eastern Clark County, Vancouver became the fourth largest city in Washington. \url{http://www.co.clark.wa.us/aboutcc/proud_past/I205bridge.html} (last visited Apr. 24, 2005).} This area of Washington must, under the state’s Growth Management Act (GMA), adopt a coordinated plan with other governmental agencies, adopt land use regulations, and make land use decisions consistent with that plan.\footnote{Washington has thirteen state planning goals but local comprehensive plans need not address all of the goals. For example, economic development is Goal 7, but it need not be addressed when planning for growth. \cite{WASH. REV. C. § 36.70A.070(1), (3)}; \cite{see also supra note 2 (discussing the Washington Growth Management Act).} The location of intense retail commercial areas requires coordination of public facilities and services\footnote{As a practical matter, most developments must have the required transportation improvements in place or funded within two years of the grant of land use approval.} with particular emphasis on “concurrency” for transportation facilities.\footnote{Although Vancouver and Clark County have not had the controversies that have been evident in Oregon, the area has had significant retail commercial activity. \cite{See, e.g., Final Order, Hazel Dell Towne Center, Clark County File No. CUP2002-00002/CPZ2002-0008/PSR2001-00104 (Aug. 2002).}} The constellation of these requirements brings the reality of the relative scarcity of commercial land and a need to apply sufficient public resources to these developments.\footnote{See Edward J. Sullivan, Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100, 77 Or. L. REV. 813 (1998) (for a description of the Oregon planning system).}

The Oregon portion of the region has even more complex planning requirements. City, county, and regional plans must be coordinated and “acknowledged” to comply with applicable state-wide planning goals, which are the standards for land use planning and implementation in Oregon.\footnote{See Edward J. Sullivan, Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100, 77 Or. L. REV. 813 (1998) (for a description of the Oregon planning system).} In addition to goal-orientated compliance, the urban portion of the region in Oregon is subject to consistency review with Metro’s planning requirements. The first regional government in Oregon, the Metropolitan
Cudgels and Collaboration

Planning Commission, was created in 1957. Following the passage of a state constitutional amendment to allow municipalities to deal with matters of regional concern, Metro has been empowered by its charter and state law to undertake and enforce regional planning and land use controls. Notwithstanding these state and regional controls, most planning and land use regulations are local products; cities and counties determine the specific planning vision for their communities consistent with state and regional policy, and identify the steps necessary to achieve that vision. This flexibility of planning and regulation has created an atmosphere by which the downtown transit mall and the provision of light rail lines, in place of additional road corridors, has improved the quality of life in the region.

There are two state planning regimes in the Portland-Vancouver region. This paper will deal with their negative and positive effects in responding to the issues raised by the changing face of retail development and markets in each state.

II. THE CUDGELS

To meet the challenges of new retail paradigms—such as malls and big box stores—communities have the option of looking to limits on such development, as well as working with development interests to assure that projects work both for the entrepreneurs and the community. The following are some examples from the Portland-Vancouver region setting limits on retail commercial development.

Preserving Blocks of Industrial Land

Retail commercial centers and buildings pose a threat not only to the


19. In 1971, the legislature established and funded the Portland Metropolitan Study Commission (PMSC) which functioned from 1963 to 1971 and substantially transformed the structure of government in the Portland area.

The preamble of the Act creating the PMSC asserted that the growth of urban and suburban populations had created problems of water supply, sewage disposal, transportation, parks, police and fire protection, air pollution, planning, and zoning that “extend beyond the individual units and local government and cannot adequately be met by such individual units.” METRO CHARTER, IN ABOUT METRO, available at http://www.metro-region.org/article.cfm?articleid=211. The legislation allowed each of the thirty-eight legislators representing Multnomah, Clackamas, Washington, and Columbia counties to appoint one member of the Commission. Their charge was to prepare “a comprehensive plan for the furnishing of such metropolitan services as . . . desirable in the metropolitan area.” Id.

20. The Metro Charter was approved by popular vote in 1992 and amended in 2000. Id.

appropriate use of commercial land, but also to the amount of open industrial land. The issue arises when the land use category may include both commercial and industrial uses, or when the designation includes the right to allow for retail use as part of an industrial use. In these cases, land economics may cause retail chain store owners to exert pressure on local officials to "interpret" a predominately commercial use to be allowable in a designated industrial area. If the issue only revolves around the validity of the use, the new development may be underway before there is time to launch a challenge to it. Because the interpretation may have occurred only at the building permit stage, there may have been no opportunity for the public to become aware of the application or to respond to it.

To avoid such conflicts, Metro has designated "Regionally Significant Industrial Areas" (RSIAs), i.e., those areas in large blocks and designated industrial on Metro’s Framework Plan. Metro has required its constituent cities and counties to do the following in RSIAs:

1. Set out a specific plan and zoning designation for those specific areas;
2. Review and revise land use designations applicable to such sites to limit the size and location of new structures so that no more than 3,000 square-feet is used for a specific retail use (oriented towards providing this use of service to those within the industrial area only) and not more than 20,000 square-feet in the aggregate;
3. Assure that such uses do not reduce peak performance on main Roadway Routes and Roadway Connectors shown on Metro’s freight network map (November 2003) below standards set in the 2004 Regional Transportation Plan (RTP) or require added road capacity to prevent falling below the standards; and
4. Regulate land division in such areas so that parcels under fifty acres may be divided into smaller parcel sizes if allowed by local regulations; however, for

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22. For example, a hardware store storage use might be read to support a mega-market hardware store. To some extent, this imprecision is derived from state law. See generally Marcott Holdings, Inc. v. City of Tigard, 30 LUBA 101 (1995).
23. PORTLAND OR., METRO CODE § 3.07.420(A) (2004).
24. Id. § 3.07.420(B).
25. Id. § 3.07.420(C).
larger parcels, such division may not result in a parcel under fifty acres and must be done in accordance with a master plan, though smaller lots may result at forty percent of the land that has already been developed with industrial uses or used as accessory to industrial uses.\textsuperscript{26}

The Metro Code contains exceptions addressing existing land divisions and non-industrial uses pertaining to drawing maps, implementing regulations,\textsuperscript{27} or for covering special situations. These include divisions to provide public service facilities, to protect the natural resource, to divide a non-conforming use, or to allow financing.\textsuperscript{28}

Metro has similar authority with respect to industrial lands not within the RSIA designation. The pattern is similar to RSIA industrial lands protection:

1. While no specific plan designation is required, local governments must review regulations for industrial areas and revise them to limit new commercial buildings to those that serve the needs of the area primarily, and are limited to no more than 5,000 square-feet of sales or service area or an aggregate of 20,000 square-feet.\textsuperscript{29}

2. As with our RSIA lands, new buildings containing commercial uses are limited so as not to interfere with the efficient movement of freight along Main Roadway Routes and Roadway Connectors shown on the same freight network map referred to above.\textsuperscript{30} Other measures specifically authorized include: access restrictions to such routes and connections, siting limitations, and traffic thresholds\textsuperscript{31} for non-conforming uses. These measures are to be considered in drafting the map and enforcing the regulations.\textsuperscript{32}

3. Limitations on land divisions and exceptions are

\begin{itemize}
\item \textsuperscript{26} Id. § 3.07.420(E).
\item \textsuperscript{27} Id. § 3.07.420(A), (E), (F).
\item \textsuperscript{28} Id. § 3.07.420(E), (F). Notwithstanding these regulations, Metro has never taken formal enforcement action to preserve industrial lands.
\item \textsuperscript{29} Id. § 3.07.430(A). The exceptions for public use airports, industrial training areas, and RSIA areas are contained here as well.
\item \textsuperscript{30} Id. § 3.07.430(B).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. § 3.07.430(A), (D), (E). As of the present date, there is no case in which Metro has been required to act to enforce its regulations.
\end{itemize}
Finally, in order to resolve conflicts over the introduction of retail commercial uses into its "employment areas," Metro has required cities and counties to "limit new and expanded commercial retail uses to those appropriate in type and size to serve the needs of businesses, employees and residents of the Employment Areas." To that end, a city or county may not approve a gross leasable area (or lease a retail sales area) of more than 60,000 square-feet if any lot or parcel or a combination thereof is supported only by a street. If the land was not within an employment area designated by the Metro map, the local government may allow commercial retail uses in excess of 60,000 square-feet if the local government allowed such uses before January 1, 2003. Metro also requires that transportation facilities be adequate by the time the use comes on line and the local comprehensive plan provides for adequate transportation facilities to serve the employment area over the planning period. Finally, a local government may allow retail commercial use over 60,000 square-feet if the use will generate an increase of no more than twenty-five percent in site-generated traffic over the industrial uses allowed.

III. GRESHAM CIVIC NEIGHBORHOOD

Gresham is a rapidly growing city located east of downtown Portland. Its growth has been spurred by an ambitious economic development, the annexation program, and the fact that it is one terminus of the Metropolitan Light Rail Transit Program (MAX) which allows one to travel between downtown Portland and Gresham City Hall in forty minutes. When the city decided to assist in the development of a largely vacant 130 acre parcel, which includes City Hall and two light rail stations, it decided to remove a regional shopping center designation from one of the parcels and to develop the remainder as a Transit Oriented Development (TOD) under the State’s Transportation Planning Rule (TPR) instead. These State TPR objectives

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33. *Id.* § 3.07.430(D).
34. In addition to mapping Regionally Significant Industrial Areas, Metro has also mapped Employment and Industrial Lands. *Portland, Or., Ordinance 04-1040B, Exhibit C* (Jun. 24, 2004).
36. *Id.* § 3.07.440(B).
37. *Id.* § 3.07.440(D).
38. *Id.* § 3.07.440(E). *See infra* Part VI.
40. The Transportation Planning Rule (TPR) requires that cities, counties, metropolitan planning organizations, and the Oregon Department of Transportation (ODOT) exercise their planning...
reinforced Metro’s planning efforts so that the plan set out the following goals and objectives.

1. Reduce automobile trips by capitalizing on transit opportunities, and by the creation of an environment which encourages people to walk.
2. Create a circulation system that favors safe and efficient access by and between all modes.
3. Respond to the central location of the project within the City of Gresham by including a wide range of uses and activities developed to urban densities. Uses should complement those already established nearby.
4. Investigate and implement cost-effective measures to reduce automobile travel.
5. Provide effective connections to adjacent neighborhoods with bike routes and footpaths.
6. Maximize potential transit ridership through an appropriate mix and density of uses developed in the Civic Neighborhood, and by providing easy access to transit.
7. Set a precedent for sustainable development in regional centers. 

Because the generally undeveloped area included City Hall, it was called the Gresham Civic Neighborhood and has as its hallmark pedestrian and bicycle transportation connections. A key purpose of the Gresham obligations to provide a safe, convenient and economic transportation system. OR. ADMIN. R. 660-012-0015(4) (2004). Under the rule, all local governments must prepare and adopt a TSP. Id. The TSP must evaluate the existing land use controls, facilities, and services to determine how it should go about meeting the overall transportation needs. Id. When development is proposed, the local government can determine the precise location, alignment, and preliminary design of the improvements included within the TSP. Id. Another critical element of the TPR is coordination. Under Administrative Rule 660-012-0015(1), ODOT must prepare its TSP in a matter consistent with the state land use agency (LCDC) and acknowledged comprehensive plans. OR. ADMIN. R. 660-012-0015(1) (2004). The regional TSP, prepared by Metropolitan areas or counties, must be consistent with the adopted elements of the state TSP and local TSPs must be consistent with regional TSPs and adopted elements of the state TSP. Probably the most notable feature of the TPR is that it requires every local government to take measures to enhance pedestrian, bicycle, and transit travel, while at the same time, it requires local governments to reduce reliance on the automobile. For areas inside a Metropolitan Planning Organization, the rule requires a 15% reduction in total automobile vehicle miles traveled per capita within thirty years following adoption of the TSP. OR. ADMIN. R. 660-012-0035(2) (2004). For the Portland metropolitan area, the rule also requires evaluation of alternative land use designations, densities and designs. Id.

41. GRESHAM, OR., ORDINANCE 1366, App. 38, 1 (Jul. 11, 1995) [hereinafter Gresham Ordinance].

42. Id. The city, along with Metro, Tri-Met, Portland General Electric, and a development firm sponsored a mixed use program for the area with the goals of reducing residential auto trips by 10%, office trips by 30%, and retail trips by 35%. Id.
Civic Neighborhood Plan was to show that the development of mixed uses at high densities was feasible, particularly if a multi-modal friendly environment offering advantages not found in conventional suburban developments was created.\footnote{43}

The notion was to locate work and shopping opportunities closer to residents. The result was a project that won the Professional Achievement and Planning Award from the Oregon Chapter of the American Planning Association for the innovation, transferability, quality implementation, professionalism, and community contribution of this project.\footnote{44} The first phase opened on November 15, 2000, and consisted of 297,055 square-feet of retail and office space and 662 residential units.\footnote{45}

The Civic Neighborhood Plan uses transportation to support desired land uses. The area is bisected by Tri-Met’s light rail line which is, in turn, supported by a grid street network with pedestrian approaches oriented towards two light rail stations. The existing “Gresham City Hall” station is located in the southeastern portion of the Civic Neighborhood, and the future “Civic Drive” station sits in the very center of the neighborhood.\footnote{46} The land uses for the plan area are arranged so that the highest intensity of uses and floor area ratios are located nearest to the light rail station.\footnote{47} The entire area is zoned for mixed use so that housing is mixed with office and retail commercial areas.\footnote{48} The land use intensities for the residential component of the program is far greater than would have occurred in a suburban residential setting typical of a bedroom community like Gresham. These uses reinforce the investment made in retail and office uses.

The Gresham Civic Neighborhood Plan is implemented through a series of land use districts that illustrate its transit supportive nature:

1. Transit Development District—Medium Density—Civic (TDM-C). This district includes areas with good

\footnote{43} Id. \footnote{44} Press Release, Gresham Community & Economic Development Department, Gresham Station Receives Planning Award (Aug. 23, 2001) at http://www.ci.gresham.or.us/departments/cedd/awards.asp. \footnote{45} Gresham Ordinance, supra note 41, at 6. One of the developers of this project was Center Oak Properties, L.L.C. which also played a role in the Bridgeport Village Development discussed infra. \footnote{46} See also GRESHAM, OR., DEV. CODE § 4.1247A (2003) (providing a map of the Gresham Civic Neighborhood Functional Street Classification, which shows the placement of the rail stations within the city); Gresham Ordinance, supra note 41 at 15–16 (summarizing the intended and existing light rail stations in Gresham). \footnote{47} Gresham Ordinance, supra note 41, at 7. Street design and classification support this transit oriented approach. GRESHAM, OR., DEV. CODE §§ 4.1244, 4.1247. \footnote{48} Id. However, the map shows a predominant use in each case. Note that the City Hall occupies 50,000 square-feet of space and another 90,000 square-feet of office space is expected in the second phase.
access to existing and future light rail stations and abutting arterial streets where larger buildings are encouraged with parking behind, under, or to the sides of the structure. 49 Mixed use and multi-family developments with a minimum density of 24 units per acre are encouraged. 50

2. Transit Development District—High Density—Civic (TDH-C). This district includes land around existing and future light rail stations. 51 Parking is permitted in the same manner as the medium density designation. 52 Mixed use and multi-family uses are also allowed with a minimum of thirty units per acre. 53

3. High Density Residential—Civic (HDR-C). This district applies to land within walking distance of the light rail stations, though it is normally further from those stations than the TDH-C designated lands and is to be developed in a minimum density of twenty-four units per acre. 54

4. Moderate density residential—Civic (MDR-C). This district applies to other lands within walking distance of the light rail station. It has a minimum density of seventeen units per acre. 55

The dimensional requirements for these districts contain no minimum lot size, comparatively little residential and commercial parking requirements, and a floor area ratio supporting higher buildings in the more intense land use designations. 56 The design standards for these districts discourage blank walls in favor of windows at the ground floor level and

49. GRESHAM, OR., DEV. CODE §§ 4.1210, 4.1220. Primary uses in this district include commercial, retail, and service uses occupying the ground floor and all or a portion of the second floor.

50. Id.

51. GRESHAM, OR., DEV. CODE §§ 4.1211, 4.120. Primary uses in this district include office buildings, retail, and service uses. Freestanding retail uses are also permitted up to 10,000 square-feet. Id. § 4.1211.

52. Id. § 4.1211.

53. Id. § 4.211.

54. GRESHAM, OR., DEV. CODE §§ 4.1212, 4.120. Residential uses are the primary use, but permitted secondary uses include neighborhood commercial uses, small offices, and parks. Certain other office commercial uses are permitted, but freestanding retail uses are limited to 10,000 square-feet.

55. GRESHAM, OR., DEV. CODE §§ 4.1213, 4.120. Mixed use and neighborhood commercial uses are allowed to occupy all the buildings so long as the underlying residential densities are met. § 4.1213. Unlike the other residential designations, this district has a maximum residential density of 30 units per acre. § 4.1230.

56. GRESHAM, OR., DEV. CODE § 4.1230. Most of the designations have a 40-foot height limit, and all except for the MDR-C allow up to 80 feet if built-in fire protection systems are provided. Id.
design variations on street-facing facades. Moreover, as part of its transit supportive role, building entrances must be oriented toward the street, adequately illuminated, and provide protection from the elements. Auto dependant uses are limited to perimeter sites within the neighborhood in order to limit auto movements and facilitate pedestrian movements. Site appearance is enhanced through architectural design review guidelines, which, despite their name, are binding. Street trees and open space are

57. GRESHAM, OR., DEV. CODE § 4.1235.
58. GRESHAM, OR., DEV. CODE § 4.1236. Moreover, drive-through uses are discouraged in the civic neighborhood and allowed only when subordinate to another permanent use. GRESHAM, OR., DEV. CODE § 4.1239.
59. GRESHAM, OR., DEV. CODE § 4.1238.
60. As set out in GRESHAM, OR., DEV. CODE § 4.1242(G), these guidelines include the following:

(1) Buildings should promote and enhance a comfortable pedestrian scale and orientation. Facades should be varied and articulated to provide visual interest to pedestrians. Within larger projects, variations in facades, floor levels, architectural features, and exterior finishes are encouraged to create the appearance of several smaller buildings.

(2) Upper stories should be articulated with features such as bays and balconies.

(3) To balance horizontal features on longer facades, vertical building elements, such as stairs to upper stories and building entries, should be emphasized.

(4) Buildings should incorporate features such as arcades, roofs, porches, alcoves, porticoes, and awnings to protect pedestrians from the rain and sun.

(5) Special attention should be given to designing a primary building entrance which is both attractive and functional. Primary entrances should be clearly visible from the street, and incorporate changes in mass, surface, or finish to give emphasis to the entrance. All building entrances and exits should be well lit.

(6) Certain buildings, because of their size, purpose, or location should be given special attention in the form of ornamental building features, such as towers, cupolas and pediments. Examples of these special buildings include theaters, hotels, cultural centers, and civic building.

(7) Buildings located at the intersection of two streets should consider the use of a corner entrance to the building.

(8) Exterior building materials and finishes should convey an impression of permanence and durability. Materials such as masonry, stone, stucco, wood, terra cotta, and tile are encouraged. Windows are also encouraged, where they allow views to interior activity areas or displays. However, glass curtain walls, reflective glass, and painted or darkly tinted glass should not be used.

(9) Where masonry is used for exterior finish, decorative patterns (other than running bond pattern) should be considered. These decorative patterns may include multi-colored masonry units, such as brick, tile, stone, or cast stone, in a layered or geometric pattern, or multi-colored ceramic tile bands used in conjunction with materials such as concrete or stucco.

(10) Preferred colors for exterior building finishes are earthtones, creams, and pastels of earthtones. High-intensity primary colors, metallic colors, and black should be avoided.

(11) All roof and wall-mounted mechanical, electrical, communications, and
also regulated, as are views, so that nearby hills and Mt. Hood can be seen. Further, to assure that there are “eyes on the street” for security purposes, a high level of pedestrian activity is encouraged around the civic neighborhood light rail station most times of the day. In addition, a public plaza with a mix of active uses is required for the areas adjacent to these places.

The Gresham Civic Neighborhood has begun opening its second phase to provide for the Gresham Station North light rail facility. This phase will consist of approximately 250,000 square-feet of Class A office space, 400,000 square-feet of retail space, 1,600 homes and additional uses.

service equipment, including satellite dishes and vent pipes, shall be removed or screened from public view by parapets, walls, fences, dense evergreen foliage, or by other suitable means.

(12) For buildings designed to house most types of retail, service, or office businesses, traditional storefront elements are encouraged for any façade facing a primary pedestrian street. These elements include:

(a) Front and side building walls placed within 10 feet of abutting street right-of-way boundaries;
(b) Clearly delineated upper and lower facades;
(c) A lower façade containing large display windows and a recessed entry or entries;
(d) Smaller, regularly spaced windows in upper stories;
(e) Decorative trim, such as window hoods, surrounding upper floor windows;
(f) A decorative cornice near the top of the façade;
(g) Piers or pilasters, typically of masonry.

(13) Individual windows in upper stories should conform with the following guidelines:

(a) Glass area dimensions should not exceed 5 feet by 7 feet. (The longest dimension may be taken either horizontally or vertically).
(b) Windows should have trim or molding at least two inches wide around their perimeters.

(14) Ornamental devices, such as molding, entablature, and friezes, are encouraged at the roofline. Where such ornamentation is present in the form of a linear molding or board, the band should be at least 8 inches wide.

(15) Arbors or trellises supporting living landscape materials should be considered for ornamentation of exterior walls. Any such feature should cover an area of at least 100 square-feet, and include sufficient plantings to achieve at least 30% coverage by plant materials within three years.

61. GRESHAM, OR., DEV. CODE §§ 4.1240, 4.1241.
62. Id. § 4.1243.
63. Id. § 4.1248(A). The standard for these uses is set out in Section 4.1248(B), i.e., retail, service, commercial, professional offices and community service uses, which are required on the ground floor with primary customer entrances oriented towards the light rail station and the public plaza with no off-street parking and loading permitted.
64. Id. § 4.1248(B)(1), (2). Above the ground floor, professional offices, commercial service or residential uses are required. Id. § 4.1248(B)(3).
Additional shops and restaurants are planned. By all measures, the development is a success.

IV. RECYCLING THE COUNTY ROCK QUARRY—BRIDGEPORT VILLAGE

Near the Interstate-5 Freeway, the main north-south route from Portland to San Francisco and about ten miles south of downtown Portland, is a former rock quarry and landfill owned by Washington County, the so-called Durham Quarry. Proximity and access to the freeway made the site a prime candidate for redevelopment, particularly in the light of the relative immobility of the regional urban growth boundary.

Since the quarry was mined out, Washington County, the owner of the facility, had no use for the land, so it asked for development proposals. The winning proposal came from Opus Northwest, LLC, a Minnesota company that partnered with Center Oak Property, LLC, to spend $200 million to construct a 500,000 square-foot shopping center called Bridgeport Village. The shopping center contained restaurants, a multiple-screen cinema, and both retail and office space on twenty-seven acres. Because the area was within two jurisdictions, bridging the cities of Tualatin and Tigard, the two cities and Washington County agreed to enter into an Intergovernmental Agreement specifying that the City of Tualatin should handle most of the development permitting.

The Tualatin Development Code (TDC) sets out the background for the Bridgeport Village development, noting that the city has limited area designated primarily for intense commercial development, and that the

66. Id. The office space includes a state-of-the art health center and surgi-center, a 45,000 square-feet fitness facility, and a high school for 750 gifted students. The site will also include a second light rail station with thousands of passengers every day. Upon completion, Gresham Station North will be the largest mixed-use project in the state with over 400,000 square-feet of retail, 1600 homes, and 250,000 square-feet of office space.

67. When it was created in 1983, the Metro UGB included 228,952 acres and has increased by only 27,175 acres since that time. Because the site was designated “General Commercial” in the applicable plans, it was not subject to Metro’s “big box” limitations. See supra § II of this paper.

68. Jeanie Senior, New Mall’s in the Bag, PORTLAND TRIB., Nov. 12, 2004, at Business Section, available at http://www.portlandtribune.com. The demographic profile provided by a consultant showed an average household income of approximately $75,000 to $100,000 in the area. The featured store was a Crate & Barrel. Id; see also BRIDGEPORT VILLAGE, PROJECT INFORMATION, at www.bridgeport-village.com (boasting the first Crate & Barrel built in Oregon). The complex is more correctly termed a “lifestyle center” which is often a destination for amusement and recreation, in addition to retail commercial uses. Tualatin wanted a well-designed, pedestrian-oriented, urban-scale development with traffic impacts no worse than for the existing area and centered these objectives as part of its design requirements. Of the 1,800 parking spaces, 1000 were placed in a parking structure at the rear of the site.

69. Intergovernmental Agreement among the Cities of Tigard and Tualatin and Washington County, May 14, 2002. One major issue, sign permitting, is handled by the individual cities.
twenty-eight acre Durham Quarry site was the only remaining large undeveloped site. The city decided to preserve existing light industrial uses that were established in the area in the 1970s, but because there was a surplus of industrial lands, the city re-designated some of the adjacent area to a General Commercial classification. This commercial land was again redesignated in 2002 to a Mixed Use Commercial Overlay District as part of the Bridgeport Village proposal, subject to site and design review requirements. The TDC set high expectations for this area:

The purpose of this district is to recognize and accommodate the changing commercial/residential marketplace by allowing commercial and residential mixed uses in the Durham Quarry Site and Durham Quarry Area.

The initial application of the District is only to the Durham Quarry Site. Possible future application of the Mixed Use Commercial Overlay District is the Durham Quarry Area through the Plan Text Amendment process. Retail, office, business services and personal services are emphasized, but residential uses are also allowed. A second purpose is to recognize that when developed under certain regulations commercial and residential uses may be compatible in the General Commercial District. The Mixed Use Commercial Overlay District allows flexibility in the uses permitted for properties in the Durham Quarry Site and Durham Quarry Area.

To ensure that these specific goals were met, the city adopted a zoning chapter applicable only to the Durham Quarry property, called the Mixed Use Commercial Overlay District. That zoning district allows a wide variety of housing, commercial, and office uses, and transportation

70. TUALATIN, OR., DEV. CODE § 6.010 (1)–(4) (2003); see also TUALATIN, OR., DEV. CODE § 57.010 (2002).

71. Id. § 6.010(5)–(6).

72. These site and design requirements for the Mixed Use Commercial Overlay District (contained in TUALATIN, OR., DEV. CODE §§ 57.005–900 (2002)) exceed those generally applicable to other commercial areas of the City. Similarly, the City of Tigard redesignated the eight acres on the northern part of the site which lay within that City from an Industrial Park to a Mixed Use Commercial (MUC) classification. The regulations of the two cities were identical and the redesignations were done in the light of the Bridgeport Village proposal.

73. TUALATIN, OR., DEV. CODE § 57.010. As a result of the design requirements, the site was generally developed in two-story structures. Aside from an 80,000 square-foot cinema, all other buildings are no greater than 40,000 square-feet.

74. Chapter 57 of the Tualatin Code sets out the details of the regulations of the Mixed Use Commercial Overlay District. See, e.g., TUALATIN, OR., DEV. CODE § 57.040. The site was entirely a commercial development. Residential uses were never proposed and office development was planned only for the second floor of two-story structures. Interview with Doug Rux, City of Tualatin Community Development Director (Feb. 18, 2005).
facilities. The city generally requires approval by the city’s Architectural Review Board (ARB) for all large development projects and, following approval, requires construction to be in accordance with the approved plans.

The ARB is authorized to place conditions on approvals to protect the public from potentially deleterious effects of a proposal, fulfill public service and facility needs created by the proposal, or otherwise carry out the city’s Code. The city’s Mixed Use Commercial Overlay District contains specific design, landscaping, and screening requirements applicable only to the Bridgeport Village site. The focus of the district’s Design Standards is to create a “high-quality mixed use area, providing a convenient pedestrian and bikeway system and utilizing streetscape to create a high quality image for the area.” The design regulations speak to mass and density of buildings, proximity of more intensive uses to transportation facilities, pedestrian and bicycle access, landscaping, parking, and building design.

The elements of the Tualatin Development Code enhance the goals and objectives of the city’s plans to assist the location of desirable commercial development, particularly when the site had been a mined out quarry. There might be some lessons learned from the experience, however, according to the Community Development Director:

1. There was insufficient emphasis on useable second story space for significant office or residential use;
2. The surrounding area must be included in a plan, as the impacts (particularly transportation impacts from a large retail commercial use) reach far beyond the site itself; and
3. To prevent a “sea of asphalt” parking lot

75. See TUALATIN, OR., DEV. CODE § 57.020. Other residential, civic, and commercial uses are permitted by conditional use. See id. § 57.030. As noted, neither office nor residential uses were attempted on the site.
76. TUALATIN, OR., DEV. CODE § 73.040(1).
77. TUALATIN, OR., DEV. CODE § 73.055 (2002).
78. Sections 57.050, 57.200, and 57.300 of the Tualatin Code apply detailed standards relating to front facades and main entries, roof lines, trim details, mechanical equipment, and parking where more than half of a structure is devoted to residential use. TUALATIN, OR., DEV. CODE §§ 57.050, 57.200, 57.300 (2002).
79. Section 57.400 requires maintenance of landscaping, including pruning and revegetation as a condition of a certificate of occupancy, in addition to detailed buffering and screening requirements. Id. § 57.400. Maximum landscape coverage is 10% of the site. Id. § 57.050(2)(g). See also id. §§ 73.310–390.
80. Id. § 57.200. This section also requires conformity to these provisions and provides a conflict resolution process before the ARB if other city standards are inconsistent.
81. See id. The streets are laid out in a quadrant with structured parking behind.
appearance, serious consideration must be made for underground parking.\textsuperscript{82}

Nevertheless, the development was undertaken as part of a public-private partnership in which the private side put up much of the infrastructure funds, but did well from the deal.\textsuperscript{83} The public side was able to sell an otherwise nonperforming asset and work cooperatively to resolve a longstanding problem with the use of a well-located parcel.

V. THE STREETS OF TANASBOURNE

In central Washington County, a short thirty minute trip from downtown Portland, the western suburb of Hillsboro contains a “lifestyle center mall” development\textsuperscript{84} known as The Streets of Tanasbourne. The Streets of Tanasbourne was part of an 850 acre master plan development originally undertaken by Standard Insurance Company and approved by Washington County in 1983; however, this seventeen acre parcel was undeveloped when the site was annexed to Hillsboro in 1987.\textsuperscript{85} In 2000, Hillsboro approved a retail development, but again the site was undeveloped. After a change in the developer, the project is now marketed as a “lifestyle center,” and was approved in 2004 to include 386,000 square-foot open air center retail space and higher end retail and restaurant uses.\textsuperscript{86}

\begin{flushright}
\textsuperscript{82} Interview with Doug Rux, City of Tualatin community development director (Feb. 18, 2005). While housing was an allowed use, its suburban location off a freeway in a sea of retail uses rendered housing infeasible. Moreover, there were other viable suburban office sites available, so the market was not competitive.

\textsuperscript{83} The parcel was sold in 2004 to a company owned by the California Public Employees Retirement System for $170 million, the highest dollar real estate deal in the Metro area. Opus put up all infrastructure funds (about $8.5m). There was no direct publicly subsidized public infrastructure. OR. BUS. J., Jan. 28, 2005.

\textsuperscript{84} “Lifestyle centers” are a “boutique” shopping concept typically located near affluent residential neighborhoods that feature fancy stores aimed at well-to-do consumers. See Parija Bhatnager, Not a Mall, It’s a Lifestyle Center (Jan. 12, 2005), available at http://money.cnn.com/2005/01/11/news/fortune500/retail_lifestylecenter/ (stating that “unlike the massive, windowless 800,000 square foot suburban malls anchored by a discount or department store, lifestyle centers tend to be smaller, around 50,000 square-feet. They’re often open-air venues—like a cute little village—and are devoid of an anchor store.”). These retail malls are smaller than traditional shopping malls. They are rarely enclosed, and have streets and sidewalks in lieu of the pedestrian amenities associated with malls.

\textsuperscript{85} Interview with Deborah Raber, Hillsboro Planning Supervisor (Mar. 7, 2005). The original master plan indicated 2 million square-feet of retail and office space, 4,000 residential units, and a 550-room hotel. Id. The particular 17 acre site at issue was once scheduled to be developed as a hospital facility.

\textsuperscript{86} See Lindsay Gordon & Skip Rotticci, Portland Real Estate: Coming Up Roses? (Feb. 2005), available at http://www.westernrebusiness.com/articles/FEBO5/highlight2.html. The center is anchored by a Meier & Frank department store (80,000 square-feet) and an REI outdoor clothing and adventure equipment retail store (40,000 square-feet) and has a three level parking garage adjacent to the department store. Id. The department store was the first built in the region by Meier & Frank in more
Several features distinguish the Tanasbourne retail center from others discussed in this article. For example, this development is not located on or near major transportation arterials (as are Bridgeport and Cascade Station) and it is not directly accessible by the region's light rail system (such as Gresham Civic Neighborhood or Cascade Station). Moreover, the project did not require rezoning, but was approved as a design review application in a commercial zone. It is estimated that, due to the close proximity of many of the region's large employment centers such as Nike and Intel Corp., the number of people that live within a five mile radius of the subject site is between 200,000 and 250,000 people. Another feature is the "spine" that unifies the majority of the site favors pedestrians over cars, and is constructed to look like a small town "Main Street." Hillsboro planning staff also worked with the developer to assure that the western edge of the site, which abuts high density residential uses, was pedestrian-friendly and inviting to the adjacent residential uses.

The Streets of Tanasbourne opened in October 2004. At this early stage it is difficult to tell if the development has been a success. Two pads remain to be built, but Hillsboro staff has facilitated development of these sites by approving parking variances to allow increased square footage for these pads without further increases in on-site parking. If success is gauged by providing pedestrian-friendly retail uses to a major employment area that—up to this point—was starved for a large town center development, then The Streets are bound for success.


88. Gordon & Rotticci, supra note 87. The adjacent Tanasbourne neighborhood has a density of 22 units per acre. No housing is provided as part of this project.

89. The "Main Street" design extends upward on this sloped site, connecting to a fountain and plaza area at an intersection. Interview with Deborah Raber, Hillsboro Planning Supervisor (Mar. 7, 2005). Stairs from the plaza extend to the northwestern corner of the site, where a strong pedestrian link is provided across the adjacent street and the adjacent high density residential neighborhood. Id.

90. To do this, the department store and parking garage were designed to increase the visual and textural variety, the sidewalks were widened on both sides of the street, and landscaping was installed to soften the taller structure. The site designers also took advantage of the slope of the site to construct most of the lowest level of the garage below grade, thereby reducing its height and allowed a skybridge connection to the second floor of the department store. Interview with Deborah Raber, Hillsboro Planning Supervisor (Mar. 7, 2005).

91. In return, The Streets management has worked with owners of surrounding theaters and office parks to provide employee parking and shuttle service during holiday peak hours. Id.
VI. PORTLAND’S CASCADE STATION PROJECT AND THE CHANGING RETAIL MARKET

In 1978, Congress cancelled an appropriation to build the Mount Hood Freeway connecting Portland to its sister city to the east, Gresham, and authorized the use of those funds to build a light rail system to connect those two cities.\(^92\) Ground was broken in 1981 for the fifteen-mile section and in the 1990s a further extension of MAX (as the light rail system operated by the Tri-County Metropolitan Transit District, or Tri-Met) connected Portland to the City of Hillsboro, to the west.\(^93\) MAX was a transportation success for the region.

In 1997, Tri-Met, the Port of Portland (which operates Portland International Airport or PDX), and the City of Portland considered construction of a MAX spur of 5.5 miles, to connect the Portland-Gresham line with the airport in order to provide direct access to the city centers of those cities, as well as Hillsboro. Because there were no federal funds for this extension, the Portland Development Commission, the city’s urban renewal agency—though a separate municipal corporation—entered into an agreement in 1999 with Cascade Station Development Corp. (CSDC), a company in which Bechtel Construction Co. had a dominant role.\(^94\) The agreement called for CSDC to construct the spur in return for CSDC’s option to receive a long-term lease and exclusive development rights to a 120-acre “gateway parcel” adjacent to PDX and the I-205 Freeway with a direct connection to Clark County, Washington.\(^95\) The spur was opened in September, 2001 and CSDC anticipated the retail, employment, and entertainment uses contemplated for the area.\(^96\) However, the parcel did not

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93. Id.
95. Id.
96. According to the Cascade Station Staff Report by the Portland Planning Staff, the site was to be the beneficiary of 7000 new jobs, along with consequent ridership increases for Tri-Met. CSDC
market well at all. Although “shovel-ready” for development for three years, there was limited market interest in the site for several reasons:

1. There was no large anchor tenant, although stores below 60,000 square-feet were allowed;
2. Because the site was adjacent to PDX, residential uses were not permitted under FAA regulations, so the site lacked foot traffic and a residential market base;
3. The site was impacted by the fallout of 9/11 on business generally and airport related business in particular;
4. Lack of critical mass exacerbated a market downturn and created a negative reputation for the property;
5. The market downturn was reflected in a fifteen percent regional office vacancy rate (which was even greater outside the central city); and
6. The downturn in the heretofore-booming technical area negatively impacted the site.\textsuperscript{97}

As a result, in 2004-05, the Portland Planning Bureau staff, along with the developers and other public agencies, recommended some changes to the approved plans and development agreement among the city, PDC, and the developer. The reconfiguration is illustrated by the following table:

<table>
<thead>
<tr>
<th>Allowed Land Uses</th>
<th>1999</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office</td>
<td>1,325,000 SF</td>
<td>1,115,000 SF</td>
</tr>
<tr>
<td>Retail and Theatre</td>
<td>500,000 SF</td>
<td>807,000 SF</td>
</tr>
<tr>
<td>Hotel</td>
<td>1,200 Rooms</td>
<td>250 Rooms</td>
</tr>
<tr>
<td>Gas Station (1 facility)</td>
<td>12 Fueling Positions</td>
<td>12 Fueling Positions\textsuperscript{98}</td>
</tr>
</tbody>
</table>

The controversial part of the proposal was the allowance of up to three big box stores (60,000 square-feet each). Smart Growth theory attempts to limit such facilities because of their effect on land use and transportation patterns. As noted above, Metro had already prohibited most of such facilities in Employment Areas as of September, 2003 unless—as found in this case—the development did not increase site-generated traffic more than

\textsuperscript{97} Id. at 3.
\textsuperscript{98} Id. at 4.
twenty-five percent over the underlying use, and parking standards were met.\textsuperscript{99} The city council thus approved these changes.\textsuperscript{100}

In approving these changes, the Portland City Council revised its policy for the Cascade Station area to read as follows:

\textbf{5.13 Cascade Station/Portland International Center}

Encourage the development of Cascade Station/Portland International Center (CS/PIC) as a high quality, vibrant mixed-use employment center and gateway to Portland via light rail from Portland International Airport and Interstate 205. Design and development of CS/PIC will create jobs, capitalize on unique infrastructure: Park Blocks and light rail, provide a variety of uses including, office, retail, industrial, hospitality, and entertainment uses, be pedestrian-oriented, and complement its location at Portland International Airport.\textsuperscript{101}

While the revised plan and regulations have not yet received Federal Aviation Administration approval, such approval is anticipated. Capacity of adjacent transportation facilities was a concern during the revisions. However, the city retained a transportation consultant and accepted the report generated from the resultant study.\textsuperscript{102} The study provided a process for review of transportation capacity through a Transportation Impact Analysis.\textsuperscript{103}

Site and design review for the CSDC property is governed simultaneously by the development agreement. The agreement provides for joint public-private review of development proposals by CSDC, the Port of Portland (charged with operating the airport) PDC, by City planning and construction agencies, and a public review of the subarea master plans that make up the subject property.\textsuperscript{104}

Whether it was wise to allow big box stores to improve the economic prospects of an assisted development in return for the construction of a light rail extension remains to be seen.\textsuperscript{105} There is a question as to whether big

\textsuperscript{99}. PORTLAND, OR., METRO CODE § 3.07.440(E) (2004); see also Cascade Station Staff Report, supra note 97, at 5 (addressing Metro criteria).

\textsuperscript{100}. PORTLAND OR., ORDINANCE 179,076 (Feb. 17, 2005).

\textsuperscript{101}. Portland Comprehensive Plan, Policy 5.13. In addition, the city amended its development regulations and zoning map for the site and approved revisions to the development agreement previously entered into with the Port of Portland and CSDC.

\textsuperscript{102}. One of the results of the study was a table of equivalent uses for transportation capacity purposes under PORTLAND, OR., CITY CODE §§ 33.508.220, .230 (2004), as well as Table 508-1.

\textsuperscript{103}. Id. § 33.508.220(C).

\textsuperscript{104}. See id. § 33.508.230. This section contains detailed requirements with respect to building height, street floor windows and awnings, setbacks, building entrances, landscaping and required amenities, parking, and relationship to the light rail stations in the area.

\textsuperscript{105}. See Dylan Rivera, Ikea Outside the Box for Cascade Station’s Uses (Jan. 21, 2005), available at http://www.oregonlive.com (speculating on the history of Cascade Station and whether the
box stores play any role in the region outside of downtown areas, because of their general inconsistency with pedestrian and transit orientation requirements for commercial centers, as well as urban design considerations which encourage entrances to be close to street fronts and parking to be hidden behind the retail structure. Indeed, it can be argued that big boxes are also inconsistent with city centers because of their orientation to the auto and their detraction from desirable downtown retail patterns. In this case, the freeway and light rail infrastructure was present while the residential base was not.

The Cascade Station project would not have met Smart Growth criteria because residential uses were prohibited from being close to PDX. Instead, a destination shopping center with up to three big box stores resulted. Perhaps the policy reversal from the original Cascade Station plan was necessary to provide for the comfort of future partners in joint public-private ventures, but the Cascade Station experience seems to show that the bottom line trumps all other considerations.

VII. CONCLUSION

The Portland-Vancouver Metropolitan Region demonstrates the relative certainty that comprehensive planning and coordinated land use regulation give developers, as well as the flexibility such policies give to municipalities to achieve public policy objectives.

Regarding mega-malls and big box stores, the state and regional systems at work in at least the Oregon portion of this region prevent retail giants and mall developers from playing one jurisdiction against another. Moreover, both the planning culture and surrounding jurisdictions would suspiciously look at a single municipality breaking with the policy of the region. Generally, there is little resistance to the size limitations and prohibitions on retail uses applicable throughout the region. Criticism of the regional approach centers around the failure of the region to “walk its talk” on the use of transportation planning as the basis for new retail center—neither Bridgeport Village nor The Streets of Tanasbourne are located near light rail lines, nor are they regional centers on Metro’s plan. In fact, neither development is at the heart of the existing commercial center of the city they serve, but provides a suburban, auto-oriented retail opportunity without housing. A fairly good argument can be made that these uses tend to take away from the vitality of downtowns and regional centers.

The bigger story, however, is the use of positive planning wherein

Swedish furniture outlet would find the area desirable).
regulators, economic development advocates, property owners, planners and others collaborate for a desirable development and revise plans and regulations to meet that vision. The Gresham, Tualatin, and Hillsboro developments saw the full force of local governments to support these development efforts. The Cascade Station story has not been completed, but appears to be headed in the same direction.

The Pacific Northwest is a place where many planning efforts, both good (including mandatory comprehensive planning and coordination between plans and regulations) and bad (governmental payments for regulations) are derived. The responses to large malls and stores seem to fall on the side of meritorious planning.
Sprawl and the Coercive Force of Zoning Law: Fear & Loathing

Al Norman*

Although local zoning laws are written to protect the health, safety, and general welfare of community residents, these laws—and the state enabling legislation supporting them—have, in practice, severely limited public participation. Due in part to a general lack of public participation, many local ordinances place homeowners at a distinct disadvantage. For this reason, most citizen groups that have gone through the legal process in “sprawl battles” will describe their relationship to the law as one of “fear and loathing.”

Local community groups fighting sprawling development at the grassroots level find themselves on an uneven playing field. Citizens seeking to exercise their constitutional right to petition the government quickly discover that the legal system is tilted in favor of developers in three primary ways: (1) the cost of litigation is used as a weapon to intimidate public officials; (2) the resource inequalities between citizens and developers discourage citizens from appealing unfavorable decisions; and (3) the legal standing prerequisites unduly restrict plaintiff appeals.

I. LITIGATION AS A WEAPON TO INTIMIDATE

The following dialogue between Beverley Billiris, the Mayor of Tarpon Springs, Florida, and Channel 10 News in Florida, details many of the concerns expressed by opponents to siting Wal-Mart superstores in their hometowns.

MAYOR BEVERLEY BILLIRIS: So there is no limit to what this would have cost the City of Tarpon Springs if we lost the lawsuit. At what price do I say no?
CHANNEL 10 NEWS: But if the city had to approve this anyway, why go through all of the effort of that long marathon [of] public comment?
MAYOR BILLIRIS: Because that’s our process. Everyone has the opportunity to speak on anything that comes before this commission.
CHANNEL 10 NEWS: City Commissioner Peter Nehr says the city should have fought in court.
CITY COMMISSIONER PETER NEHR: If it costs us thirty

*Advocate against mega-stores and director of Sprawl-Busters. Al Norman achieved national attention in October of 1993 when he successfully stopped Wal-Mart from locating in his hometown of Greenfield, Massachusetts. Al Norman is the editor of the monthly Sprawl Busters Alert, and has traveled throughout the U.S helping dozens of local coalitions.
or forty thousand dollars, I think it's a fight that would have been worth it for the city to pay to save the heritage, the culture that we in Tarpon Springs are known for.\(^1\)

The concerns expressed by Mayor Billiris epitomize one of the major problems facing environmentalists and land use activists across the country: public officials think all developments, everywhere, are “as of right.” They believe that developers bring progress and tax revenue. Moreover, many believe that if you oppose them, they will take you to court and beat you.

The subsequent Tarpon Springs hearing on Wal-Mart ran for 12 straight hours into the early morning. Sixty people spoke out against the plan, while eight were in favor. Nevertheless, the Commissioners approved the superstore by a vote of 3-2. Although the Commissioners are bound to protect the health, safety, and welfare of the residents of Tarpon Springs, they chose to protect the profit of developers instead. In this case, the law was used to intimidate these officials into believing that if they rejected Wal-Mart, they would pay the price.

II. RESOURCE BARRIERS TO CITIZEN APPEALS

When the residents of Tarpon Springs went looking for an attorney, they found one who insisted on $25,000 in advance, and insisted that all members of the citizen group become members of an “unincorporated association;” establishing a contractual relationship between individual members of the organization.

In the land use context, the law denies citizen taxpayers the right to legal representation, as well as the right to cross-examine developers, their traffic engineers, or their wetland specialists. Grassroots organizations have scant budgets with which they may retain private counsel; they hold bake sales to fight the world's largest retailer. Last year, Wal-Mart had profits of $9 billion. They maintain a large staff of in-house attorneys and retain local law firms to guide them through every step of the local zoning and appeals process. When faced with a legal challenge, Wal-Mart comes to the table with a land use attorney, a traffic engineer, a hydrologist, civil engineers, and other specialists for the site plan.

Compared to Wal-Mart, homeowners have insufficient funds to hire a wetland specialist to delineate where the wetland sits, an attorney to tell them how the Clean Water Act can be used in their favor, and a traffic engineer to submit expert traffic counts into the administrative record. Very few zoning codes even require that traffic impact statements or other

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1. *Channel 10 News* (Florida Local Channel 10 television broadcast, Jan. 18, 2005).
professional studies be conducted by independent analysts hired by the city or town. On the contrary, most of these studies are paid for by the developers. Requiring the development process to incorporate independent analysts would revolutionize the land use planning process.

Today, a traffic study produced by a developer will look like it was written by Garrison Keillor in Lake Wobegon—where all traffic flows are good-looking and all intersections above average. Yet, many of the traffic jams we have all experienced exist because some traffic engineer underestimated the impact of developments.

Given that the competition to protect open space is unfair and extremely pro-development, why is it that we restrict similar bias in other areas, such as auto insurance and utility regulation? In state-administered utility rate cases, for example, one would expect to find the Attorney General's office—or the equivalent state representative—arguing on behalf of ratepayers. Auto rates are regulated by the state Division of Insurance. But in zoning cases, state law considers zoning to be largely a matter of local police powers, leaving citizens mismatched in their fight against powerful corporate interests.

III. STANDING IS NARROWLY CONSTRUED TO LIMIT PLAINTIFF APPEALS

In Massachusetts, my home state, before a concerned citizen is permitted to challenge a developer, they are required to satisfy a threshold standing requirement. They must meet the definition of a “party in interest,” which is defined as: “abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list . . .”

In Greenfield, Massachusetts, the town's planning board allowed the construction of the largest retail building in the history of the community to happen without a “Major Development Review” process. Town officials argued that the new building was, in fact, a simple expansion of an old building—even though the old building was razed—and did not require the special economic and environmental reviews called for in the town's zoning ordinance. When residents of Greenfield tried to raise the procedural defect in the planning board's approval of the Home Depot store, they were unable to find any plaintiffs who could satisfy the state's standing requirements because no one lived close enough to the store to meet the definition of “abutters . . . or abutters to the abutters within three hundred feet.”

narrow standing laws are clearly biased in favor of developers.

In a similar case from Hickory, North Carolina, a nonprofit preservation group, Northeast Concerned Citizens, sought standing to challenge a big box developer, but was denied because not all of its members were adversely affected by the proposed superstore. The community group argued:

Many of the supporters and the people whose interest it represents are people who own property in the immediate vicinity of the proposed shopping center that is the subject of this litigation. Accordingly, the use and enjoyment of the properties owned by such people would be diminished and their property values would be lowered if the proposed shopping center were to be constructed, and therefore, such persons would suffer special damages that are different in degree and kind from any adverse affects [sic] that may be suffered generally by other residents of the City of Hickory . . . .

The trial court ruled against the citizens, holding that “only twelve of [the] plaintiff’s one hundred and fourteen members/shareholders had [a specific legal interest directly and adversely affected by the rezoning ordinance].” According to the court, the record did not contain any evidence that the plaintiff possessed an identifiable interest; therefore, the plaintiffs had standing only if all of its members/shareholders had the required interest.

The court of appeal ruled that the corporation did not have any legal interest in property affected by a zoning ordinance despite the fact that “the members/shareholders of the corporation have standing as individuals to challenge the zoning ordinance.”

The court of appeal ruled that “standing exists to challenge a zoning ordinance . . . when the plaintiff has a ‘specific personal and legal interest’ in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.” Similarly, standing exists to challenge a zoning ordinance by writ of certiorari when the plaintiff is an “aggrieved party.”

Following the North Carolina statute, the court held that the plaintiff must show damages “distinct from the rest of the community” as a

4. Id. at 772.
5. Id.
6. Id.
7. Id. (citing Taylor v. City of Raleigh, 227 S.E.2d 576, 583 (N.C. Ct. App. 1976)).
8. N.C. GEN. STAT. §160A—388(e) (2005); see also Northeast Concerned Citizens., 545 S.E.2d at 772.
result of the zoning ordinance.\(^9\)

The concurring judge wrote, "I disagree with the conclusion that a corporation has standing to challenge a zoning action only if ‘all of the members/shareholders of the corporation’ would have individual standing to bring the action . . . ."\(^10\) The judge further noted that “[he] has been able to find no case in any jurisdiction which mandates that every single one of the individual members of an association must have standing on their own before an association itself may have standing to bring a zoning action.”\(^11\)

It should be readily apparent that a person desiring relaxation of zoning restrictions, such as a change from residential to business, has little to lose and much to gain if he can prevail. Such a person is not reluctant to spend money to retain special counsel and real estate appraisers if it will bring him the desired result. On the other hand, the individual owner of land in the neighborhood may not realize the impact the proposed change of zoning will have on his property, or may not possess the financial resources to oppose the proposed change. By granting neighborhood and civic associations standing in such situations, the expense can be spread out over a number of property owners, thereby putting them on an economic parity with the developer.

IV. PLANNING AND ZONING BOARDS ARE PACKED WITH 'SPECIAL INTERESTS' THAT ARE PRO-SPRAWL

The lack of a level legal playing field is, in large measure, responsible for millions of square-feet of development. Most members of local planning and zoning boards are insulated from public accountability because they are appointed, not elected. As a result, planning boards consider themselves accountable to the mayor or the city council—whoever appointed them.

One of the greatest impediments to community-based grassroots action is the overwhelming feeling that the land use process is a “done deal,”

\(^9\) Id.; see also Northeast Concerned Citizens, 545 S.E.2d at 771.

\(^10\) Id.

\(^11\) Id. at 773 (citing Simons v. City of Los Angeles, 161 Cal. Rptr. 67, 69 (Cal. Ct. App., 1979) (standing found when “many” of association's members owned property in close proximity to the site proposed to be rezoned); Life of the Land v. Land Use Com'n, 594 P.2d 1079, 1082 (Haw. Ct. App.1979) (three of organization's members lived in immediate vicinity of land proposed to be rezoned; other members used land for recreation); Ecology Action v. Van Cort, 417 N.Y.S.2d 165, 169 (N.Y. Sup. Ct. 1979) (association given standing had over forty active members, several of whom lived near the proposed development); 1000 Friends of Oregon v. Multnomah County, Etc., 593 P.2d 1171, 1175 (Or. Ct. App. 1978) (organization had standing where one of its members had individual standing); Save a Valuable Environment v. Bothell, 576 P.2d 401, 404 (Wash. 1978) (a non-profit association has standing if“one or more of its members are specifically injured.”)).
because that is what planning boards often communicate to their constituents. In their book, David Porter and Chester Mirsky describe the local planning boards in upstate New York:

It was an entrenched group of insiders, an established urban regime, who, based on social, political, and economic interrelationships, controlled and dominated local government as if it [was] a family business. It was no coincidence that only lawyers predisposed to development were selected to represent public bodies. Such lawyers depended for their livelihood on local governments facilitating private interests that were consonant with maintaining the local power structure and development of local and outside capital.... This group of insiders is not easily penetrable, and resists those aspects of state law which it perceives as contrary to its interests.12

In my own practice, I always counsel local groups to never retain land use lawyers from their own town to make sure their hired attorneys are not going to cave in at the end to satisfy the good-old-boy network that feeds their future practice.

When placed in the wrong hands, even good zoning ordinances can be polluted. My city of Greenfield, Massachusetts, has an excellent “Major Development Review” ordinance, enacted in 1991, that requires an economic impact study to be conducted for any large-scale development projects; however, no meaningful economic impact study has ever been done. The local boards do not have the expertise to review such studies, and their rabidly “pro-growth” bias makes such ordinances an inconvenience rather than a tool for evaluating impacts. In effect, Greenfield has no Major Development Review ordinance because no one pays it any mind.

V. CONCLUSION

Local city councils and commissions determine land use decisions based on local zoning ordinances and, more broadly, on the “public health, safety and welfare” of its citizens.13 The Supreme Court has ruled that such decisions are best handled at the local level.14 However, this process of local self-determination is not without its flaws. Local citizens remain powerless against developers, who exert their money and influence to hire top-notch lawyers, scientists and traffic engineers to tailor arguments and studies in support of the proposed development.

12. DAVID PORTER & CHESTER MIRSKY, MEGAMALL ON THE HUDSON (Trafford, 2003).
14. Id.
Moreover, local citizens and community groups do not possess enough resources to obtain the same competent representation in law or science. In fact, state standing requirements are often so narrow that many citizens adversely affected by a proposed development do not have a right to challenge the development, either individually or through an unincorporated community association. Therefore, citizen groups’ membership is stifled, lacking the funding that broader membership would provide and allowing them to pay for litigation and expert studies. Until the standing law is changed and local governments begin to rely on independent expert studies (instead of the applicant’s studies), developers will continue to exert their financial power in small towns throughout the country. Until these changes are made, local governments will continue to make land use decisions based on the financial coerciveness of big box developers such as Wal-Mart.
Solving and Re-solving the Big Box Dilemma in Vermont Communities

Elizabeth Courtney*

I. UNDERSTANDING THE DILEMMA

Vermont has a rich history of natural and working landscapes surrounding compact settlements. This traditional land use pattern has helped define the qualities that make Vermont an identifiable destination for millions of visitors every year; and, for 600,000 residents, it has made it a desirable place to call home. For over forty years, the Vermont Natural Resources Council (VNRC) has been protecting and restoring Vermont’s working landscape and natural resources through research, education, collaboration, and advocacy. VNRC is the voice for the environment in the Statehouse, helping to usher in such landmark environmental legislation as the billboard bill, the bottle bill, Act 250, Act 200, the Vermont Water Quality Standards, the septic rules, and the stormwater legislation of 2003.

A strong tradition of working landscapes, active community life, and strong environmental advocacy help keep Vermont’s landscapes relatively intact throughout most of the state. In 1993, the National Trust for Historic Preservation named the entire state of Vermont an “Endangered Historic Place.” Vermont’s unique historic integrity, as well as the threat of Vermont’s first Wal-Mart, both contributed to this designation. The designation galvanized public attention on the issue of sprawl and the resulting threat to Vermont’s economy and environment.

At the time, there were six proposed sites for Wal-Mart stores in Vermont: Bennington, Rutland, Berlin, Williston, St. Johnsbury, and St. Albans. The Bennington, Rutland, and Berlin stores were permitted and built in approximately 50,000 to 76,000 square-foot plots, in pre-existing vacant department stores, and in or near existing centers. Wal-Mart subsequently abandoned its plan to build in St. Johnsbury. The VNRC successfully challenged—all the way to the Vermont Supreme Court—a proposal for a 100,000 square-foot store in a cornfield two miles north of the town of St. Albans. 2

Both the Vermont Supreme Court and the Vermont Environmental Board found that the proposed 100,000 square-foot Wal-Mart in a St.

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Albans town cornfield would constitute "scattered development."\textsuperscript{3} Moreover, the location of the proposed project was not an "existing settlement" as defined by Act 250, Vermont's Land Use and Development Law.\textsuperscript{4} The board further found that the project would have fiscal and economic impacts on surrounding communities, and that Wal-Mart would need to evaluate the region's "financial capacity" before any construction could proceed.\textsuperscript{5} Wal-Mart chose not to do the requested capacity study and has not conducted one since. The cornfield north of town continues to grow corn, for now.

Wal-Mart's sixth proposal concerned a 115,000 square-foot store at Tafts Corner in Williston. This area is now home not only to Wal-Mart and Sam's Club, but to over a dozen other big box projects on property that was once more than sixty acres of prime agricultural land. Today, the Williston Wal-Mart stands as a poster child for the wrong kind of development in Vermont.

What are the hallmarks of the "wrong kind" of development in Vermont? In a nutshell, it boils down to five issues that affect Vermont's environment, economy, and communities: Scale, location, predatory pricing, low wages, and transience.

II. SOLVING THE DILEMMA

Let us take a look at how—with encouragement from The Rutland Downtown Partnership, the VNRC, and the Preservation Trust of Vermont (PTV)—Wal-Mart addressed the issues of scale and location in the Rutland case.

Killington, Pico, Mendon Mountain, Salt Ash, and Shrewsbury Peak stand as a lush natural backdrop in contrast to downtown Rutland. Rutland's distinctive architecture acts as a monument to the rise and fall of the economic engines that have provided livelihood for generations in this community. This story is told by the old glove factory that now houses the food coop, the revitalized Paramount Theater, the railroad infrastructure of the marble industry's hay-day, and Depot Park at the entrance to the 1996 Wal-Mart store.

Typical Wal-Mart development is characterized by countrysides strewn with new and abandoned big box buildings and their endless parking lots.


\textsuperscript{5} Id. at 32.
Further, retail analysts estimate that for every Wal-Mart superstore opening, two supermarkets will close. According to Wal-Mart spokeswoman, Mia Masten, even though the Rutland “shop” is a thriving business, it is rumored that Wal-Mart wants to close it to pave the way for a typical superstore development on the outskirts of town.  

Not only is the current Wal-Mart thriving in Rutland, but according to the several adjacent business owners, its very presence is helping the rest of the downtown shops attract customers. How could it be that the nation’s largest big box developer, known for developments of 200,000 square-foot “superstores” in sprawling locations across the land, has a 76,000 square-foot “adaptive reuse” store in the heart of downtown Rutland?

The answer: in 1996, Rutland took control and did it their way. They insisted that Wal-Mart meet two critical criteria for the community—down-size and downtown. This was a great first step for Vermont in handling the first wave of Wal-Mart stores entering the state. After all, Vermont had too much to lose as a state that sells its beautiful landscape and pristine environment. As a New York Times editorial states: “More than a quarter of the state's income now comes from tourism, and nobody's going to mail home a postcard of a Wal-Mart.”

That was a decade ago. Fast forward to 2005 and notice that Wal-Mart is back. Vermont is once again poised to respond. This time there is more at stake. Not only are our communities and natural resources at risk, but we’ve realized that, to borrow a phrase from Bill Clinton, “it’s the economy, stupid!” We’ve learned over the past decade that Vermonters should consider three additional criteria for a successful Wal-Mart location. They are: buy local, pay livable wages, and stay put. That gives us what we like to refer to as Wal-Mart’s “five easy pieces:”

1. Down-Size: Vermont’s small scale landscapes and economies demand smaller stores, not big boxes.
2. Downtown: Our historic town centers need a critical mass of business to thrive.
3. Buy Local: Let’s keep as much revenue in Vermont as possible.
4. Pay Livable Wages: Vermonters deserve a livable wage.

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6. Stephen Kiernan, Vermont’s Identity at Risk?, BURL. FREE PRESS, May 25, 2004, at 1A (“The Rutland store is very, very profitable,” Masten said, "but we get the complaint that it is tight for people, that it's hard to move around. . . . Our customers are telling us they want a larger store").
8. Many people remember the phrase made famous by James Carville: "It's the economy, stupid." Carville, a brilliant political strategist, hung it on a sign in Bill Clinton's Little Rock campaign headquarters.
5. Stay Put: Don’t use the downtown store as a stepping stone to a sprawl location.

The question before us is this: Can the country’s largest employer of cheap labor (the average Wal-Mart sales clerk earns $8.00 per hour) and the buyer and seller of all things Chinese\(^9\) actually bring prosperity to Vermont’s downtowns? The answer is maybe—if Wal-Mart is willing to be the good neighbor it purports to be in small towns throughout the country.

Let us take a look at workers’ salaries. According to the state of Vermont Joint Fiscal Office, a livable wage for a single person is $13.49 per hour with \(73\%\) of health benefits covered.\(^10\) As the average Wal-Mart employee earns $8.00 per hour, employers who wish to compete with Wal-Mart will be forced to lower wages, thus threatening the quality of life of many Vermont workers.\(^11\) Let us level the playing field! Wal-Mart or any retailer should guarantee Vermonters that they will pay a livable wage.

Furthermore, keeping dollars in Vermont is critical. “Buying local” should be a goal for all Vermonters. If Wal-Mart can sell Vermont’s Cabot Cheese across the nation, it could probably sell it here in Vermont, along with a myriad of other Vermont products, including maple sugar products and furniture produced with wood from our own forests.

There is also a growing body of research from states such as California, Georgia, and Tennessee that demonstrates how Wal-Mart places a disproportionate burden on state welfare programs like Medicaid.\(^12\) Because of Wal-Mart’s low wages, many Wal-Mart workers either can’t afford Wal-Mart’s health insurance or are underinsured because of the store’s poor health insurance. Vermont may want to look at Montana’s proposal, now in the State Senate, to tax the gross receipts of stores with more than $20 million in sales. The bill’s sponsor, Sen. Ken Toole, says Montana residents are tired of subsidizing big box stores whose low prices and high profits are dependent on paying workers low wages. Toole states, “When you don’t pay workers, they get public assistance. Guess who pays...

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Solving and Re-solving the Big Box Dilemma

for that?"\textsuperscript{13} The proposal would impose a 1% tax on stores with more than $20 million in sales, and would rise to 2% on stores with more than $40 million in sales. It would generate about $20 million a year to state coffers.\textsuperscript{14}

If Wal-Mart is to build more stores in Vermont, we hope that Wal-Mart—and every town in Vermont it approaches—will consider the five easy pieces carefully. After all, we’ve only got one Vermont.

III. RE-SOLVING THE DILEMMA

Ten years after the first wave of Wal-Mart proposals, Wal-Mart is back. This time the giant retailer is hoping to build larger stores in Bennington, Rutland, Middlebury, Morrisville, Derby, St. Johnsbury, and yes, St. Albans again. It is déjà vu for those of us that worked so hard to keep them out the first time. The National Trust for Historic preservation has \textit{again} in 2004 named Vermont an “Endangered Historic Place.”\textsuperscript{15} Wal-Mart says the Rutland and Bennington stores are not big enough. This time the proposed stores are bigger. This time the proposed stores in St. Albans, Derby, and Rutland are outside of town.

In order to keep Wal-Mart’s focus on better locations and smaller sizes, we must stop proposals for sprawl developments. In order to uphold the past decisions of the Environmental Board in 1994 and the Vermont Supreme Court in 1997, VNRC is again participating as an opposing party in the latest St. Albans’ Wal-Mart proposal. The new 161,000 square-foot project will have even greater water quality, sprawl, and economic impacts on the community than its proposed 100,000 square-foot predecessor. Moreover, the project will have a significant impact on traffic congestion at Interstate 89, Exit 20 at a time when the state is implementing guidelines for development at interstate interchanges.

VNRC will intervene in the permitting process in three ways: (1) it will participate in the Town of St. Albans Development Review Board (DRB) hearings, (2) the Act 250 land use review process, and (3) the Vermont Agency of Natural Resources’ (ANR) stormwater permit process.


\textsuperscript{14} Id.

A 161,000 square-foot Wal-Mart at this site would require two stormwater permits: a state operational permit and a National Pollution Discharge (NPDES) permit.

VNRC is also providing legal and technical assistance to a grassroots organization, Northwest Citizens for Responsible Growth (NCRG), who is interested in appealing any local permit that is given by the Town of St. Albans. Wal-Mart filed an application for a conditional use permit with the Town of St. Albans DRB on May 18, 2004. The first two hearings were on June 10 and September 23. Hearings have continued through the winter and resumed on March 24. As of now, fifty-six local property owners and voters have submitted a petition to the DRB, setting the stage for a possible appeal of the permit, which could come this spring. For example, the proposed Wal-Mart would severely impact at least one property owner, who lives on an organic vegetable farm adjacent to the proposed project.

The Act 250 criteria also offer a means to challenge this project. The very criteria VNRC used to stop the Wal-Mart proposal in the 1990’s are still applicable, and may be used to win this case. Our position is that the proposed project will create scattered development, traffic congestion, drain the economic vitality out of the downtown, harm the character of the area, and create an adverse impact on the scenic views of the countryside from the interstate.

VNRC believes it could successfully challenge a petition for a stormwater permit for the proposed project on this undeveloped site since the site is in an existing impaired watershed. Vermont law dictates that development in an impaired watershed requires “no net increase of pollutants” to the waterway. This will be an extremely high bar for Wal-Mart to reach.

VNRC is also working to expose the larger problem of permitting polluted stormwater discharges into waters that do not meet basic water quality standards. The Vermont ANR has been sorely understaffed and under-funded for years, and has yet to adopt a uniform policy for the issuance of stormwater permits. VNRC has been working for the past two years in a collaborative process with legislators, business members, local decision makers, and others to create workable and enforceable stormwater procedures. In June of 2004, the Legislature responded by passing stormwater legislation that should help us in this campaign and beyond.
After the stormwater permit submission, there will be a 10-day comment period in which VNRC will request a public hearing. We will work to inform the community about the issues and will encourage citizens to participate. After the hearing, the ANR will respond to comments and issue a ruling.

Once the ruling is issued, parties will have 30 days to appeal. The appeal will go to the state Environmental Court, where it could take over a year to resolve. Based on Wal-Mart's track record nationally, if it loses this case, it will appeal the Environmental Court decision to the Vermont Supreme Court. If VNRC loses, we will also appeal. That case will likely take an additional year.

The Act 250 permitting process will probably run on a similar timeline if there is an appeal to the Vermont Supreme Court. If we assume that the permit application is filed this spring, District Environmental Commission hearings will be held later this year and could extend into the fall or winter. After a decision is issued, one or more parties will appeal to the Vermont Environmental Court. That appeal could take several months to a year to run its course. Recent legislation will allow VNRC to appeal any Act 250 permit directly to the Vermont Supreme Court. Thus, whichever party loses, they will likely take the case to the Vermont Supreme Court. That will take another year, delaying any resolution until late 2007.

In any case, Wal-Mart will have a difficult road ahead if it wishes to develop big box stores in the State of Vermont. As we work to show Wal-Mart where they should not build, we will also work with them to find an alternate site—closer to or in the downtown, and at a smaller scale.

This process of working with Wal-Mart has already begun. VNRC and PTV have met with the local developer and have discussed with Wal-Mart two alternative locations for the St. Albans store—an existing nearby shopping center with a vacant Ames department store, as well as an existing location in downtown. The PTV has prepared site and building plans for a downsized store at the latter site. PTV has also discussed these options with St. Albans officials. VNRC has sent a letter to Wal-Mart asking them to work with us on a downtown location. To date, Wal-Mart has not been willing to change its plans. VNRC has at least attempted to open the door for further dialogue.

VNRC and PTV will continue to offer constructive and workable options to Wal-Mart, its local developer, owners of nearby sites, and local officials. The dynamic may change as the permit process progresses. As Wal-Mart sees that it has serious opposition (or in the words of the Wal-

Mart CEO Lee Scott, it is being “nibbled to death by guppies”), it may be more willing to work with VNRC and other concerned citizens to talk about downsizing in other locations.  

IV. ORGANIZING THE COMMUNITY

It can be difficult to know what to do when Wal-Mart comes knocking on your community’s front door, but you don’t have to be an expert to make a big impact. Preemptive measures are usually most effective, but there are also many options if Wal-Mart has already begun to explore in your town.

1) **Attend your town’s planning and select board meetings**, before Wal-Mart comes to your community, and urge them to adopt a cap on the size of retail development, as Bennington and St. Albans have done and as Middlebury is considering. Call your town clerk for the date of the next meeting. In Vermont, if a citizen circulates a petition on an issue and collects signatures of 5% of the town’s eligible voters, the town must put the issue up for a town vote. Also, support the statewide effort to establish commercial caps in the Vermont Legislature.

2) **Get help from organizations such as the Vermont Natural Resources Council, the Preservation Trust of Vermont, or the Vermont Forum on Sprawl to find out what they can do to help.** In St. Albans, for example, VNRC contacted our members and others in the area to help form the group Northwest Citizens for Responsible Growth. This group is fighting the proposed Wal-Mart in their community. They now meet regularly, and VNRC is providing them with outreach, legal and technical expertise.

3) **Start talking to your friends and neighbors.** As more and more Vermonters learn about Wal-Mart’s devastating impacts, communities can galvanize in opposition and protect their local economy and environment. Facts about Wal-Mart’s effects on local economies, jobs, and the environment can be found at www.VermontWalMartWatch.org.

4) **Call or write to your legislators.** They want to hear from you! Find out the name and contact information for your legislator on VNRC’s website—www.vnrc.org. The website also provides an overview of the legislative process and tips on how to write a letter to or lobby elected officials. With enough citizen support, Vermont could pass a statewide cap on the size of retail development.

5) **Write a letter to the editor of your local paper.** Letters to the editor can be a very effective way to reach a wide audience for free.

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Again, tips for writing letters are available on VNRC’s website.

6) **Do your homework.** Good retail space sits empty in many areas in Vermont. In Morrisville, community members are working with the Lamoille Economic Development Corporation, the Lamoille County Planning Commission, and others to find a suitably-sized retailer to fill the vacancy left by a downtown Ames store. Contact your town officials about becoming a part of the process in your community.

7) **Think outside the “big box.”** What alternatives does your community have to battle the allure of a one-stop-shopping experience? Communities in other states are forming cooperatives where members contribute money and co-own a store that sells a variety of goods, from socks and jeans to toys and shovels. The money stays local, and the store acts as a draw for additional community businesses. Talk to your friends, family, and community members about forming a cooperative in your town. VNRC is now researching cooperative efforts from around the country.

8) **Get started.** Organizing a group in your community takes time and money. Many small, local groups have received funding from the New England Grassroots Environmental Fund. Go to www.grassrootsfund.org for more information. Aside from getting your friends and neighbors to chip in, visit your local businesses and ask for help.
Twenty Lessons From Maryland’s Smart Growth Initiative

John W. Frece*

I. INTRODUCTION

In the early 1990s, a gubernatorial commission created in Maryland to look at the state’s development patterns through the year 2020, boldly proposed to shift the balance of power over land use control in Maryland from the local level to the state. Vehemently opposed by the state’s 23 counties, the commission’s sweeping recommendations were too much for state legislators to swallow, even in generally progressive Maryland. The proposal never emerged from a legislative committee. When the end finally came, it was a crushing defeat for advocates of stronger state authority over land use. It also served as a cautionary tale for subsequent political leaders who might otherwise be tempted to push for stronger state authority.

The following year, the Economic Growth, Resource Protection and Planning Act of 1992 ("Growth Act"), which is a much less sweeping and intentionally less controversial land use law, was enacted. Perhaps the most important provision of this law was a requirement that all local government comprehensive plans be revised to be consistent with eight “visions” designed to guide policymakers in deciding where and how future development should occur. The visions were phrased as broad statements of principle:

1. development shall be concentrated in suitable areas;
2. sensitive areas shall be protected;

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1. See James R. Cohen, Maryland’s “Smart Growth,” Using Incentives to Combat Sprawl, in Urban Sprawl: Causes, Consequences and Policy Responses 4 (2002), available at http://www.arch.umd.edu/URSP/People/faculty/jcohensgchapter.pdf. The 2020 commission’s proposal called for local governments to designate land in their jurisdictions into four categories: developed areas; growth areas; sensitive areas; and, rural and resource areas. The commission also recommended that the State establish specified permitted densities and performance standards within the growth, developed and rural resource areas, and require local governments to inventory their environmentally sensitive areas and develop protection programs. Finally, the commission proposed that the state be given approval authority over local plans, which would be valid for only three years.
3. in rural areas, growth shall be directed to existing population centers and resource areas shall be protected;
4. stewardship of the Chesapeake Bay and the land shall be a universal ethic;
5. conservation of resources, including a reduction in resource consumption, shall be practiced;
6. to encourage the achievement of paragraphs (1) through (5) of this subsection, economic growth shall be encouraged and regulatory mechanisms shall be streamlined;
7. adequate public facilities and infrastructure are available or planned in areas where growth is to occur; and
8. funding mechanisms shall be addressed to achieve this policy.3

The Growth Act also specifically identified four types of “sensitive areas” for special protection: streams and stream buffers; 100-year floodplains; habitats for endangered species; and steep slopes.4 Nevertheless, it was left to local governments to draft plans to protect these and other sensitive areas.5

Advocates for stronger state authority over land use dismissed the Growth Act as weak and ineffective. It was derided by critics as “a nothing-burger.” In retrospect, however, the Growth Act could claim one significant accomplishment: it became the foundation on which a bigger, broader, stronger land use reform would be built five years later.

II. SMART GROWTH

In November 1994, Parris N. Glendening was elected as Maryland’s new governor after serving two decades as a municipal and county official. The last 12 of those years he served three terms as county executive of Prince George’s County, a suburb of Washington, D.C., and one of the largest and most diverse counties in Maryland.

4. MD. ANN. CODE art. 66B, § 3.06 (1994).
5. MD. CODE ANN., STATE FIN. & PROC. § 5-709 (2000). (requiring local plans to contain recommendations that: encourage streamlined review of development applications within areas designated for growth; encourage the use of flexible development regulations to promote innovative and cost-saving site design and protect the environment; use innovative techniques to foster economic development in areas designated for growth; and, encourage more widespread use of flexible development standards. Finally, the Growth Act created a seventeen-member advisory commission to monitor the progress made in implementing the Growth Act, explore new solutions, and report annually to the governor and the general assembly. Seats on the Growth Commission were designated to represent the full array of land use stakeholders: business, finance, agriculture, forestry, environmental, civic associations, planning, real estate development interests, counties and municipal governments, and the General Assembly).
Glendening gained extensive experience dealing with local land use issues. As a result, he arrived in Annapolis with an understanding of the push and pull of the development community, the internal politics of supporting or opposing specific projects, and the importance of obtaining financial support for development projects from the state. For years, Glendening watched as most of the state support for development in his county went for new projects, new development, new schools and roads, as well as other infrastructure on the fringe. Meanwhile, older communities and first-ring suburbs were neglected, deteriorating and left to fend for themselves.

Within two years of coming to office, Glendening had his staff working on a new statewide approach to land use. Glendening had become frustrated with the state’s inability to influence a county government’s decision to build a huge new mini-city in an old-growth forest on the banks of the Potomac River. Furthermore, Glendening was bothered by the inability of the state to intervene in a quaint Eastern Shore town’s fight to stop the merchandising giant, Wal-Mart, from killing the town’s downtown businesses.

Glendening told his staff that the state had to increase its role in local land use issues, but no one knew quite how that could be done. What the Maryland staff did was devise a new approach to state involvement in land use, an approach that was often trial and error. Working quietly behind the scenes, the governor and his staff put their new program together from April through December 1996, and introduced it in the General Assembly in January 1997. It would be known as the “Smart Growth and Neighborhood Conservation” initiative.

The initiative, however, raised a number of questions. How far could the governor’s office push the new approach without suffering defeat? How could the governor’s office get disparate factions working toward the same goal? Did the public care and, if so, what did they think? Finally, from Governor Glendening’s personal political perspective, could he do this and still be re-elected?

To the surprise of many on the governor’s staff, especially his hardened political consultants, Maryland’s Smart Growth program became one of the best-known land use initiatives in the country. For Glendening personally, it became his “legacy” issue—the one issue for which he would be known throughout the country.

The Smart Growth law that was enacted in 1997 had several component parts, but the thrust of the initiative was fundamentally simple:
use state financial resources as incentives to alter development behavior. It was this reliance on incentives, rather than regulations, that represented the breakthrough that attracted so much national attention.

Before the Smart Growth law was enacted, the state government in Maryland made no distinction about where a development project was located before deciding whether to provide financial assistance. If the project was otherwise eligible, no one within the state government ever asked the question, “Where is it?” To demonstrate the folly of this approach, Glendening himself would cite the example of an expensive highway the state built to enable residents of a down-on-its-luck western Maryland city to reach a new shopping mall outside of town. Easy access to the new mall simply accelerated the death of the city’s downtown business district, which in turn spawned its own downward spiral of unemployment and abandonment.

The Smart Growth law was designed to change that. It restricted where the state could spend money associated with growth projects to municipalities and other locally-designated areas that became known in the legislation as Priority Funding Areas (PFAs). After the Smart Growth law formally took effect on October 1, 1998, projects outside of PFAs were prohibited from receiving state financial assistance except in rare instances or when a formal exception was granted. This had never been done before, at least not in Maryland.

Governor Glendening’s theory was that where the state spent its money could affect growth decisions. Glendening often said that developers make “bottom line decisions” and believed that if the availability of state financial assistance would improve a developer’s or builder’s bottom line, then it might change their decision on where to build. To this end, the Governor and his staff restricted almost every growth-related financial or technical assistance program the state offered to PFAs: housing assistance programs, job creation tax credits, brownfield cleanup assistance, historic preservation assistance, etc.

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7. MD. CODE ANN., STATE FIN. & PROC § 5-7B-02 (2000) (Priority Funding Areas were defined as all areas within the boundaries of the state’s 156 incorporated municipalities, within the beltway around Baltimore and the Maryland portion of the beltway around Washington, D.C., and in any other area designated as a PFA by any of Maryland’s 23 county governments, as long as those areas met minimum state criteria. Generally, the state criteria for local designation of PFAs required that such areas must: (1) be served by, or planned to be served by, public sewer and water; (2) require that new residential development within the PFA be a minimum of 3.5 units per acre (existing communities as of January 1, 1997, that were already served by public sewer or water systems also qualified, but needed to meet a density threshold of only 2 units per acre); and (3) be sized to accommodate a given county’s projected growth over the next 20 years).

8. Id. See also Cohen, supra note 1.
tax credits, business expansion loans, park improvement funds, highway
improvement funds, and the location and placement of state offices. They
hoped such support would generate more development within PFAs, and
that the absence of financial support elsewhere would discourage
development outside of PFAs.9

III. RURAL LEGACY

Glendening and his team also knew that however successful their
efforts to revitalize or rejuvenate existing communities might be,
development pressure would continue to spread outwards, threatening
farmland, forests, the scenic beauty of the state, water quality in the
Chesapeake Bay and its tributaries, and Maryland’s air quality. Thus, the
second prong of the Maryland Smart Growth program was directed at
permanently protecting the best remaining natural areas in the state before
they were lost forever to development.

The measure was called the Rural Legacy Program10 because it was
designed to save the rural legacy of a state that had become the fifth most
densely populated in the nation. The state envisioned a multi-year program
in which millions of dollars in state funds would be anteed up each year to
be awarded on a competitive basis to finance the best protection plans
submitted by local sponsors.

The goal was to establish a community-up process to identify large,
contiguous tracts of land that were either still in pristine condition or were
not overly fragmented by existing development. To be eligible for Rural
Legacy funds, such lands had to feature multiple resources, such as scenic
or historic value, prime agricultural soils, wetlands, buffers along
waterways, old growth forests, wildlife habitat, buffers around drinking
water reservoirs, or areas that would serve as greenbelts to protect the
character of small towns or communities.11 While the legislation would
authorize purchases of land in fee simple, the Governor and his Smart
Growth advisers anticipated that Rural Legacy funds would primarily be
used to purchase development rights on targeted properties, leaving
ownership and usage in the hands of existing landowners.12

The program was appealing because it was both voluntary and
competitive. It involved willing landowners, who usually worked with non-
profit land trusts to develop an application for Rural Legacy funds. Every

application had to have prior local government approval. The lands to be protected also had to meet criteria set forth in the law. The goal was to protect large tracts of land that had not yet been overly fragmented by development, but which were clearly threatened by the spread of development.

The Rural Legacy program was never intended to function by itself. Almost every Rural Legacy area was comprised of many individually owned parcels. The strategy was to save the entire area by employing the resources from multiple programs. These programs include the Rural Legacy program;\textsuperscript{13} GreenPrint (a program designed to protect the state’s most ecologically significant lands);\textsuperscript{14} Program Open Space (the state’s parkland acquisition program);\textsuperscript{15} the Agricultural Land Preservation Program (which was aimed at farmland protection);\textsuperscript{16} donated easements to the Maryland Environmental Trust;\textsuperscript{17} and a variety of county purchases of development rights or transfer of development rights programs. By applying funds from so many different sources, it became possible to protect a large area from encroaching development.

IV. TWENTY LESSONS

Land use decisions have a long incubation period. A major development project can take five to ten years to move from inception through zoning and subdivision approval, environmental permitting, approval for utilities, and a waiting period to assure compliance with local adequate public facilities ordinances. Increasingly, projects that obtain required approvals are still appealed by local opponents, adding months and often years to the process. For example, a highway project can stay on the books for forty years without the first shovel of dirt being turned, and take five to ten years or more to build once all approvals are granted. Transit planners think in thirty to fifty year time horizons.

Change is also gradual. Who is to say when or what has to happen before a specific city or town or community reaches what author Malcolm Gladwell\textsuperscript{18} calls “the tipping point” for better or for ill? What is the action

\textsuperscript{13} MD. CODE ANN., NAT. RES. I § 5-9A-01 (2000).
\textsuperscript{14} 2001 Md. Laws 3070, ch. 570 (H.B. 1379). See also Maryland Department of Natural Resources, Maryland’s GreenPrint Program (2005), available at http://www.dnr.state.md.us/greenways/greenprint/greenprint.html [hereinafter GreenPrint].
\textsuperscript{15} MD. CODE ANN., NAT. RES. I § 5-904(E)(1) (2000).
\textsuperscript{18} See generally, MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN
or incident or series of changes that drive people (and businesses) away, or that bring them back? What critical mass is necessary before someone says, “I’d like to live there,” instead of, “I’m moving out?”

By these standards, it would be premature to say whether Maryland’s Smart Growth program has been successful. It is simply too soon to tell. Moreover, just as the Governor’s Smart Growth initiative was built on the Growth Act— which in turn was built on earlier land use efforts— it is fair to say that land use initiatives are always dynamic and the Maryland Smart Growth experiment is no different. Land use laws and strategies are changed, modified, expanded, improved, and sometimes weakened over time. However, they are never static, which makes it all the more difficult to judge their short or long-term effectiveness.

More than a few people, however, have monitored what transpired in Maryland over the past decade or more. While it would be foolhardy to predict the long-range implications of Maryland’s Smart Growth initiative, enough time has gone by to make some initial assessments about what the Glendening administration did right in creating the Smart Growth initiative, as well as what the administration did wrong.

Based on Maryland’s experience, the following are twenty lessons relevant to state and local governments who are struggling with these complex, stubbornly resistant, and politically explosive issues.

A. What the Maryland Smart Growth Initiative Did Right

1. The governor and staff understood the political parameters and did not try to overreach.

Nothing guided the Glendening administration’s initial approach to land use issues in Maryland more than the 1991 defeat of the recommendations offered by the 2020 Commission to shift some of the authority over land use decisions from local governments to the state. Governor Glendening and his team knew they had to learn from the lessons of the past, and that it would be futile to try the same approach twice.

As a result, Glendening was able at the outset to outline a broad set of parameters for what the state’s new program would and would not do. The first and most important of the parameters was that whatever the state did, it had to find a way to preserve local decision-making authority. (It is not an overstatement to say that the Smart Growth initiative would never have

MAKE A BIG DIFFERENCE (Little Brown & Co. 2000).
been enacted without preserving local land use authority, but as discussed below, this proved to be one of the program’s weaknesses as well).

The second parameter had to do with cost. At the time the Smart Growth initiative was being developed, the state treasury was not facing a deficit, nor was there likely to be a big surplus. Whatever was proposed, therefore, could not constitute a big new spending program. The program had to live within the resources then available. Not only was this a pragmatic approach, since the state didn’t have extra money to spend, but it was a strategic approach as well: Glendening did not want his new land use program to come under attack as a drain on limited state financial resources that potential supporters might rather see spent elsewhere.

Perhaps the most important parameter was that the new initiative was not to take a regulatory approach, but rather an incentive-based approach. Regulations, Glendening believed, created more enemies than friends. Intuitively and politically, he knew that an incentive-based program would have a softer landing in the legislature and with the public-at-large. In retrospect, it was the incentive-based nature of the Maryland program that seemed to attract so much attention from outside the state.

Finally, the Maryland program would be unabashedly pro-growth. It would not be a “no-growth” program or even a “slow-growth” program. Growth supported by the program, however, could not be anywhere or at any cost. While the Smart Growth program was not a planning program per se, it was the state’s intention to support well-planned growth, especially in areas already supported by infrastructure and services.

Because the program embraced growth, homebuilders, developers, and even the property rights advocates who might otherwise have opposed the Smart Growth initiative, were neutralized. Pro Growth advocates wanted to know the new rules and they wanted those rules to be fairly and consistently applied. But as long the state was not trying to stop growth, they were willing let the program unfold.

Obviously, the political parameters of a land use program in Maryland will be different than they are in Vermont, Ohio, Montana, or anywhere else. But once the staff understands the limits and knows how far they can go, then it becomes easier to fashion a program that fits within those restraints.

2. The program was branded with a name people would recognize and that would be hard to oppose.

In retrospect, the selection of the name “Smart Growth” represented one of the Glendening Administration’s smartest strategies. Those two
words summarized a broad set of issues with a phrase catchy enough to grab people’s attention. Moreover, it was a concept that was hard for anyone to oppose. Who would want to be against “smart growth?” The phrase also helped mollify the suspicious pro-growth crowd, assuring them the state still favored growth as long as it was “smart” growth.

Even before the initiative was enacted, it became obvious that those who opposed “Smart Growth” must inevitably favor “dumb growth.” No one wanted to be seen as favoring “dumb growth.” Over time, this became a nuisance, especially among those local elected officials and planners who suddenly found that the work they had been doing so proudly for years was now denigrated and dismissed as “dumb growth.” However, there can be no doubt about the power of those two words in their ability convey the fundamental belief that the patterns of growth experienced in the United States for the past half century have not been in the collective best interest of citizens, and should be improved. Everyone can take a smarter approach to growth.

Today, the phrase “Smart Growth” works in some settings, but not in others. To some, it carries the partisan baggage of Parris Glendening and Al Gore. To others, it is simply insulting. Still others equate it erroneously with top-down regulatory approaches that are usually unpopular with the public. Around the country, dozens of other names have been tried: “Livable Communities,” “Balanced Growth,” “Quality Growth,” “Sustainable Growth,” and “Priority Places.” Even when these substitute names are used, however, the press and public still often refer to the issues embraced under these titles as “Smart Growth.”

A computerized Google search of the phrase “Smart Growth” is all it takes to demonstrate how common and widespread this shorthand description has become. While there is abundant evidence that this popular phrase was not first coined in Maryland, there is little doubt that the Maryland program succeeded in popularizing it.

An intangible and un-measurable effect of the phrase “Smart Growth” is the degree to which it has empowered everyday citizens to talk about issues that once seemed to be the exclusive language of builders, planners and traffic engineers. It has enabled the public to see that, where and how we build, is directly connected to their quality of life. Further, it begs the question: Are we being smart about our community’s growth?

3. The program relied on incentives rather than regulations to change people’s behavior.

How do you change behavior? It sounds like a sociological question,
but it was the root question for Glendening and his staff as they debated ways to change the trends of development patterns in Maryland. Do you whack them with a stick or reward them with a carrot?

At that time, most of the models in effect in other states were based in regulations: You may build here; you may not build there. You must build this; you may not build that.

From a political standpoint, the likelihood of enacting such regulatory structure in Maryland seemed highly unlikely, if not impossible. Virtually any regulatory framework based at the state level would impinge upon—or be seen as impinging upon—the land use authority vested in Maryland’s local governments. Parris Glendening, who in 1997 was a little more than a year shy of a re-election bid, was not interested in promoting a high profile, sure-loser in the legislature.

If the state could not control the land use decisions of local government, then what could it control? The answer was remarkably obvious: It could control where it spent state money. Moreover, Glendening was convinced that it mattered to builders, developers, and local governments where the state invested its resources. Such investments could make a project happen, and the absence of state funds could grind a project to a halt.

The state of Maryland had never before restricted the use of its financial resources in this way. The incentive approach was clearly more palatable than alternative regulatory approaches. It didn’t stop growth; it rewarded “smart” growth. It didn’t cost the state more; it enabled the state to spend more efficiently what it already was spending. It represented a better, more thoughtful use of resources. It was, as liberal Governor Glendening often said, a very conservative approach to infrastructure investment. Moreover, it positioned the state as setting an example that local governments might follow.

4. The program was based on an urban-rural strategy that created broad-based coalitions.

Over the course of 1996, the component programs of what became Maryland’s Smart Growth initiative were developed almost independently and glued together just before they were introduced into the legislature as a package. The Priority Funding Area concept was developed by one staff group interested in redevelopment, brownfield cleanup, and other efforts to support older cities and towns. The Rural Legacy Program was developed by the state’s Natural Resources department and environmentalists alarmed about the loss of farms, forests, and streams.
By linking these urban and rural initiatives—what the staff came to call the "inside/outside strategy"—Glendening created a broad-based coalition that was difficult to defeat. At times during the 1997 legislative session, supporters of one element of the Smart Growth initiative or another sought to cherry-pick the portion they supported and let the rest rise or fall by itself. But Glendening consistently resisted such attempts, insisting that the various components were linked, and thus needed to be considered together and approved together.

This inside/outside strategy provided both substantive and political benefits. Substantively, it was clear that until something was done to make older towns and cities a place where people would want to live, where the schools were of high quality and crime was not a constant fear, the outward migration would continue. At the same time, it was recognized that success in the older towns and cities would be slow and pressure would continue to build on rural areas. The staff recognized that the state needed to attack both problems simultaneously.

Politically, this enabled the governor to build a broad and strong coalition of urban, suburban, and rural legislators who may have preferred to support one part of the program more than another, but who nonetheless were convinced to support the entire program.

5. The governor and staff alerted stakeholders early in the process of the state's intentions and invited their input.

Surprise is rarely an advantage when trying to pass legislation. Surprise irritates lawmakers and makes the interests affected by legislation suspicious and distrustful. It is difficult to muster a majority under such circumstances. However, announcing legislative plans too early can short-circuit the best of proposals by giving potential opponents too much time to organize an attack.

Maryland’s Smart Growth program succeeded, in part, because by the time it was introduced, every potential stakeholder knew a proposal was coming and had been given an opportunity to offer ideas. Six months before the legislative session was to convene, the governor used a major speech to municipal leaders to announce his plans to introduce a land use measure. Governor Glendening was careful not to prejudge what would be in that legislation, and invited interested parties to offer suggestions.

The governor then dispatched members of his staff to meet with several hundred different organizations and local governments. Ideas from each group were collected, put together in a book, and re-circulated to all of the same groups so that everyone knew what everyone else was proposing. The feedback from the groups informed the choices made by the governor and his staff. Glendening could easily see which ideas were clearly off the table, and which ones seemed to have general support. The outreach effort may not have nailed down converts, but it had a calming effect.

6. State agencies worked together toward the same broad set of goals.

Glendening not only had to sell the concept of Smart Growth to the General Assembly and public, but he also had to sell it to members of his own cabinet. Department chiefs have their own agendas, ideas, constituents, and their own set of pressures. They must sort through the scores of issues a governor may champion in any given year to determine the ones which the governor is truly interested.

The workgroup staff that put Maryland’s Smart Growth initiative together represented all the major state agencies: environment, natural resources, planning, economic development, general services, budget and management, housing, and community development. By its nature, Smart Growth represents a cross-disciplinary set of issues. But that fact did not, by itself, cause cabinet secretaries to work together. It took direction and leadership from the top.

The governor’s first step toward this goal came in 1998, when he issued a Smart Growth Executive Order that, among other actions, established a Smart Growth sub-cabinet and a staff-level Smart Growth coordinating committee. The Governor was beginning to make it clear that he wanted secretaries and staff from different agencies to work together on Smart Growth issues. It set Smart Growth policies for state agencies to follow. For example, one policy established downtown areas as the priority location for new offices, as well as for holding conferences or meetings.

At first, the response from the cabinet was tentative. At early sub-cabinet meetings, often only one or two secretaries would show up; the rest would send deputies or other surrogates. Not until Glendening was re-elected (campaigning, in part, on a Smart Growth platform) and began to demonstrate intense interest in the Smart Growth program did participation in sub-cabinet meetings and actual cross-departmental cooperation actually increase. After two cabinet secretaries were replaced at the start of his

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second term, Glendening publicly explained their departure by saying they
had not strongly supported Smart Growth. Subsequently, attendance at sub-
cabinet meetings never faltered, and once brought together to discuss
specific projects, genuine cooperation ensued. Ultimately, Smart Growth is
enhanced when multiple agencies with different responsibilities, different
resources, and different expertise work together. However, there is no
substitute for strong leadership from the top to make that happen.

7. The governor and his cabinet secretaries demonstrated a willingness
to make tough decisions to do things differently than in the past.

After re-election, in early 1999, Glendening directed his cabinet
secretaries to review their budgets and programs, identify those that were
inconsistent with the state’s Smart Growth law, and discontinue them. The
governor intended to demonstrate—by example—that Smart Growth meant
the state was going to do things differently.

The most visible casualties of this policy were five highway bypass
projects. Even though none of these costly roads were likely to be built in
the foreseeable future, their cancellation created uproar. The road
alignments were mostly outside of and did not connect to Priority Funding
Areas, and were therefore in violation of the Smart Growth law. No one
could recall the last time the Department of Transportation had taken any
project—much less five of them—out of the long-range transportation plan.

When one county that had consistently ignored the state’s Smart
Growth efforts decided to rezone much of its agricultural land to permit
more development, the state threatened to withhold state funds earmarked
for the county for farmland preservation. Such a bold move had not
previously been attempted. Why should the state spend money to preserve
farmland in a county that could become so fragmented by development that
farming would no longer be a viable option? The county backed down.

The state was not only willing to step in to stop “dumb growth,” it also
became more active in support of “Smart Growth.” Increasingly, state
officials testified for or took positions in favor of local smart growth
development projects, helping push through approval of projects that might
otherwise have died in the face of local opposition.

Consistent with the governor’s executive order, the state insisted that
new state facilities or offices be located in downtown areas of towns and
cities, rather than on the outskirts of town. Prior to this executive order,
most courthouses, motor vehicle offices, or other facilities were built on the

ducation/growfromhere/LESSON15/MDP/EXECORDER.HTM.
outskirts of town. For example, the University of Maryland, was persuaded to build a satellite campus in an abandoned but historic downtown building, rather than on the university’s preferred greenfield site.

State agencies also began to use funds in novel new ways. For example, transportation funds that in the past might have been used to expand suburban roadway capacity, were instead used to improve older state roads that ran through the heart of older small towns and cities. In many cases, these roads had not been upgraded in decades. The new improvements often included brick sidewalks, ornamental street lights and benches, and landscaping. These projects not only were cost efficient (a relatively small amount of money went a long way), but were politically popular as well. The ground-breaking and ribbon-cutting ceremonies that resulted from these projects could fit neatly within a typical four-year term in office.

State funds for public school construction and renovation were also targeted at older schools in older areas, rather than mostly for new schools in suburban and rural locations. Schools were magnets for families, so the magnets should be placed where you want the families to live. When one southern Maryland county persisted in permitting residential development outside of designated growth areas, the governor responded by warning that the state would restrict the availability of funds for new schools in those areas.

It took political courage each time the state took action, but through the passage of time, it seemed more surprising when state actions did not support the broader goals of Smart Growth.

8. The state recognized that cultural change would only come with the passage of time, so the staff paid particular attention to educating young people about land use issues.

From the outset, the governor and his staff believed that all the rules and incentives the state could muster to encourage smart growth would have little effect if the public’s mindset toward land use did not change. Early on, the governor concluded that it would require a change in thinking to make Smart Growth successful. Glendening called for a “Smart Growth ethos” that he compared with the spirit of the Chesapeake Bay Foundation’s “Save the Bay” effort.

With the knowledge that change takes time, the state tried to think about, focus on, and discuss “Smart Growth” issues. At first, few young people were familiar with “Smart Growth” terminology and knew little about issues such as zoning categories, the purchase of development rights,
design-based codes or any of the other arcane topics of the land use. However, they knew about traffic congestion, the loss of farm and forestland near their homes to development, the construction of the latest subdivision of strip malls, as well as the construction of dual-lane highways. Young people sensed something was out-of-balance and that it was affecting the quality of their lives; but they couldn’t contextualize the problem.

Governor Glendening’s staff tried to inform young people of the land use issues they would encounter as adults. Over the course of five years, the state held four workshops entitled: the Governors’ Youth Environmental Summits. Each summit was attended by 700 to 800 high school students and their teachers. The agenda of the summits were to present panelists with opposing views so students can hear both sides of difficult land development issues. Additionally, in order to get students to envision what their state would look like in the future, the state sponsored an art and photo contest for which participants were asked to draw, paint or photograph “The Maryland You Want.” The best entries were put on display in the Maryland State House.

Working with a profit-making subsidiary of the National Geographic Society, the state’s Smart Growth staff developed a Maryland Smart Growth Map. This map was a helpful student learning tool: on one side it showed the trends that led to the Smart Growth initiative, and on the other it showed the Smart Growth response.

Later, the staff developed a series of Smart Growth lesson plans for middle and high school teachers to use in their classrooms. With the help of a grant from a non-profit foundation, the staff offered training sessions so teachers could learn how to use the lesson plans in their classrooms. The teachers were also provided with mini-grants to cover the cost of field trips, to purchase pedometers, or other materials to help the students understand the issues. Most recently, foundation funds have been used to provide scholarships to a handful of teachers, enabling them to take a more in-depth Smart Growth Leadership course offered by the University of Maryland.

Through education, the state promoted student participation and enhanced knowledge of current land use issues that relate to Smart Growth.

25. See Maryland Department of Natural Resources, Where Do We Go From Here? Education Grant Application & Guidelines (2005), available at http://www.dnr.state.md.us/education/growfromhere/grantapplication.doc.
By educating the students, the staff was able to encourage cultural change that will foster the long-term survival of Maryland “Smart Growth” Program.

9. The state recognized that the initial legislation was just the beginning, and to achieve real change new proposals had to be added every year.

Internally, Glendening and his staff knew that what they were proposing in 1997 would not be enough to stop sprawl or revitalize long-troubled cities. But they also felt it went farther than anything that had been previously tried in Maryland. If they could get Smart Growth on the books, they felt they would be able to expand it in later years.

Every year thereafter, the governor, his staff, and his agencies returned to the legislature with new proposals. Such proposals included measures to improve or expand on programs already on the books, or fought for more money in the budget to support the incentive-based approach. For example, it became obvious that the state’s historic preservation tax credit was becoming one of the most effective incentives for redevelopment. The administration and the General Assembly steadily increased the size of the tax credit available to participating developers. Furthermore, to encourage more cooperation among departments and provide technical advice on specific development projects to builders, developers, or even local governments, the governor created an Office of Smart Growth within his office.

The goal was to keep the pressure on. The Glendening administration returned to the legislature year after year with new proposals designed to strengthen the original program. It was obvious that only so much change would be approved in any single year, so the administration looked at the long-term benefits the program would offer and consistently applied pressure—attempting to realize the grandest vision for the program.

10. The governor tried to institutionalize as much of the program as possible.

When the 1997 Smart Growth bills were introduced, no one in the Glendening administration knew for sure if the bills would pass. Stiff opposition resulted because the legislation would make “Smart Growth” the

law of the land, both literally and figuratively. Laws are traditionally hard to pass, but even harder to repeal. Because of this recognition, throughout his years in office Glendening purposely tried to institutionalize as much of the Smart Growth program as possible in hopes it would survive after he left office.

At times, the governor even sought legislative approval when none was needed. For example, he asked the General Assembly to approve legislation directing the Office of Planning to draft model codes for redevelopment and infill projects. Glendening could have delegated his work to the director of planning, but knew it would carry more weight if the General Assembly authorized it. Thus, he sought and received legislative approval.

Similarly, Glendening created the Office of Smart Growth in statute, even though he probably could have delegated the duties to the staff in the governor’s office to work on the program. After Glendening left office, a new governor redirected the resources of the office elsewhere, but the framework for the office remained embedded in statute and protected by sympathetic legislators. Presumably, some future governor could fill the office’s now vacant positions and put it back to work again.

The legislation creating the Office of Smart Growth also contained a provision formally establishing in statute the Smart Growth Sub-Cabinet. Prior to that, the sub-cabinet only existed under a general executive order that could be superseded by a subsequent executive order.

The fight for smarter growth was to be a long-term struggle, not something accomplished in a year or two, or even in a four-year term. By institutionalizing as much of the program as possible, the governor sought to shelter the effort against the vicissitudes of politics.

B. What the Maryland Smart Growth Initiative Did Wrong

1. The state never set specific goals or benchmarks for what it intended to achieve, and therefore had no way of measuring if the program was successful.

At the time the Smart Growth initiative was being developed, the Governor and his staff were thoroughly convinced of the seriousness of the state’s development trends. Ron Kreitner, the state planning director,

30. Id.
steadily rolled out the ominous numbers:\textsuperscript{32}

- Average household size had declined from 3.25 to 2.43, even as lot sizes steadily increased from .42 acres in 1985 to .57 acres in 1993 (36\% increase). This meant the state was consuming more land to serve fewer people.\textsuperscript{33}
- Between 1970 and 1990, more than 420,000 people had moved out of older developed areas, leaving abandoned houses, closed shops and underutilized infrastructure and services in their wake.\textsuperscript{34}
- Over the previous half century, Baltimore had become an urban centrifuge, flinging its residents into the surrounding suburbia. A city population that peaked at nearly 1 million in mid-century had plummeted to about 645,000 by the century's end and was continuing to fall.\textsuperscript{35}
- Moreover, the average family moving out of the city tended to have a salary twice that of any family moving in, further reducing resources available to city government.\textsuperscript{36}
- There has been a flight from Maryland cities and a push to previously rural areas, putting increased pressure on farm and forest land.\textsuperscript{37}
- Development significantly impacted the Chesapeake Bay drainage area. The loss of vegetation—a sink for chemicals, pesticides, and airborne deposits of nitrogen—led to increasing runoff of non-source pollution into the bay.\textsuperscript{38}
- Rapid growth outside Maryland cities put increasing pressure on septic systems, with more than $36 million a year being spent to clean up or fix failed septic systems; yet each year more houses were built that relied on septic systems.\textsuperscript{39}

Despite such a wealth of statistics, those who put the “Smart Growth” initiative together never tried to establish a set of specific goals for the program. Few people asked, and fewer suggested how the state would know if the “Smart Growth” initiative was successful. There were no benchmarks, no goals, and no plans for measuring change.\textsuperscript{40}

\textsuperscript{32} See Staff Meeting, Maryland Office of Planning, Neighborhood Conservation and Smart Growth (June 18, 1996) (on file with author).
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See generally, Gerrit-Jan Knaap & Yan Song, Zorica Nedovic-Budic, Measuring Patterns for Urban Development: New Intelligence for the War on Sprawl, National Center for Smart Growth Research and Education, University of Maryland, available at http://www.smartgrowth.umd.edu/researc
This shortcoming can be explained, in part, by the fact that the Smart Growth staff faced more fundamental concerns, not the least of which was whether they could muster the majorities needed to enact the proposal. But it was true that without knowing where the program was headed, it was impossible for anyone to know whether it was reaching its destination.41

2. The state never conducted any regional or statewide visioning exercises or made any other attempts to determine what the public thought their state or region should look like in the future.

The Glendening administration staff did a commendable job reaching out to several hundred private sector, non-profit, and governmental organizations to solicit ideas as the Smart Growth initiative was being formulated. But the plan the state ultimately devised was not informed by any statewide or even regional visioning exercises that might have engaged the public at-large.

A number of states, most notably Utah through its Envision Utah project,42 have brought together thousands of citizens to discuss and visualize the future of their jurisdiction. In the Envision Utah example, several different scenarios for future growth were developed and citizens were allowed to choose from among them.43 No similar effort was made in Maryland. In the same way the initiative suffered from not having precise goals, it also suffered from the absence of a broad, publicly-supported vision of what the state could or should look like in twenty, thirty, or fifty years.

As a result, local officials felt the state failed to acknowledge or address regional or local differences. Despite statements by the governor to the contrary, many citizens viewed “Smart Growth” as a “one-size-fits-all” effort designed to stuff higher densities into jurisdictions where such intense development would be inappropriate and strongly opposed.

By failing to develop a mechanism through which citizens from different parts of the state could develop their own vision for how “Smart Growth” should be locally defined, the program created opponents where supporters could have been found.

42. See generally Envision Utah, at http://www.envisionutah.org (last visited Apr. 24, 2005).
3. The Smart Growth initiative made very little headway in changing the paradigm of local land use control.

While there were benefits from the Maryland Smart Growth program preserving local land use decision-making authority, this preservation of local authority also led to a number of problems. The program had little impact on the almost exclusive authority of local governments to make land use decisions. As a result, the success of the state program largely hinged on the actions of local government officials over which the state had little or no control. If local decisions went contrary to the general goals of Smart Growth, the state had little recourse.

The governor could and did use his office as a “bully pulpit” to encourage local government adherence to Smart Growth principles. In his second term, he increasingly withheld state funds as a “stick” designed to force local governments into taking Smart Growth actions. Toward the end of his administration, the governor began to invoke the rarely used state authority to intervene in local land use decisions as a means of steering Smart Growth projects to approval or defeating projects that were at odds with Smart Growth goals. However, in the final analysis, decisions on where growth should occur remained at the local level, where they were often guided by the same parochial political interests that created the state’s sprawling development pattern in the first place.

Any effort to transfer land use authority from the local governments to the state surely would have been met with vehement opposition from the counties and would have been unlikely to pass. Without such change, there is no governmental entity with the authority to look at the overall picture and decide what decisions would result in the greatest good.

4. Because the Maryland Smart Growth initiative was institutionalized almost completely at the state government level, its continuance became problematic once there was a regime change.

Maryland’s “Smart Growth” initiative is still part of state law in Maryland, but the program’s momentum has been lost and the initiative itself is a ghost of what it was just three years ago. This is because the Smart Growth program was institutionalized almost completely at the state government level and depended heavily on interest and leadership from the governor.

When Maryland elected a new governor, Robert L. Ehrlich, Jr., in January 2003, the state’s “Smart Growth” movement almost immediately began to falter. Veteran staff who had worked on the program since its
inception voluntarily left state service or were asked to leave. Funds for “Smart Growth” programs were sharply reduced and, in some instances, zeroed out. Moreover, the philosophy of the new governor was to leave local governments alone and let them continue to make their own land use decisions without state interference, regardless of the financial or other effects those decisions might have on the state as a whole or on neighboring jurisdictions.

Absent strong leadership from the state and without sufficient financial incentives, local governments returned to “business-as-usual.” Glendening succeeded in embedding the “Smart Growth” initiative in state statute, but there was little he could do to assure that future governors would see this as an important issue deserving of their time and attention.

5. The financial incentives the state offered were never sufficient to encourage the kind of changes the program hoped to achieve.

The financial incentives the state was offering to change land use behavior was never sufficient to create the change envisioned by those involved in establishing the “Smart Growth” Program. The state had other budgetary priorities that had to be met, and so the state was not able to offer enough money to convince builders, developers, or local governments to do things differently. In many instances, a subsidy from the state was never sought in the first place and therefore had no bearing on the ultimate development decision.

For the most part, the incentives offered under the Smart Growth law affected only new development projects and only those projects for which state financial assistance was considered necessary. If neither a project’s developer nor the local government wanted or sought state financial assistance, a project was essentially unaffected by the Smart Growth law. Moreover, local governments retained the authority to approve projects, regardless of whether they were in the growth area designated by the Smart Growth law.

The second serious problem with an incentive-based approach is that it is always subject to changing political priorities and economic cycles. If a new administration at the state level decides to appropriate funds elsewhere, the Smart Growth program will lose its effectiveness. If the economy declines or the state refuses to raise sufficient revenues to cover costs, then programs that might otherwise be used as incentives are cut.

An incentive-based program without sufficient funding does not hold much promise for effecting change. To be effective, Maryland’s “Smart Growth” program needs more money for incentives, not less.
6. The structure and ground rules for the basic planning block of Smart Growth—the Priority Funding Areas—were too weak and porous to slow sprawl, much less stop it.

Maryland’s Smart Growth program relies heavily on its ability to restrict certain state financial assistance for growth-related projects to specific geographic areas in each local jurisdiction; called Priority Funding Areas (PFAs). The creation of these PFAs represented a crisp departure from the past practice of the state in which location was not part of the criteria for deciding the eligibility of projects for funds. The PFA concept was devised to channel new growth into already developed areas and to allow local jurisdictions to designate new growth areas, as long as those areas met some minimum state criteria.

While this was a step in the right direction, it clearly did not go far enough. Maryland’s PFAs, for example, would not be confused with the more regulatory structure in place in Oregon, where an Urban Growth Boundary separates where growth is allowed and where it is not. Even the Urban Rural Demarcation Line, long used by planners in Baltimore County, provides stronger separation of growth and no-growth areas than do the PFAs under Smart Growth.

Part of the problem stems from the simplistic statutory definition of PFAs, which limits PFA designations to municipalities, areas inside the Baltimore and Washington beltways, and to areas served by (or planned to be served by) public water and sewer. In some low-lying areas of the state, public sewers have been extended to serve developments where septic systems were failing. These areas were never intended to be “growth areas,” yet because the PFA definition is tied to the availability of sewer service, these areas are now considered PFAs. The legislation, which is somewhat arbitrary, requires that new residential developments within PFAs be built at a minimum density of 3.5 units per acre. However, this inflexible standard is the same for every PFA regardless of size, character or location.

The hard reality of Maryland’s PFA concept is that it does not prevent growth outside of PFA boundaries. The PFA concept prevents the use of state funds to assist projects that are outside of PFAs. If a project does not

44. See MD. CODE ANN., STATE FIN. & PROC § 5-7B-02 (2000).
47. Id.
48. Id.
require or seek state financial assistance, and is otherwise approved by a local government, the PFA designation has no bearing on the project or its location.  

There is anecdotal evidence that the mere creation of PFAs and the subsequent public attention that has been directed to decisions on whether new projects are to be located inside or outside PFA boundaries, has had a salutary effect on local government decisions. The PFA boundaries have provided a framework with which to judge local government development decisions. The fact remains, however, that the universe of projects affected by the PFA designation is relatively small.

7. **There was limited public input into the creation of local Priority Funding Area boundaries and no control of their size once they have been established.**

The PFA Act failed to stipulate any process that local governments are required to follow as they establish PFAs for their jurisdiction. There is no requirement for public hearings on PFA boundaries and no requirements for informing the public of the plans for the PFA designation. However, once a jurisdiction creates its PFA, there is nothing preventing it from changing the boundaries of the PFA anytime it deems necessary, as long as the new PFA meets the minimum state criteria.

Under the legislation originally introduced in 1997, the Maryland Department of Planning would have been given authority to deny local PFA plans if they failed to meet state criteria. The approval authority was stripped from Maryland counties, leaving the department of planning only with authority to “comment” on local PFA plans. Stronger state authority over PFA plans would likely result in the production of more meaningful plans.

8. **Even though a substantial amount of money was spent on land preservation, and a large amount of acreage was protected, it has yet to be demonstrated that this effort changed or even affected broader land use patterns.**

One of the most successful elements of the Maryland Smart Growth

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49. *Id.*
50. *Id.*
effort was the state’s ability to identify and protect undeveloped rural lands threatened by development. As of April 2004, the state had preserved 217,461 acres with its farmland preservation program; 48,223 acres through the Rural Legacy Program; and another 21,814 acres of environmentally sensitive lands protected through the GreenPrint program. In addition, another 110,176 acres were protected through various county purchase-of or transfer-of-development rights programs. These programs were so successful that by the end of the Glendening administration, land was being protected at a faster rate than it was being developed.

Although these land preservation programs were, and continue to be popular with the public, little work has been done to determine whether such an expenditure of taxpayer dollars actually changed development patterns (other than by halting development on the specific parcels from which development rights were purchased). Like many other aspects of the Smart Growth initiative, policymakers investigate whether the land preservation programs are working. This is necessary because it must be determined if the programs are having the desired effect of stemming the spread of sprawl development.

9. The problem with the state’s original brownfields cleanup legislation was bifurcated between two state agencies, inefficient and under funded.

The task of reclaiming, cleaning, and redeveloping contaminated properties is not for the faint at heart. Maryland is fortunate not to have the plentiful supply of brownfield sites found in larger, more industrial states, but each parcel is a cleanup challenge nevertheless.

The Maryland brownfield cleanup program did well, but would have done better had it not been chronically under-funded. The state failed to provide sufficient resources to serve as genuine incentives to attract serious

53. See GreenPrint, supra note 14.
54. Capital Grants and Loan Administration, Maryland Department of Natural Resources, LandacadevchartFINAL2004 (chart showing “Land Preserved and Developed”), June 24, 2004 (on file with author).
55. Maryland Department of Planning, Total Acres Preserved, Converted and Developed in Maryland Counties, (chart showing the total acres of land preserved, converted and developed in Maryland counties), Apr. 20, 2004 (on file with author).
private investors to brownfield cleanup and redevelopment projects. Additionally, the program was hampered by a division of responsibilities among state agencies. Maryland’s brownfield cleanup legislation was the hard-won product of negotiations between two feuding interest groups—the state’s business community, and its environmentalists. Reflecting the high level of mistrust between these two groups, the legislative compromise ultimately approved by the General Assembly, and signed into law by the governor, divided responsibility for brownfield cleanup between two separate and very different state agencies. The Maryland Department of Environment was given responsibility for regulating the assessment of contamination on suspected brownfield properties and overseeing any subsequent cleanup efforts. The Department of Business and Economic Development was delegated the task of helping promote the marketing and redevelopment of brownfield properties after they have been cleaned.  

In practice, this bifurcated system was inefficient to administer, and businesses found it difficult to coordinate between the two agencies. Failure to properly finance the initiative resulted in a slower pace of cleanup and redevelopment than what might otherwise have been possible.

10. There was never sufficient emphasis placed on housing.

One of the most difficult land use problems facing the Baltimore-Washington region is a general shortage of housing, a sharp rise in housing costs, and an acute shortage of so-called “workforce housing” for moderate income citizens. While it does not seem fair to blame the “Smart Growth” program for causing the housing shortage, it does seem fair to blame the program for doing little to improve the situation.

A number of state housing programs that pre-date the “Smart Growth” initiative were targeted to support PFAs, but in general the Maryland Smart Growth initiative failed to develop a strong housing component because of the overarching concerns of equity, gentrification, and elitism. The “New Urbanist” style developments that Smart Growth advocates promoted on greenfield sites were well-received, but often so pricey they were out of the range of moderate or low income Marylanders. Similarly, some redevelopment projects in older communities displaced long-time residents with higher priced housing that those older residents could not


V. CONCLUSION

Maryland’s experiment with Smart Growth was unquestionably a move in the right direction. It represented the logical next step in the state’s long history of progressive land use and environmental protection efforts. For the first time, it harnessed the power of the state budget to pull the state toward a smarter pattern of development. It made the goal of achieving smarter growth the framework within which other developments and facility decisions by state agencies could be made. And it produced an unprecedented level of cross-departmental cooperation.

The Smart Growth initiative focused public attention on the needs and potential of long-neglected older towns and cities. It raised awareness of the environmental and fiscal costs of a dispersed development pattern. It generated a healthy dialogue at all levels of government, among students, and with the public-at-large about growth and development, and its connection to the quality of life experienced by all Marylanders.

Maryland’s “Smart Growth” initiative probably represented as much change as was politically possible to achieve at the time. However, it wasn’t enough. Maryland did an exceptional job packaging and promoting its “Smart Growth” program, but in some ways, its national reputation exceeded the actual results on the ground. To be truly successful, the Maryland program—or any program that attempts to emulate it—needs to go farther and for a longer period of time. Successful programs must have a clear sense of where they are headed so they aren’t blown off course with every dip in the economy or shift in the political winds. Since land use change takes time, the Maryland experience demonstrates that patience and determination is a prerequisite to keep the program headed in the same direction.

For a statewide, incentive-based program to succeed, incentives must be large, meaningful, and continuous to be dependable. Growth boundaries need to be stronger, less porous, and more effective than the PFA concept developed as part of the Maryland program.

While an incentive-based approach may be politically popular, to be effective it must be more integrated into county and municipal plans. Incentives that are not intentionally intertwined with local land use planning processes can be wasted, or worse, can be counterproductive.

States cannot do it alone. The Maryland experience demonstrates the value of a statewide approach and the importance of assuring that local government decisions do not undercut the statewide smart growth goal. A state-only approach is as flawed as a local government-only approach. States and their local governments must become committed partners.

To that end, they must be committed to the same regional or statewide vision. State and local governments need to agree on where they are going and develop a set of specific goals and objectives to get there. Finally, these goals and objectives must be monitored and measured over time to determine if, how, and why growth patterns are changing. Without that, it will never be possible to determine if new development patterns are any smarter than the ones they replaced.