

**CHALLENGING THE SPRAWL OF BIG BOX RETAIL:  
THE SMART GROWTH APPROACH TO  
“ZONE IT AND THEY WILL COME” DEVELOPMENT**



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## INTRODUCTION

Since 1970, researchers have published over 500 studies on sprawl outlining the complex problems associated with suburban land use.<sup>1</sup> Traffic congestion and pollution, loss of agricultural land, the paving over of streams and habitat, and the development of impersonal, car-dependent communities have all undermined the quality of life in urban regions.

During this same time period, citizens and local governments have been increasingly concerned with the livability of metropolitan areas. Most notably, communities are rejecting developments that are subsidized by local taxpayers and that detract from the ecological, social and economic vitality of a region. Many communities no longer unquestioningly accept that all types of growth are good, and are working towards “smart growth” policies for their municipalities and regional districts.

“Smart growth” refers to land use and development practices that enhance the quality of life in communities and preserve ecological integrity. Such practices range from demand management strategies for transportation, water provisioning and energy, to development practices that minimize ecological damage and foster vibrant communities (clustering buildings, surface drainage, limits on impervious surface coverage, and increased housing densities). Smart growth practices also aim to limit the sprawl of urban centers by using tools such as urban containment boundaries. Finally, smart growth responds to the current fiscal realities facing local governments: development based upon resource efficiency and conservation costs less than conventional sprawl development.

A key aspect of smart growth is addressing the proliferation of suburban big box retail stores. Big box retail encourages sprawling land uses, automobile dependence and the paving of large tracts of near-urban land. It also contributes to the decline of urban and neighborhood centers as it attracts retail activity out of central business districts to the urban fringe. As smaller local businesses close in neighborhoods, residents increasingly use automobiles and travel farther to go shopping. Touted as good economic development through job creation, studies show that big box retail changes not only the look of a community, but the automobile habits and cycle of commerce within a region.

The purpose of this paper is to outline the impacts of big box retail land uses on communities in North America and to explore legal and integrated land use strategies to address the problems associated with big box retail. While it is beyond the scope of this paper to detail strategies that counter the effects of superstores on regional and national labor markets, many of the land use solutions proposed in Part 3 inherently address these issues. In Part 1, I briefly outline the smart growth metropolitan development framework in which big box sprawl is situated, and in Part 2 set out the problems with big box stores. In Part 3, I present the jurisprudence of land use and zoning that frames how local governments and citizens can control retail development in communities. In Part 4, I further discuss specific strategies employed by states, local governments, and citizens to control big box sprawl. Finally, Part 5 is dedicated to case studies of integrated legal and political approaches that have resulted in smart growth solutions.

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<sup>1</sup> Robert Burchell et. al., *The Costs of Sprawl – Revisited* (1998). For a treatment of sprawl from a political economy and institutional perspective, see William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *Fordham L. Rev.* 57 (1999).

## 1. THE SMART GROWTH FRAMEWORK

Smart growth comes in many forms and is essentially a new name for various land use patterns and infrastructure funding for which enlightened urbanists have advocated for half a century.<sup>2</sup> Metropolitan regions must be contained to protect natural and resource landscapes and to revitalize urban centers. The new features of this package of strategies are a recognition that suburban development should not be subsidized by taxpayers, and that sustainability goes beyond the natural environment and includes social considerations like affordable housing.<sup>3</sup> The two foundational approaches of the smart growth platform are ecosystem-based management and demand management.<sup>4</sup> Ecosystem-based management strategies approach protection of the environment from a watershed level, and seek to involve all levels of government and private landholders in the implementation of a coordinated watershed plan.<sup>5</sup>

Demand-side management attempt to decrease the demand for goods and services, in contrast to traditional supply-side approaches that respond to problems by simply increasing supplies.<sup>6</sup> By reducing the demand for a service, such as roads for cars or water for household use, demand-side management conserves resources and can be less expensive than supply-side methods. Demand-side strategies often require a change in human behavior, such as adopting different travel patterns, or technological innovation, such as water saving appliances. Finally, at a systemic level, demand-management calls for a shift in the focus of suburban sprawl from the consumption of new land at the urban fringe to re-use and conservation of existing developed land.

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<sup>2</sup> The most renowned advocate of vital central cities is Jane Jacobs, as expressed in *The Death and Life of Great American Cities* (1963).

<sup>3</sup> See, for example, John R. Nolon, *Local Land Use Controls that Achieve Smart Growth*, 31 *Envtl. L. Rep.* 11025 (2001); Oliver A. Pollard, *Smart Growth: The Promise, Politics and Potential Pitfalls of Emerging Growth Management Strategies*, 19 *Va. Env'tl. L.J.* 247 (2000); Rose A. Kob, *Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy*, 14 *Tul. Env'tl. L.J.* 139 (2000); Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 *Ga. St. U. L. Rev.* 1019 (2001); Deborah Curran and May Leung, *Smart Growth: A Primer* (2000); Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 *Urb. Law.* 181 (2000); Linda Nowla, Chris Rolfe, and Kathy Grant, *The Smart Growth Guide to Local Government Law and Advocacy* (2001); Robert Freilich, *From Sprawl to Smart Growth: Successful Legal, Planning and Environmental Systems* (1999); Eben Fodor, *Better Not Bigger* (1999); Constance E. Beaumont, *Challenging Sprawl: Organizational Responses to a National Problem* (1999) (hereafter "Challenging Sprawl") and *Smart States, Better Communities* (1996); David Rusk, *Cities Without Suburbs* (1995).

<sup>4</sup> For a practical approach to these principles, see Curran and Leung, *id.*

<sup>5</sup> See, for example, Robert Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, *U. Colorado L. Rev.* 293. Although significantly more challenging than in rural areas, urban ecosystem-based management is gaining support. See, for example, Nancy P. Spyke, *Charm in the City: Thought on Urban Ecosystem Management*, 16 *J. Land Use & Env'tl. L.* 153 (2001); and J.B. Ruhl, *Taming the Suburban Amoeba in the Ecosystem Age: Some Do's and Don'ts*, 3-FALL *Widener L. Symp. J.* 61 (1998).

<sup>6</sup> See, for example, the work of the Victoria Transport Policy Institute, [www.vtpi.org](http://www.vtpi.org) (last visited November 13, 2001).

The State of Maryland defines smart growth as targeted infrastructure funding in priority areas where development meets a detached home-type density of 3.5 units per acre. It also means preserving 200,000 acres of open space in the next 15 years.<sup>7</sup> For the non-profit Greenbelt Alliance, it means securing urban growth boundaries via voter referenda or city council action in all locally governed areas in the San Francisco Bay. It also means endorsing higher density infill developments that provide affordable housing and add character to a neighborhood.<sup>8</sup> At its worst, smart growth is used to protect the development of low-density neighborhoods at the suburban fringe.<sup>9</sup> At its best, smart growth revitalizes city centers and redevelops sprawling suburbs to create livable communities. It is this latter form of smart growth that is the framework for this paper.

The four strategies at the core of smart growth are containing urban areas, increasing transportation choices, protecting the environment, and densifying and diversifying housing. These strategies are interdependent and mutually supportive.

## 1.1 CONTAINING URBAN AREAS

Urban containment involves drawing an artificial line around an urban center, the urban containment boundary (UCB), which separates the urban and rural part of the region. Policies from all levels of government then channel development into neighborhoods within the UCB.<sup>10</sup> The purpose is to protect resource and ecologically sensitive lands, and to revitalize urban cores. UCB's protect resource and ecosystem uses both by preventing near urban land from being developed, and by preventing rural residential conflicts that constrain working activities on rural land. By concentrating development into existing neighborhoods, UCB's facilitate the redevelopment of older neighborhoods, and foster more efficient uses of land. It means appropriately increasing the density in all neighborhoods while retaining community character. Design based on smart growth principles creates site and neighborhood appropriate structures.<sup>11</sup>

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<sup>7</sup> Parris N. Glendening, Governor of Maryland in Beaumont, Challenging Sprawl, *supra* note 3 at 94.

<sup>8</sup> See [www.greenbelt.org](http://www.greenbelt.org) for a description of these programs (last visited on November 13, 2001).

<sup>9</sup> The term smart growth has also been adopted by the National Association of Home Builders (NAHB), an organization that represents the residential building industry. The 2001 publication, *Smart Growth: Building Better Places to Live, Work and Play*, sets out the NAHB policy on smart growth. It states that the majority of new housing will continue to be provided at the urban fringe as single detached dwellings. The NAHB defines smart growth as "...meeting the underlying demand for housing created by an ever-increasing population by building a political consensus and employing market-sensitive and innovative land-use planning concepts. It means understanding that suburban job growth and the public's overwhelming desire to live in single-family homes will continue to necessitate growth in suburbia." The NAHB also recognizes that all development must be undertaken in a different way: "...smart growth means meeting that housing demand in smarter ways by planning for and building to higher densities; revitalizing our nation's cities and older suburbs; preserving meaningful open space and protecting environmentally sensitive areas." at 2.

<sup>10</sup> These include establishing servicing limits beyond which servicing will not be funded, staged development where servicing, including adequate schools, will be put in place over a long-term planning horizon, and zoning controls. The District of Saanich, just north of Victoria, British Columbia has had an urban containment boundary since the late 1960's. In the U.S., the most famous urban containment boundary system was mandated by state legislation in Oregon in the 1970's.

<sup>11</sup> See, for example, Douglas G. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 U. Det. Mercy L. Rev. 267 (1994).

Urban containment is also supported by individuals whose primary concern is to decrease municipal costs, and thus property taxes. Building within areas where servicing is already in place is less expensive for all taxpayers than extending servicing to bare land developments. Cost of servicing studies demonstrate that densification saves local governments millions of dollars over the long-term planning horizon.<sup>12</sup> Densification also makes service provision much easier and more efficient by creating a critical mass of citizens to use the services provided. This is especially true for public transit, school bus trips, and emergency response. Decreased servicing costs and redevelopment are also key strategies for creating better transportation choices.

## 1.2 INCREASING TRANSPORTATION CHOICES

Automobile use is convenient and comfortable because it is heavily subsidized. Increasing transportation choices means leveling the playing field by removing subsidies to the car and make other forms of transportation more efficient and economical.<sup>13</sup> This task begins with land use planning. Higher densities enable frequent and efficient transit, and facilitate the development of services within walking distance of residences. Commuter pedestrian corridors and bicycle paths can be built into the urban infrastructure, as roads are currently. Increasing transportation choices also reflects the metropolitan reality that individuals on fixed incomes rely on urban bus service as their primary transportation mode. As several recent court cases have demonstrated, local and state governments disproportionately fund suburban commuter transportation, such as light rapid transit, at the expense of local bus services.<sup>14</sup> Finally, decreasing the reliance on the automobile significantly improves urban air quality and noise levels, and decreases the amount of ecosystem paved over by roads.

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<sup>12</sup> Abundant literature exists on the high costs of suburban development when compared with redeveloping existing urban areas or concentrating development in higher densities when undertaking greenfield (bare land) development. The American Farmland Trust uses a costs of servicing methodology to demonstrate the high cost of suburban development. See, for example, *The Last Roundup? How Public Policies Facilitate Rural Sprawl and The Decline of Ranching in Colorado's Mountain Valleys* (no date); *An Unlevel Playing Field: How Public Policies Favor Suburban Sprawl Over Downtown Development in Metropolitan Atlanta* (1999); *Living on the Edge: The Costs and Risks of Scattered Development* (1998); *Alternatives for Future Urban Growth in California's Central Valley: The Bottom Line for Agriculture and Taxpayers* (1995). Myron Orfield has also extensively documented this phenomenon in the Twin Cities region in Minnesota (Minneapolis and St Paul) in *Metropolitix* (1998). He demonstrates how suburban development creates regional inequalities as suburbs proportionally garner a larger share of public funding and new employment than do urban areas.

<sup>13</sup> The Victoria Transport Policy Institute is committed to quantifying the cost of car subsidization and proposing economical alternatives. These publications are available online at [www.vtppi.org](http://www.vtppi.org) (last visited on November 13, 2001).

<sup>14</sup> See, for example, *Labour/Cnty Strategy Ctr. v. Los Angeles County MTA*, CV 94-5936 TJH (Mx) (C.D. Cal. 1994) Consent Decree, available at <http://www.environmentaldefense.org/programs/transportation/equity/decree.exe>. For a discussion of the case, see Kevin J. Klesh, *Urban Sprawl: Can the 'Transportation Equity' Movement and Federal Transportation Policy Help Break down Barriers to Regional Solutions?*, 7 *Envtl. Law.* 649 (2001) at 671-676.

### **1.3 PROTECTING THE ENVIRONMENT**

In addition to the ecosystem benefits of containing urban areas, smart growth includes protecting the environment at a neighborhood and site level. Local governments are increasingly integrating development into ecosystems by using ecological processes as part of the infrastructure network. This includes creating greenways to link parks and natural areas in habitat corridors and using the natural features of the land to shape the location and form of development. Local governments often require buildings to be clustered away from environmentally sensitive areas, and encourage the stewardship of private land. Clustering development can also create more affordable and diverse housing types.

### **1.4 DENSIFYING AND DIVERSIFYING HOUSING**

Densification and diversification of the housing stock foster affordable housing by increasing the supply of residential units and creating more options for owners and renters regarding the type of housing form and tenancy that is appropriate for a particular life circumstance. Housing densification also means that commercial, health and other services can be located closer to residences, thus decreasing transportation costs and pollution associated with automobile use.

The costs of servicing roads and automobile pollution are two of the largest problems associated with superstore development. Viewed through the smart growth lens set out above, big box retailers contribute to suburban sprawl by paving over large tracts of undeveloped land for a retail experience that draws shoppers outside of established urban commercial districts and to which access is only available by driving.

## **2. THE DEBATE ABOUT BIG BOX RETAIL: LESSONS FROM THE U.S. AND CANADA**

### **2.1 DEFINITION OF BIG BOX RETAIL<sup>15</sup>**

The term “big box retailers,” also known as “superstores,” “mega-retail discount chains,” and “value retailers” refers to large chain stores that typically locate at the suburban fringe near major highways and interchanges.<sup>16</sup> Their aim is to capture a large share of the region’s retail market for their products, and their transportation and economic impacts affect all local jurisdictions in a region. They have a one-story floor plan that spreads out over 90,000 to 220,000 square feet or more, and they require an even greater amount of land for parking.

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<sup>15</sup> The description in this section is a compilation of definitions by Constance E. Beaumont, *How Superstore Sprawl Can Harm Communities And What Citizens Can Do About It* (1994) at 4-5 and William E. Roper and Elizabeth Humstone, *Wal-Mart in Vermont – The Case Against Sprawl*, 22 *Vt. L. Rev.* 755 (1998) at 755.

<sup>16</sup> Most notably, these retail and wholesale chains include Wal-Mart, Home Depot, Costco. Some wholesale chains apply a low threshold for memberships and act more like retail big box chains. Traditional department stores such as the Bay, Sears, Macy’s and Nordstroms are not included in this category for the purposes of this paper as they originally integrated into downtowns and other already-existing commercial areas. Many small retailers extol the benefits of existing downtown department stores as they are the principal retailer in the urban core that attract shoppers to the area.

## **2.2 WHY COMMUNITIES LOVE SUPERSTORES**

The big box model offers one-stop convenient shopping for busy families. They provide a wide selection of goods at low prices, create jobs and furnish sales tax revenues for local governments. On their face, they generate significant benefits for consumers and the local economy.

However, neither market mechanisms nor the land use planning regime have adequately accounted for the negative externalities of big box retail.<sup>17</sup> This is largely due to the impact of their national and international operations as experienced at the local level. It is also because of the lack of credible information about their effects on communities.

## **2.3 PROBLEMS WITH BIG BOX RETAIL**

The problems with superstore development can be categorized as environmental harms, land use and transportation costs to customers and local governments, and weakened community economies and culture.

### **2.3.1 Environmental Degradation**

Some of the most endangered habitats and sensitive areas are located in urbanizing areas, as human settlement tends to occur in valley bottoms and along shorelines. Likewise, some of the most productive agricultural land is adjacent to urban areas. The big box retail formula results in store sites that are flat landscapes of almost 100 percent impermeable surfaces. All plant and animal habitats, hydrological flows and ecological processes are drastically altered. Big box growth also induces other commercial greenfield development in the area: one superstore could result in dozens of hectares of paved landscape.<sup>18</sup>

For example, in the past five years two big box retailers have constructed stores in the Municipality of Langford, a suburb of Victoria, British Columbia. Built on an endangered Garry Oak meadow (for which only 0.5% of the original habitat is protected),

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<sup>17</sup> Several authors argue that the problems with suburban sprawl and big box retail are most efficiently addressed through market mechanisms. See, for example, Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. Penn. L. Rev. 859 (2000); Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Anti-Sprawl Movement*, 14 Tul. Env't L.J. 171 (2000); Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 San Diego L. Rev. 693 (2001). These arguments fail to address the reality that the land use regime arose because of the negative externalities of industrial pollution in residential areas. The market never operates in its genuine form so that externalities can be adequately dealt with. While it is beyond the scope of this paper to rebut these arguments in detail, the complexities of federal subsidies for transportation and the incentives awarded to businesses by local and state governments undermine the purity of accounts relying on the market. A more fruitful analysis is to examine the specific effects of big box development on a number of communities and compare its benefits and costs.

<sup>18</sup> The induced effects attached to big box developments have been identified as impacts on transportation, new commercial development, and community economies, and are discussed in more detail below.

the Costco site totals 5.61 hectares. Adjacent to it, the Home Depot site resulted in the destruction of 4.22 hectares of forest.<sup>19</sup>

The greatest environmental impact of big box development is their design for automobile-dependent shopping far from existing commercial centers. Automobiles generate from forty to sixty percent of urban smog and eighty percent of carbon dioxide emissions.<sup>20</sup> In a typical urban setting, each car requires 4000 square feet of asphalt for parking and operation.<sup>21</sup>

### **2.3.2 Land Use and Transportation Costs**

Big box retail developments contribute to urban sprawl. They locate outside of urban commercial areas, often on greenfield sites or in older industrial areas, because of their size and parking needs. Located on the periphery, public transit and cycling are inefficient to these stores given their distance from residential areas. Most customers frequent the store using an automobile, and one 110,000 square foot big box store can generate 9710 vehicle trips per day.<sup>22</sup> Traffic, and thus air pollution, increases dramatically.

Suburban locations pose additional servicing costs for local governments that are often subsidized by existing taxpayers.<sup>23</sup> At the same time, big box stores attract more growth to the suburban location, thus exacerbating the induced impact or secondary development effects. New businesses create costs for roads, police and fire services, and water and sewer infrastructure.<sup>24</sup>

Finally, big box retailers create competition amongst local governments as they attempt to attract megastore business. Local governments often subsidize the construction of new roads and facilities for the retailers. For example, the City of Oxnard in California spent \$30 million in tax money on a parking garage to attract Costco away from Ventura, another local government in the region.<sup>25</sup> In the U.S., many local and state governments allow big box retailers to retain all sales taxes collected for a given number of years in order to help finance the construction and debt costs of the new facility.<sup>26</sup> A DuPage County, Illinois study found that the sales and property tax revenues generated from new Wal-Mart stores did not pay for the increased cost of roads, water and sewage, and other services to the suburban greenfield locations.<sup>27</sup> Taxpayers end up paying for

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<sup>19</sup> Information taken from the site-development file from the Municipality of Langford. On file with author.

<sup>20</sup> Beaumont, supra note 15 at 13, citing Conservation Law Foundation, *The Automobile Index*. Other environmental costs of automobiles include pollution caused by oil spills and fossil fuel processing and use, ozone-depleting chlorofluorocarbons, lead from batteries, tires, and other resources used in the manufacture and operation of vehicles..

<sup>21</sup> Beaumont, id at 3, citing David G. Burwell et al. National Wildlife Federation.

<sup>22</sup> Michelle Gregory, *Doing Business with Big Box Retailers*, *Zoning News* (October, 1993) at 1.

<sup>23</sup> A. Sorensen and J. Esseks, "Living on the Edge: The Costs and Risks of Scatter Development" (1999).

<sup>24</sup> Roper and Humstone, supra note 15 at 773.

<sup>25</sup> Aaron Glantz, California Governor Vetoes Bill Banning Superstores, 65 *Planning* (Oct, 1999) 22

<sup>26</sup> Edward B. Shils, "Measuring the Economic and Sociological Impact of the Mega-Retail Discount Chains on Small Enterprise in Urban, Suburban and Rural Communities" (1997).

<sup>27</sup> K. Mander and A. Boston, "Wal-Mart: Global Retailer" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) at 341. See also Fodor, supra note 3 and Beaumont, supra note 15.

the “benefit” of the retailer locating in their local jurisdiction, while all residents feel the impacts of the new store, particularly regarding increased traffic and declining central business districts.

### 2.3.3 Weakening Community Economies and Culture

The economics of big box stores affect the land use regime in a community by changing the demographics of, and employment within, the retail industry. In the past fifteen years, big box stores have glutted the market with retail space, shifted commercial activity from central business districts to the suburban fringe, and captured a large percentage of regional markets at the expense of smaller local businesses in the downtown core. The result is increased retail vacancies in the declining commercial core and fewer living wage jobs. Big box stores do not create new markets; they simply reallocate existing retail consumption from local businesses to national chains.

During the 1980’s, retail floor space in North America increased by 80 percent while the population increased by only 10 percent.<sup>28</sup> By 1990, retail vacancies in shopping centers stood at 12 percent in the U.S. and an additional 300 million square feet were constructed in that year.<sup>29</sup> Big box stores and the retail space glut displace existing businesses by capturing a large portion of the regional sales market. Kenneth Stone, Iowa State University economist, studied the effect of superstores on small towns in Iowa and found that of the \$20 million in sales generated by a new big box store, \$11 million of that was captured from existing merchants.<sup>30</sup> As retail sales shift to suburban big box stores and malls, a concomitant decline in central commercial activity and property values is experienced.<sup>31</sup> Constance Beaumont cites several studies that found declines in downtown retail sales and property values by up to 30 percent after the development of suburban shopping malls.<sup>32</sup>

The fiscal benefits of big box retailers are also very complex to calculate and are often lower than what is believed by local government decision-makers.<sup>33</sup> The value of big box retail jobs is less than jobs in smaller locally-owned businesses. Big box retailers

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<sup>28</sup> Ian F. Thomas, *Reinventing the Regional Mall*, *Urban Land* (February 1994).

<sup>29</sup> Beaumont, *supra* note 15 at 3, citing Goodman (1993).

<sup>30</sup> He found that the town’s total retail sales rose by only \$9 million which meant that \$11 million was lost by existing retailers. Executive Summary: *The Impact of Wal-Mart Stores on Other Businesses and Strategies for Co-Existing* (1993).

<sup>31</sup> Big box retailers use pricing competition to permanently change the flow of commercial in a region. Some retailers, such as Wal-Mart, uses tactics such as setting prices below cost, 2-for-1 deals, loss leaders and category killers to draw customers. They can afford to keep prices artificially low for as long as it takes the small scale competition to go out of business. Regional wholesalers are also disappearing as big box retailers purchase huge quantities directly from manufacturers and national wholesalers. These phenomena drastically change the economic diversity of a region and alter the type of retail opportunities available to residents and visitors. The claim of big box retailers to long-term low prices is questioned by both activists and academics. Big box retailers claim low prices because of their large buying power, efficient distribution systems and low labor costs. Others claim that retailers such as Wal-Mart display their 1500 lowest-priced items at the front of the store. Numerous small businesses have launched law suits alleging that Wal-Mart is selling merchandise below cost to drive them out of business. Mander and Boston, *supra* note 27 at 342; Beaumont, *supra* note 15 at 4.

<sup>32</sup> *Supra* note 15 at 8, citing studies of Hagerstown, Maryland and Plattsburgh, New York at notes 11 to 13.

<sup>33</sup> M. Boarnet and R. Crane, “The Impact of Big Box Grocers on Southern California: Jobs, Wages and Municipal Finance” (Orange County, California: Orange County Business Council, 1999).

set low wage and family health coverage standards for the entire industry.<sup>34</sup> Thirty to fifty percent of Wal-Mart employees are retained at half-time and cannot afford the retailer's health insurance, thus relying on government or spousal policies.<sup>35</sup>

Another way of examining the change in the regional economy is through total retail job numbers. Several studies have demonstrated that for every job created at a big box store, 1 to 2 existing jobs in the community are destroyed.<sup>36</sup> Likewise, a University of Massachusetts study found that income spent on a locally owned business had four to five times the economic impact as income spent at Wal-Mart.

Finally, evidence increasingly points to the loss of local leadership, charitable contributions and sense of civic identity as local retailers close.<sup>37</sup> Sprawl development precludes the informal social gatherings and community-building that occurs on the street as citizens shop in more pedestrian-friendly commercial areas.<sup>38</sup>

In summary, not all types of economic growth benefit communities. Big box stores change the economies and cultural practices of regions. While most local governments believe that big box retail brings widespread economic benefits to municipalities, many communities are challenging this belief in suburban big box development. Courts generally defer to local governments that restrain the composition of commercial uses if this goal is accomplished using valid land use regulations. However, some of the endemic problems of the land development regime pose challenges for citizens seeking to enforce community plans or goals.

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<sup>34</sup> *Ibid*; Shils, supra note 26, Chapter 1.

<sup>35</sup> Boarnet & Crane, supra note 33; Geoff Schumacher, Wal-Mart vs. Las Vegas, [www.alternet.org/PublicArchives/schumacher917](http://www.alternet.org/PublicArchives/schumacher917); <http://www.walmartwatch.com>; Mander & Boston, supra note 27 at 335-343.

<sup>36</sup> See Lake Placid, New York study cited by Shils, supra note 26 at note 13; <http://www.walmartwatch.com>; Mander & Boston, supra note 27. Thomas Muller and Elizabeth Humstone, studying the impacts of a proposed Wal-Mart on the Town of St. Albans, Vermont, estimated that 106 people were employed for every \$10 million in sales in local businesses whereas only 65 people were employed at Wal-Mart for the same amount in sales. Economic, Fiscal, and Land Use Impacts of Proposed Wal-Mart Store on Franklin County Communities (1994) at 28.

<sup>37</sup> Beaumont, supra note 15 at 12, citing newspaper articles and research on small towns.

<sup>38</sup> Ray Oldenburg has documented the decline of "third spaces," informal gathering places where neighbors meet to share stories and discuss politics. This decline is the result of suburban land development where few community spaces exist in homogenous residential areas. *The Great Good Place: Cafes, Coffee Shops, Bookstores, Bars, Hair Salons and Other Hangouts at the Heart of Community* (1999). Robert H. Freilich and Bruce G. Peshoff have also documented the social costs of sprawl. *The Social Costs of Sprawl*, 29 *Urb. Law.* 183 (1997).

### 3. THE JURISPRUDENCE OF BIG BOX RETAIL REGULATION<sup>39</sup>

In the United States, the states enable local government jurisdiction over land use planning and controls as part of their police power to ensure the general health, safety, welfare and morals of residents.<sup>40</sup> This is accomplished through zoning, the elements of which have been upheld as valid regulation of property. Uniform regulation does not prohibit reasonable use of property, and the compatibility of land uses ensured through zoning increase property values.<sup>41</sup> Likewise, courts have upheld growth management schemes that require congruence between the rate of development and availability of infrastructure and other services.<sup>42</sup>

Subsections 91(5), 91(13) and 92(8) of the Canadian Constitution Act award the provinces jurisdiction over “all matters of a merely local or private nature,” “property and civil rights in the province,” and “municipal institutions in the province.”<sup>43</sup> The provinces in turn define the powers of local governments via statute.

#### 3.1 STATE OR PROVINCIAL INITIATIVES

Most states and provinces defer to local governments for metropolitan land use decisions. However, a few states specifically address the negative externalities of large scale developments outside of urban areas through state-level regulations mandating

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<sup>39</sup> Descriptions of the general and widely applicable planning and zoning principles outlined in this section were gleaned from James A. Kushner, *Subdivision Law and Growth Management* (2<sup>nd</sup> Edition) (2001) and Nowlan, Rolfe & Grant, *supra* note 3. They are set out in a generic form as their specifics vary from jurisdiction to jurisdiction. Where a regulatory approach is unique to one jurisdiction, the regulation and references to it are specifically noted. All metropolitan regions in North America use zoning as the basis for land use, except Houston, Texas (Kushner at 1.26).

<sup>40</sup> The police power is retained by the states via the tenth amendment. U.S. Const. amend (X). States have the authority to determine the bounds of local government jurisdiction [*Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907)]. The system of allocating authority between state and local government is complicated by some state’s adhering to Dillon’s rule whereby state expressly confer local government powers through legislation, and other state’s following a home rule philosophy. Although important, these differences are not integral to this paper and are simply noted here. Kushner, *id.*, discusses them in detail at 1.30 to 1.42.

<sup>41</sup> For example, in *Village of Euclid, Ohio v. Ambler Realty Company*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926), the Supreme Court first endorsed municipal control of land use, and thus land use planning, through zoning without paying compensation to affected property owners. Courts have also upheld the aesthetic rationale for eminent domain [*Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954)], height restrictions [*Welch v. Swansey*, 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909)], uniform set-backs [*Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, 53 A.L.R. 1210 (1927)], subdivision exactions [*Ayers v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1, 11 A.L.R.2d 503 (1949)], and urban renewal [*Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed.2d 797, 6 Env’t. Rep. Cas. (BNA) 1417, 4 Env’t. L. Rep. 20302 (1974)].

<sup>42</sup> For example, courts have upheld annual building caps [*Construction Industry Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 8 Env’t. Rep. Cas. (BNA) 1001, 5 Env’t. L. Rep. 20519 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976)], temporary growth moratoria that were approved by the electorate [*Associated Home Builders etc. Inc. v. City of Livermore*, 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473, 7 Env’t. L. Rep. 20155, 92 A.L.R.3d 1038 (1976)], and timed sequential zoning where development was linked to the availability of capital facilities [*Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y. S.2d 138, 285 N.E.2d 291, 2 Env’t. L. Rep. 20296, 63 A.L.R.3d 1157 (1972)].

<sup>43</sup> *Constitution Act* (1867)

certain land use patterns or processes that enable state-level review or local government consideration of negative local effects. The most widely discussed of these regimes are those of Vermont and Oregon.<sup>44</sup> Vermont's Act 250 has the added distinction of enabling the Town of St. Albans to deny a development application by Wal-Mart on the grounds that it negatively impacted growth in the Town and imposed undue costs to the municipality due to the resulting scattered land use pattern. It is an important case because the Vermont regime allows local governments and appeal bodies to take into account the full range of impacts of new developments and rigorously weight their costs and benefits.

Vermont's growth management legislation, known as Act 250, enables an integrated system of state, regional and local plans, and provides for direct state-level review of large building projects.<sup>45</sup> Two key features of this regime are the ability of local governments to designate "growth areas" where new growth will be concentrated in a mixed-use land use pattern,<sup>46</sup> and review of projects, by District Environmental Commissions, based on legislative criteria with an appeal to the Environmental Board.<sup>47</sup>

Act 250 sets out criteria dealing with adverse community impacts that a developer must address before a District Environmental Commission will approve a permit for the development. These are technical, involving stormwater runoff and air pollution, fiscal, involving impacts on schools, existing businesses and municipal servicing, and subjective, addressing loss of agricultural land, aesthetics, and wildlife habitat.<sup>48</sup> In this context, the St. Albans Group and Wal-Mart applied for an Act 250 permit to build a 120,000-150,000 square foot store on agricultural land two miles outside of downtown St. Albans near an interstate interchange.

The District Environmental Commission issued a permit for the store that was promptly appealed on the grounds that the project did not meet the Act 250 criteria for "impact of growth" and costs of scattered development."<sup>49</sup> The Vermont Environmental Board reversed the Commission's determination and found that, while the Wal-Mart proposal complied with the historic and environmental criteria of Act 250, it failed to meet the criteria relating to public investment and infrastructure, schools, costs of scattered development, and impacts of growth.<sup>50</sup> Specifically, the Board ruled that the

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<sup>44</sup> The New York State Environmental Quality Review Act (ECL art. 8) has also been used by the Town of North Elba as part of its rationale for denying the development of a Wal-Mart store. See the discussion below of *In the Matter of Wal-Mart stores, Inc., et al v. Planning Board of the Town of North Elba*, 238 A.D.2d 93 (1998).

<sup>45</sup> Vt. Stat. Ann. Tit. 10, § 6086 (1997).

<sup>46</sup> Jessica Jay identifies four key elements of the growth center designation that lends it weight: clear definition of an area and the channeling of mixed-uses into the area, including residential, commercial, manufacturing, and recreation; public participation in the development of a long-term community plan for the development of the growth center; limitations on the development of farmland and wildlife habitat within growth centers, or in exchange for restricted development outside the growth center; and state funding priority for projects within growth centers. Jessica E. Jay, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 Vt. L. Rev. 929 (1997) at 953-954.

<sup>47</sup> Jay *id* at 948-954 and Roper & Humstone, *supra* note 15 at 756.

<sup>48</sup> Roper & Humstone, *id* at 756.

<sup>49</sup> The permit was appealed by the Vermont Natural Resources Council and the Citizens for Downtown Preservation. Roper & Humstone, *id* at 757.

<sup>50</sup> *St. Albans Group and Wal-Mart Stores, Inc.*, No. 6F0471-EB, 1995 WL 404828 (Vt. Env. Bd. June 27, 1995).

public cost of the store would outweigh the public benefit 2.5 to 1, and that it would lead to scattered development as it was not contiguous with an existing settlement. The Board's concern about impacts on existing businesses related to the fiscal health of the municipality: if businesses closed, the tax base of, and thus ability to provide servicing for the local community would decline.<sup>51</sup>

Wal-Mart and the Town of St. Albans appealed the Board's decision, and the Supreme Court of Vermont sustained the permit denial.<sup>52</sup> The Court found that "growth" within the meaning of Act 250 included both population and economic growth, and validated the Board's consideration of the secondary impacts on the local economy as relevant to several statutory criteria employed in an Act 250 analysis.<sup>53</sup> The project's impact on market competition was relevant when considering the financial capacity of the town and region to accommodate growth, provide educational services, and provide municipal or government services. The Court sustained the Environmental Board's broad analysis of potential impacts of the big box store under the Vermont regime, including loss of employment from businesses in existing commercial centers. It endorsed the consideration of 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.

Under the Vermont regime, it is of note that the Board ruled that the proposed big box store met the environmental criteria of Act 250. This part of the decision has attracted the criticism that the Act primarily fosters economic protectionism and not ecological integrity.<sup>54</sup> However, by virtue of promoting development in existing commercial centers as its main focus, the Vermont regime allows the limitation of sprawl development and preserves resources lands and habitat in that way.<sup>55</sup>

A more direct example of a state initiative to limit big box development is a 1999 bill introduced in California to prevent local governments from issuing permits for stores of 100,000 square feet or larger in which at least 15,000 square feet are used for food and drugs. The purpose was to prevent superstores from opening new stores that include supermarkets. The bill was supported by the United Food and Commercial Workers

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<sup>51</sup> Roper & Humstone, *supra* note 15 at 786, citing *Waterbury Shopping Village*, 1991 WL 177078.

<sup>52</sup> *In re Wal-Mart Stores, Inc., and the St. Albans Group*, 167 Vt. 75, 702 A.2d 397.

<sup>53</sup> *Id.* at 80-83 and 85.

<sup>54</sup> "Thus, the Board found that the St. Albans Wal-Mart project complied with all of the ecologically-related criteria under which review was conducted. This finding supports the conclusion that the construction of the "Vermont barrier" is justified by protectionist concerns for the local economy rather than ecologically-grounded concerns for the environment." Michael A. Schneider, *The Vermont Barrier: How Economic Protectionism Kept Wal-Mart Stores, Inc. out of St. Albans, Vermont*, 20 *Nova L. Rev.* 919 (1996) at 937.

<sup>55</sup> This case is particularly interesting because it goes against the general principle that land use controls, as operationalized through zoning, do not include control of competition. This point is discussed further below. Sherry K. Dreisewerd, *Staving off the Pillage of the Village: does In Re Wal-Mart Stores, Inc. Offer hope to Small Merchants Struggling for Economic Survival Against Box Retailers?*, 54 *Wash. U. J. Urb. & Contemp. L.* 323 at 340, citing Madelkar. Kushner, *supra* note 39 at 3-230 to 3-340.

Union, on the premise that big box retailers are adversely affecting traditional supermarkets in urban centers.<sup>56</sup> The bill was passed by the legislature but vetoed by the Governor.<sup>57</sup>

### 3.2 COMMUNITY PLANS AND ZONING<sup>58</sup>

Big box development is more commonly regulated through community plans and zoning. Community plans are vision and policy statements about the long-term development of a municipality. Community plans are primarily implemented through zoning regulations and, increasingly, zoning bylaws must conform to community plans. Community plan goals may be relied upon as the basis for approving or denying rezoning and subdivision applications.<sup>59</sup> However, the goals must be explicit enough to support municipal decisions relating to a specific development application.

The zoning regime was developed in recognition that the market does not account for all of the negative externalities it produces. Historically, the proximate siting of polluting industrial and residential uses was undesirable, and zoning addressed that problem. The use of zoning to confront superstore development is particularly relevant in this context because one of the principle strategies of big box developers is to offload as many costs onto the community as possible.<sup>60</sup>

Zoning bylaws and ordinances delineate areas within a municipality for different land uses and densities of development. They describe the location and size of uses and structures on a parcel, and also regulate the size, usually minimum, of parcels in a zone. The purpose of zoning is to provide for orderly development and compatible uses in the

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<sup>56</sup> The United Food and Commercial Workers Union is increasingly concerned with big box expansion into the grocery business and are another sector that is challenging superstore impacts. See, for example Schumacher, *supra* note 27.

<sup>57</sup> Glantz, *supra* note 25.

<sup>58</sup> The regulation of the subdivision of land is an equally applicable tool for regulating big box development. Like zoning, subdivision regulation establishes standards for the design and layout of streets, infrastructure and other development factors. However, because it is often combined with zoning requirements and is similar in scope, subdivision will not be addressed in this paper.

<sup>59</sup> For example, in *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, Kansas* 927 F.2d 1111, the United States Court of Appeal, Tenth Circuit upheld a City planning commission decision denying a rezoning application for a suburban shopping mall. Pursuant to the City's comprehensive development plan, as amended by a downtown plan supporting the central business district as the only retail center in the region and a reduction in competition for that business district, the City planning commission concluded that the rezoning would have a negative effect on the downtown retail area. In denying an equal protection claim by the developer alleging unfair treatment of two similarly situated persons, downtown and suburban developers, the Court of Appeal endorsed the comprehensive community plan goals of retaining the vitality of the downtown area. The Court noted that "declining to rezone the property in a manner that would threaten the vitality of the downtown retail area is rationally related to that purpose" (at 1119). Likewise, in *Willoughby v. Planning Board of Township of Deptford*, 326 N.J.Super. 158, 740 A.2d 1097, the Superior Court of New Jersey, Appellate Division ruled that an amendment to a zoning ordinance changing the zoning from office campus to town center and thus enabling the development of a shopping center was not substantially consistent with the Township's master plan (at 163). The Township Board had specifically adopted the office campus zoning in the master plan to protect residential development across the street. The court remanded the case to the municipality for correct procedural requirements.

<sup>60</sup> Beaumont, *supra* note 15 at 8.

same area. Zoning ordinances must set out specific standards, such as allowable sizes and types of uses, to provide guidance for decision-makers.<sup>61</sup>

Local government discretion in establishing community goals and zoning regulations is very broad. Courts are usually deferent to municipal decisions, and a strong presumption that zoning ordinances are valid exists. However, zoning restrictions cannot deprive an owner of all economically viable use of a property, and must advance a legitimate governmental interest relating to public health, safety or general welfare.<sup>62</sup> Likewise, local governments generally cannot rezone a specific piece of land or change permit requirements retroactively after an application for a big box store has been submitted for consideration by staff and council.<sup>63</sup>

Local governments cannot outright prohibit a specific tenant, through exclusionary or prohibitive zoning, simply because it competes with existing businesses or is undesirable in the community.<sup>64</sup> However, in furtherance of community goals to

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<sup>61</sup> For example, in *Indian Trail Property Owner's Association v. City of Spokane*, 76 Wash.App. 430, 886 P.2d 209, a citizen's group challenged the expansion of a shopping center as contrary to the applicable zoning ordinance. The Court of Appeals of Washington ruled that the zoning requirement that the size and character of stores in the zone at issue not detract from the neighborhood was not specific enough to determine whether a proposed use was permitted (at 438-9). These general requirements must be construed in conjunction with other, more specific zoning standards.

<sup>62</sup> These principles are well described in Fifth Amendment takings cases. Most notably, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 env't. L. Rep. 21104 (1992), on remand to, 309 S.C. 424, 424 S.E.2d 484, 23 Env't. L. Rep. 20297; *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Env't. L. Rep. 21083 (1994), on remand to, 319 Or. 567, 877 P.2d 1201; and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env't. L. Rep. 20918. Cases relating to big box development include *Northbrook Trust & Savings v. County of Cook*, 47 Ill.App.3d 879, 365 N.E.2d 433, 8 Ill.Dec. 195 (Appellate Court of Illinois, 1977).

<sup>63</sup> In *Hause v. City of Tucson and Wal-Mart Stores*, 199 Ariz. 499, 19 P.3d 640, the Arizona Court of Appeal addressed the validity of building permits issued shortly after the City enacted an ordinance limiting big box stores. The Court held that the permits were valid under prior law because the ordinance did not come into effect until thirty days after a public notice period had expired. Conversely, in *In re Appeal of Taft Corners Associates, Inc.*, 758 A.2d 804 (2000), zoning permit requirements of the Town of Williston, Vermont, was challenged by the owners of the 223 acre Taft Corners Commercial Park. The developers obtained subdivision permits and built over 460,000 square feet of retail space for big box stores. Because of opposition from citizens over the huge impact of this retail development, the Town amended its zoning ordinance and made retail uses in the Commercial Park conditional uses for which a permit was required. The Town selectboard then denied two retail permit applications. The developers argued that they had a vested right to zoning permits under the old zoning ordinance under which they received their subdivision permits. The Supreme Court of Vermont ruled that the holder of a subdivision permit does not have a vested right to zoning permits under the zoning regime in place at the time of receiving the subdivision permits. The zoning permits were applied for after the regulatory change (at 808). The court found that the millions of dollars the developer had invested was irrelevant to its decision.

It appears that the general rule that regulations cannot be changed in response to a pending application is inapplicable in New Jersey where a municipality may change its zoning ordinance in direct response to a particular application. In the big box context, see *Manalpan Realty, L.P. v. Township Committee of Township of Manalpan*, 140 N.J. 366, 658 A.2d 1230 (Supreme Court of New Jersey, 1995).

<sup>64</sup> In *Friends of Davis v. City of Davis*, 83 Cal.App.4th 1004, 100 Cal.Rptr.2d 413 (2000), a citizen's group challenged the approval of a big box development on the grounds that the City should have used its design review ordinance to exclude the retail chain store from the development area. The California Court of Appeal, Third District held that while a city has broad authority over land use regulation, it cannot arbitrarily exclude one tenant over others that would have a similar use (at 420).

preserve existing commercial centers, promote pedestrian-friendly businesses, and preserve the architectural, environmental and unique features of a community, municipalities do prohibit or limit big box expansion. For example, a township's limit on the size of commercial uses was found not to be a *de facto* exclusion of big box stores: smaller versions of the same land use, such as hardware stores, were allowed in the community.<sup>65</sup> The size limitation simply conflicted with the particular business model of superstores and was not directed at a particular user. A local government is not required to zone for every business model.

In general, zoning does not include the ability to limit competition. However, municipalities acting congruently with state policy enjoy some state action immunity from antitrust claims. If a court can find a legitimate legislative basis for a zoning decision, it can uphold that decision even if it limits competition.<sup>66</sup> This is the approach taken in many jurisdictions to limit sprawl and revitalize downtown cores. Local governments adopt zones or zoning districts comprising parcels of land outside the commercial core that prohibit commercial and wholesale developments. The legitimate governmental objective is to revitalize the central business district and is accomplished through restricting retail sales in the rest of the municipality.<sup>67</sup>

### **3.3 DEVELOPMENT PERMITS**

Developers must obtain various permits from their municipality as part of zoning and subdivision regulation. They generally submit a development plan that is approved, approved with amendments, or denied by a planning board or municipal council upon recommendation of planning staff. Staff review the proposed development to ensure compliance with zoning regulations and community plan goals. This process is very subjective, and the regulations and process by which proposal are reviewed have been heavily criticized as lacking measurable standards that promote consistency and smart growth.

However, development permitting can be used to prevent retail sprawl and tailor retail to uses that enhance community values. For example, the Town of North Elba in

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<sup>65</sup> *Montgomery Crossing Associates v. Township of Lower Gwynedd*, 758 A.2d 285 (at 289).

<sup>66</sup> The case of *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, Kansas*, supra note 59, involved an appeal by developers alleging civil rights and antitrust violations by the city when their rezoning application was denied. The U.S. Court of Appeals, Tenth Circuit ruled that the denial of the rezoning application was shielded from antitrust claims by state action immunity doctrine because the city planning commission's action furthered the legitimate purpose of protecting the vitality of the downtown business district (at 1120-1121). The developers wanted to build a suburban shopping mall, contrary to City preference in the community plan for redevelopment within the City core. The Court of Appeal found that urban renewal statutes often accord state action immunity on municipalities (at 1121).

<sup>67</sup> In *Forte v. Borough of Tenafly* 255 A.2d 804, the New Jersey Superior Court, Appellate Division, found that a zoning amendment that created a new zoning district in which no commercial and wholesale development that detracted from business activity in the central business district was permitted was a legitimate restriction aimed at revitalizing the central business area. The virtual monopoly conferred on the central business area did not invalidate the ordinance (as discussed in *Dreisewerd*, supra note 34 at 341-342).

the Lake Placid resort region of New York state denied a conditional use permit and site plan approval for a Wal-Mart store after a five year environmental review process.<sup>68</sup> The court upheld the Planning Board decision, noting that the Board could consider any factors within its sphere of jurisdiction. In this case, the Board relied on both the State Environmental Quality Act and the Town Land Use Code, and found that the permit did not meet specific development permit requirements as well as general development considerations pertaining to the natural, physical, social and economic resources of the Town.<sup>69</sup> The court also noted that the mandate of the Planning Board is to review the project in its entirety, and the Board's conclusions were well substantiated by the record of evidence and not based upon public sentiment or community pressure.<sup>70</sup> Just because the record could have supported a development permit approval, "...that, without more, is not enough to satisfy petitioners' burden of proving that respondent's determination is unreasonable."<sup>71</sup>

### 3.4 PROCEDURAL CHALLENGES TO BY-LAWS OR ORDINANCES

Challenges to the validity of local government procedures in adopting ordinances or bylaws can reveal improper practices. If legislated procedures have not been followed, courts will generally compel the local government to act, or will void an action or ordinance. For example, the Supreme Court of Ohio compelled the City of Avon to place a proposed amendment to the City Charter on the ballot for an upcoming election after the City received the requisite number of signatures within the appropriate time.<sup>72</sup> If passed, the amendment would have required voter approval of all commercial rezonings for superstores and shopping centers.

Bylaws and ordinances are often challenged on the basis of inadequate public notice of proposed developments, as required by provincial or state law. Courts will void local government decisions where notice does not clearly state the nature of the matters to be considered, including the type of use.<sup>73</sup>

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<sup>68</sup> *In the Matter of Wal-Mart Stores, Inc., et al v. Planning Board of the Town of North Elba*, 238 A.D.2d 93 (S.C. Appellate Division, 1998).

<sup>69</sup> The board found that the Wal-Mart plan did not meet the specific development permit requirements that the proposal would not "have a materially adverse impact upon adjoining and nearby properties" and "result in a clearly adverse aesthetic impact." (id at 97). It also referred to the adverse economic impact the proposed store would have on local businesses as a factor in determining the overall effect on the character of the community, specifically as a result of increased vacancies of commercial properties in the central business district (id at 98).

<sup>70</sup> A significant portion of the case addressed the Board's finding that the store would negatively impact on the aesthetics of the area. The court discussed several aspects of the Town's planning regime designed to protect the resort and rustic nature of the Town that strengthened its reliance on this aesthetic reasoning. Part of the Wal-Mart property was within a "Scenic Preservation Overlay," zoning superimposed on existing uses to protect scenic views (id at 98-99).

<sup>71</sup> Id at 97.

<sup>72</sup> *State Committee for the Charter Amendment Petition v. City of Avon*, 81 Ohio St.3d 590, 693 N.E.2d 205 (1998).

<sup>73</sup> For example, in *Perlmart of Lacey, Inc. v. Lacey Township Planning Board*, 295 N.J. Super. 234, 684 A.2d 1005 (1996), the Superior Court of New Jersey, Appellate Division ruled that public notice of hearings for an application was deficient because it did not specify that the proposed development was a conditional use shopping center (at 241). Likewise, in *Davis v. Board of Commissioners of the City of Danville*, 995 S.W.2d 404, the Court of Appeals of Kentucky found that plans showing topographical lines

### 3.5 PROBLEMS ENDEMIC TO THE LAND USE PLANNING REGIME

The strengths of the land use planning regime are also its greatest weaknesses. The deference states and provinces accord local governments means there are few substantive standards that can be applied on an ecosystem-based or regional level to promote smart growth consistently. Community plan and zoning requirements are often very general, can be interpreted in a number of ways, and do not provide sufficient guidance to decision-makers.<sup>74</sup> Local governments are largely independent to create their own goals, and the implementation of those goals is inherently political in nature. Community plans and zoning ordinances are easily amended, which accords local governments flexibility in responding to changing circumstances, but which also results in piecemeal development that may not accord with the overall goals of the municipality.

For example, in *Hovenden v. City of Gallatin and Wal-Mart Stores, Inc.*, the Tennessee Court of Appeals interpreted a fundamental change in a planned unit development as an administrative function of the local government planning commission. The court held that when the City zoned the area “Multiple Residential Office-Planned Unit Development” and approved the “Final Master Plan” for the development, any amendments to the “Final Master Plan” were administrative as long as they complied with the zoning ordinance. The amendment in this case was to remove the wording “to exclude major department or discount stores and gasoline stations specifically,” thus enabling Wal-Mart to open.

What the court interpreted as an administrative amendment was in fact an amendment to a crucial aspect of the planned unit development as a whole. The severance of that parameter of the development limiting big box stores fundamentally changed the substance of the on the ground result through an administrative process, without consideration of broader community impacts, and without citizen input. As is the situation with many zoning ordinances and community plan provisions that have laudable goals, the purpose of the zoning ordinance in *Hovenden* was very general and contained no objective criteria.<sup>75</sup> It provided the kind of flexibility needed to achieve smart growth goals, but provided no direction as to how to achieve such goals.

Finally, citizens may not have legal standing to challenge local government decisions. Standing rules differ significantly between jurisdictions and many courts are unwilling to entertain suits initiated by those who have regional or broader neighborhood concerns. For example, in *Blanchard v. Show Low Planning and Zoning Commission*, the Court of Appeals of Arizona ruled that some nearby property owners did not have taxpayer standing to challenge a big box rezoning because their land was not close

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and an entrance to the property from a highway bypass was not a conceptual development plan as required for all changes in zoning. The plan must include existing or proposed buildings, uses, pedestrian and vehicle routes, and drainage (at 406).

<sup>74</sup> See, for example, *Indian Trail Property Owner's Association v. City of Spokane*, supra note 61.

<sup>75</sup> The intent and purposes of the Planned Unit Development section of the zoning ordinance are (a) to promote flexibility in design and permit planned diversification in the location of structures; (b) to promote the efficient use of land in order to facilitate a more economic arrangement of buildings, circulation system, land use, and utilities; to preserve to the greatest extent possible the existing landscape features and amenities and to utilize such features in a harmonious fashion; (d) to encourage the total planning of tracts of land consistent with long-range plans.

enough to the parcel at issue, and they did not show particularized harm to their property.<sup>76</sup>

The legal regime for regulating big box development described above allows local governments to tailor growth to fit community goals. In most jurisdictions, local government supports superstore development outside of existing areas of business and citizens do not have specific regulatory tools with which to challenge that support. However, for an increasing number of towns and cities the flexibility in the land use regime allows them to apply smart growth goals to the regulation of commercial development. The solutions are home grown and reflect the values and culture of the communities in which they are developed.

#### **4. STRATEGIES FOR ADDRESSING THE NEGATIVE EFFECTS OF SUPERSTORES**

Contrary to popular belief, local governments have wide discretion in land use regulation and can use a number of tools to mitigate the adverse impacts of big box development. The strategies outlined below can be used individually or combined together to create a comprehensive zoning or review process that deals with the community, environmental, fiscal and municipal impacts of superstore development. The choices about which strategies to employ depend on the state or provincial enabling legislation empowering local governments, and also on local political will. In general, local governments have more discretionary power to regulate than they use, and it is at the behest of concerned citizens that comprehensive regulation is established.

##### **4.1 STATE OR PROVINCIAL LAWS ADDRESSING MEGA RETAIL STORES**

As was seen with the proposed California legislation cited above, states and provinces are reluctant to infringe on local autonomy over planning and zoning. Aside from general state-level environmental requirements,<sup>77</sup> only a few state laws directly impact big box stores. As discussed above, Vermont's Act 250 provides rigorous review of large-scale developments to protect the village atmosphere of the state. Another example is Wisconsin's prohibition on municipal use of industrial development revenue bonds to attract businesses from other areas within the state.<sup>78</sup> Local governments cannot issue these bonds to businesses if it will result in job losses in the state unless it meets several mitigation requirements.

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<sup>76</sup> *Blanchard v. Show Low Planning and Zoning Commission*, 196 Ariz. 114, 993 P.2d 1087 (Court of Appeals of Arizona, 1999) at 118. See also *Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C.App. 272, 545 S.E. 2d 768 (Court of Appeals of North Carolina, 2001).

<sup>77</sup> These regimes can be used effectively to limit big box development. However, by reviewing the cases dealing with permitting or zoning for superstores I found that local governments generally deny development on a number of grounds and rarely rely on one finding only. It also appears that local governments rely more strongly on impacts to community economies and municipal infrastructure costs.

<sup>78</sup> Chapter 66, General Municipal Law, Subchapter XI Development (adding Section 66.1103 Industrial Development Revenue Bonding, 1993).

## 4.2 STATE OR PROVINCIAL MINIMUM STANDARDS FOR LOCAL PLANS

A strong state or provincial regime that mandates the consideration of extralocal effects, including secondary fiscal impacts, is an invaluable tool for communities that oppose the development of big box stores on the urban fringe. The statewide regimes in Vermont and Oregon establish a framework where development is channeled into areas of urban containment and local governments may take into account a broad range of quality of life indices when weighing the benefits of new superstore applications.<sup>79</sup> As was demonstrated above in the *In re Wal-Mart Stores Inc.* case, courts will generally defer to decisions of local governments and administrative bodies absent unreasonable findings of fact or an error of law.<sup>80</sup>

One of the strongest anti-sprawl tools is the creation and enforcement of urban containment boundaries (UCBs). Oregon,<sup>81</sup> Washington, Minnesota,<sup>82</sup> and Tennessee,<sup>83</sup> all enable the creation of UCBs. Oregon and Washington mandate their delineation as part of statewide community plan development. The District of Saanich, British Columbia has had a UCB in place for more than thirty years, resulting in the protection of agricultural land and densification of residential areas.<sup>84</sup> The UCB is implemented by limiting sewer and other infrastructure extensions. Finally, the state of Delaware requires that local plan goals be specifically linked to zoning requirements.<sup>85</sup>

## 4.3 LAND USE APPEAL BOARDS

State- or province-wide land use appeal boards are administrative tribunals that hear disputes about local government decisions. Because they are less formal and less expensive than court processes, they are more accessible to the public. A greater number of land use decisions are appealed to land use tribunals than in jurisdictions where courts as the entity of first appeal.<sup>86</sup> The most notable administrative appeal bodies are the Land Use Board of Appeals in Oregon, the Environmental Review Board in Vermont, and the Ontario Municipal Board. The administrative tribunals in Oregon and Vermont are

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<sup>79</sup> Other states with state-mandated planning and growth management requirements include Maine, Maryland, Rhode Island, New Jersey, Florida, Georgia, Hawaii, and Washington. Beaumont, *supra* note 15 at 26.

<sup>80</sup> Courts will inquire whether the local government or agency acted in an arbitrary or capricious manner, or whether the decision was otherwise not in conformity with the law. Most courts will not substitute their judgment for that of the local government or agency, but may send the issue back to that body for reconsideration. When the decision depends on weighing evidence between planning experts, the court will typically defer to the decision-makers. Kushner, *supra* note 39 at 8-189 to 8-211.

<sup>81</sup> *Id* at 26.

<sup>82</sup> Called the Urban Growth Reservoir and enacted in 1997. Patricia Salkin, *Smart Growth at Century's End: The State of the States*, 31 *The Urban Lawyer* 601 (1999) at 620.

<sup>83</sup> Pub. Ch. 1101 (Tenn. 1998); S. 3278/H.R. 3295.

<sup>84</sup> Curran and Leung, *supra* note 3 at 25.

<sup>85</sup> H.R. 396, 139th Leg. (Del. 1998).

<sup>86</sup> For example, see the plethora of litigation initiated by citizens and the non-governmental organization 1000 Friends of Oregon to the Land Use Board of Appeals in Oregon. One example dealing with a zoning amendment that allowed the development of a Wal-Mart store is *Melton v. City of Cottage Grove*, 131 Or. App. 626, 887 P.2d 359 (1994) (appealed from LUBA Nos. 94-055; 94-061; CA A85730).

bolstered by strong state legislation that allows for the consideration of a broad range of environmental and community impacts in land use decisions.

#### **4.4 STATE OR PROVINCIAL ZONING**

While states and provinces generally defer to local governments on land use planning, some higher zoning acts as *de facto* urban containment boundaries and constrains how local governments may exercise suburban development powers. The unique Agricultural Land Reserve system in British Columbia is a large-scale example of province-wide zoning applied to all agricultural land pursuant to legislation passed in 1973.<sup>87</sup> Comprising five percent of the landbase of the province, any change of use or exclusion of that land from the agricultural zone must be approved by the Land Reserve Commission. This province-wide designation has slowed the rate of conversion of agricultural land to urban uses from 6000 to 300 hectares per year.<sup>88</sup> National and state park and forest designations near municipalities can also be viewed as a type of zoning.

#### **4.5 STATE OR PROVINCIAL REQUIREMENTS THAT FUNDING BE CHanneled INTO EXISTING COMMUNITIES AND URBAN GROWTH AREAS**

Using a more deferential approach to local government planning authority, some states influence local growth management to curb sprawl by tying funding to urban densification. For example, the state of Maryland provides funding under its Area Priority Funding initiative to projects in existing communities, downtown cores, existing industrial areas and planned growth areas.<sup>89</sup> In support of Priority Funding Areas, Maryland passed the Job Creation Tax Credit Act to provide business owners with income tax credits if they create at least 25 jobs in a PFA.<sup>90</sup> The State of Maryland has vetoed funding for five highway projects that were contrary to the new Smart Growth Act.<sup>91</sup>

#### **4.6 REGIONAL COORDINATION AND TAX SHARING (BENEFITS AND COSTS)**

Many of the impacts of big box stores are regional in scope. Because of the scale of the market share superstores aim to capture, they draw business from many local government jurisdictions in a region. Regional impacts include changes in transportation patterns, air pollution, and existing community businesses. California legislators, concluding that subsidies for big box retailers resulted in the loss of public funds for public purposes, passed a law to discourage retailers from creating competition between local governments in the same market area for sales tax revenues.<sup>92</sup> A redevelopment agency, city or county may not provide financial assistance to a big box store larger than 75,000 square feet relocating from one community to another in the same market area

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<sup>87</sup> *Agricultural Land Commission Act*, S.B.C. 1999, c.70.

<sup>88</sup> [www.landcommission.gov.bc.ca](http://www.landcommission.gov.bc.ca) (last visited December 26, 2001).

<sup>89</sup> Md. Ann. Code, State Fin. & Proc. § 5-7B-01 (1997).

<sup>90</sup> Md. Ann. Code, art. 83A, §5-1101 (1997).

<sup>91</sup> Salkin, *supra* note 82 at 618.

<sup>92</sup> The bill, 1999 AB 178 (Torlakson) was passed by the legislature nearly unanimously. Glantz, *supra* note 25. This bill is in effect until January 1, 2005 at which time its implementation will be reviewed.

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. The Cape Cod Commission encompasses all of Barnstable County, and was established in 1990 to protect the unique natural and community features of Cape Cod, including the local economy.<sup>93</sup> The Commission prepared a regional land use plan, and regulates any proposed development of regional impact. This includes the review of any new development over 10,000 square feet and changes of commercial use over 40,000 square feet. Using the regional land use plan and large scale review process, the Commission has denied development permits for several big box retailers, including Wal-Mart, Sam's Club, Costco and Home Depot.<sup>94</sup>

#### **4.7 COMPREHENSIVE COMMUNITY PLANS**

Detailed community plans that strongly support development in existing commercial and residential areas, protect environmental values, and promote local economies provide a solid platform on which local governments can rest land use decisions. The Easton, Maryland Town Council imposed a ninety day moratorium on big box store development in September 1999 after receiving applications in excess of 500,000 square feet. This amount of retail development was significantly in excess of what the Town's 1997 comprehensive plan addressed. The Town Council and citizens took the time to evaluate the impact of this new retail development, and the Planning and Zoning Commission concluded that:

Easton is a unique small town which derives its identity, in considerable part, from its historic Downtown area and the residential neighborhoods which are in easy walking distance of the Downtown. Future development, both commercial and residential, should be designed to emulate this pattern of development to strengthen Easton's atmosphere and identity. "Cookie cutter" corporate designs and color schemes do not necessarily fulfill these goals...As big box retail stores increase in size, negative land use impacts increase also [and] ...it becomes increasingly difficult to maintain compatibility of appearance and scale with the Town's small town atmosphere. Thus, once a big box store exceeds 65,000 square feet...it is of such scale that its negative impacts outweigh its positive ones and as such has no place in Easton for the remaining plan period.<sup>95</sup>

As a result of the findings and recommendations in this report, the Council enacted an ordinance amending the community plan and zoning ordinance to prohibit big box

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<sup>93</sup> [www.capecodcommission.org/act.htm](http://www.capecodcommission.org/act.htm)

<sup>94</sup> [www.newrules.org/retail/capecod/](http://www.newrules.org/retail/capecod/) (last visited December 26, 2001). Other examples of regional coordination include the elected Metropolitan Council in Portland, Oregon. The Twin Cities region of Minneapolis and St. Paul, Minnesota, is the only region in the U.S. where some sharing of tax base revenues attempts to equalize the disparate regional impacts of development. Orfield, *supra* note 12.

<sup>95</sup> Easton Planning and Zoning Commission, Report to the Easton Town Council Regarding Big Box Retailing Issues (December 1, 1999) (on file with author).

stores.<sup>96</sup> The Council also amended the zoning ordinance to bar the Administration Board of Appeals from granting variances in contravention of the big box limitation.<sup>97</sup>

The City of Solvang, California also amended its Municipal Code to prohibit formula businesses in accordance with the Land Use Element of the City's General Plan.<sup>98</sup> The key issue affecting the City's development was the maintenance of its image as a village in an agricultural and open space setting with a distinct Northern European character and orientation to tourism. The City Council concluded that in order to preserve the distinct village features of Solvang, resting on small individual shops and restaurants, the number of formula businesses could not expand.

## **4.8 ZONING AND OTHER BYLAWS OR ORDINANCES**

Many states and local governments are moving away from traditional single-use zoning in favor of more flexible zoning powers a number of uses are accommodated within the same zone.<sup>99</sup> Local governments are also creating more detailed and rigorous zoning requirements to preserve local character and commerce.

### **4.8.1 Retail Store Size Limitations**

The most popular method for local governments to regulate big box stores is to enact zoning controls that limit the size of new retail stores.<sup>100</sup> For example, the Town of North Elba enacted zoning regulations limiting the maximum square footage of retail stores, after their denial of a development permit for a Wal-Mart store was upheld by the New York Court of Appeal. Retail stores are limited to 40,000 square feet and shopping centers to 68,000 square feet.<sup>101</sup> The North Elba approach, the creation of a blanket regulation that affects all zoning in the Town, is used by many municipalities.<sup>102</sup>

Other local governments restrict retail store sizes in a specific zone or geographic area. Some of the oldest are the retail development restrictions in San Francisco,

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<sup>96</sup> Ordinance No. 399 (2000). The ordinance prohibits retail stores larger than 65,000, and any store larger than 25,000 square feet must obtain a permit from the Council. [www.town-eastonmd.com/Moratorium/Moratorium.htm](http://www.town-eastonmd.com/Moratorium/Moratorium.htm) (last visited December 26, 2001).

<sup>97</sup> Easton Zoning Ordinance (Chapter 28 of the Easton Town Code), amended by the addition of Section 803~.C(10) (March 2000).

<sup>98</sup> Ordinance No. 95-151. Formula businesses are discussed below.

<sup>99</sup> Salkin, *supra* note 82 at 601.

<sup>100</sup> This approach has withstood constitutional challenges in a number of jurisdictions. In *Loreto Development Company, Inc. v. Village of Chardon*, 119 Ohio App.3d 524, 695 N.E.2d 1151, the Court of Appeals of Ohio ruled that the zoning restriction limiting retail store size to 10,000 square feet to preserve the residential, small-town character of an area of town advanced a legitimate governmental interest and that the developer had failed to prove otherwise (at 529). The court also found that the zoning restriction did not deprive the developer of all economically viable use of the property (at 528). The Village conceded that limiting the number of employees in a local retail business does not advance a legitimate governmental interest.

<sup>101</sup> Enacted in February, 1998, the relevant portion of the Town Land Use Code Amendment ordinance is section 12, set out at [www.newrules.org/retail/northelba](http://www.newrules.org/retail/northelba) (last visited December 26, 2001).

<sup>102</sup> Many other examples of blanket retail store caps exist. For example, residents of the Town of Boxborough, Massachusetts passed a size cap limiting new retail development to 25,000 square feet by a two-thirds majority. Action taken on Article 6 at the Special Town Meeting held on March 27, 2000 (as reported in full at [www.newrules.org/retail/Boxborough](http://www.newrules.org/retail/Boxborough) - last visited December 26, 2001).

specifically in the North Beach area. In response to local concern about the rapid change in the character of the North Beach area, world renowned for its historic small-scale establishments and as a tourist destination, the City and County amended the North Beach zoning of the San Francisco Municipal Code in 1987. The amendments limited non-residential uses to a 4000 square foot maximum, with any change of use for an establishment over 2000 square feet requiring a conditional use permit.<sup>103</sup> In addition, the Council reduced the period of abandonment for conditional and nonconforming uses from three years to eighteen months, after which time the right to the use would be invalid.

More recently, the Kansas City, Missouri City Council passed detailed retail restrictions for the Brookside neighborhood specifically addressing big box suburban development by limiting store sizes and types through detailed regulation.<sup>104</sup> The purpose of the regulations is to preserve the small-scale, local and pedestrian-oriented ambiance of the mixed use neighborhood. Building size is limited to 10,000 square feet except for grocery stores where the maximum size is 25,000 square feet. General retail uses that draw customers from the broader area or that are automobile-dependent are not specifically prohibited in the District but are identified as more appropriate for intensive commercial areas. In addition to the usual height, set back and signage restrictions, the types of business establishments allowed in the District are enumerated. Drive-through businesses are specifically prohibited. What is unusual about the Brookside Business District is the extensive detail in the zoning requirements. The zoning regulations leave little leeway for discretionary interpretation, and as such are much stronger in preserving neighborhood character.

#### **4.8.2 Development Permits and Other Site-Specific Tools**

Some jurisdictions subject large retail establishments to conditional use permits, which provides an opportunity for the local government to evaluate the big box store using more rigorous criteria.<sup>105</sup> Special permitting can also be required in geographically

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<sup>103</sup> Amending Part II, Chapter II of the San Francisco Municipal Code - amending sections 178 and 186.1. The descriptions of these Neighborhood Commercial Individual Area Districts are found in Part II, Chapter II, Article 7 of the San Francisco Municipal Code. The North Beach Neighborhood Commercial District is viewed by the City as a neighborhood marketplace, specialty shopping and dining district, as well as a tourist attraction. The purpose of zoning controls is to maintain the existing small-scale of development, promote a mix of sales, services and restaurants, and preserve the balance between neighborhood-oriented business, citywide specialty shopping, and dining uses.

<sup>104</sup> Ord. No. 1441 and Ord. No. 1442 (November 2000). Amendment to the Code of Ordinances of the City of Kansas City, Missouri, adding a new Section 80-135, District BBD (Brookside Business District).

<sup>105</sup> The Coconino County, Arizona Board of Supervisors amended sections 8 and 11 of the County Zoning Ordinance in August 2001 to address retail store size. The Supervisors added a definition of "large retail establishment," meaning a retail establishment with commercial or a combination of commercial uses ranging in size from 25,000 to 70,000 square feet, and requiring these establishments to obtain a conditional use permit to operate in enumerated commercial zones. Large retail establishments over 70,000 square feet are prohibited (the full text of the amendment is set out at [www.newrules.org/retail/coconino.html](http://www.newrules.org/retail/coconino.html), last visited December 26, 2001).

defined development permit areas (DPAs). Where municipal legislation enables DPAs and they are designated by local government, DPA requirements can impose more detailed development criteria than is normally found in zoning regulations. The Kansas City Brookside Business District, described above, would be a good example of a DPA if it were designated as such. The ordinance enacting the District imposes detailed type of use and site development criteria. It controls the form and character of development by including requirements for the character and landscaping of the site, and exterior design of buildings.

DPAs are also used for the protection of the natural environment. In British Columbia, local governments may designate DPAs that specify areas of land or natural features that must remain free from development, preserved, protected or restored in accordance with a development permit.<sup>106</sup> Local governments may also require the dedication of natural watercourses and the preservation or restoration of fish habitat and riparian areas. All DPA designations must be justified as in keeping with community goals and objectives as set out in the community plan.

An example of the use of development permits to further community plan goals can be found in Santa Cruz, California. The City Council adopted an ordinance requiring new retail stores over 16,000 square feet to obtain a special permit.<sup>107</sup> The permitting process allows the City to evaluate whether the store meets Downtown Recovery Plan goals of adding to the balanced and diverse mix of downtown businesses. The new store is also evaluated for its ability to contribute to community organizations, hire local residents, and participate in community events.

Most additional bylaw and zoning powers of local governments that mitigate the adverse impacts of big box development address site-specific impacts. In many jurisdictions, local governments may pass regulations dealing with tree protection, vegetative screening and landscaping, soil removal and deposition, limits on impervious surface cover, and watercourse protection. While these are piecemeal solutions, when combined with other tools they can comprehensively regulate big box development.

### **4.8.3 Prohibition on Formula Businesses**

Formula businesses require each of their establishments to conform to the same regulations for architecture, service, dress code, and business operations. Their trademark is a standardized presentation in every town or city of operation. Formula businesses are usually restaurants, including most fast-food restaurants, retail stores, hotels and other chain businesses. Several communities have limited formula businesses in certain zones, or require that they are unique and enhance the character of the community. Given the formula by which chains and big box stores operate, such ordinances both limit the chains willing to conform to local standards, and significantly alter the look of those that do comply with local regulations. The MacDonaldis in Carmel, California fits in with the local architecture and signage. Port Jefferson, New York banned formula businesses from its

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<sup>106</sup> Local Government Act, S.B.C. 2000, s.920.

<sup>107</sup> Ordinance 2000-20 (amending portions of section 24.10.2301 of the Downtown Recovery Plan). <http://www.ci.santa-cruz.ca.us/cc/archives/00/10-10/10-10rpt/2000-20.html> (last visited December 26, 2001).

commercial and waterfront districts to retain their historic character.<sup>108</sup> Likewise, the City of Winslow (Bainbridge Island, Washington) prohibited formula take-out food restaurants in all zones in the City with overwhelming public support.<sup>109</sup> The Urban Design subsection of the Comprehensive Plan called for pedestrian-oriented businesses and a village atmosphere, and the City Council determined that fast-food restaurants did not conform to those goals. The Council wanted to prevent a “commercial overconcentration of automobile-oriented businesses,” and to promote pedestrian-oriented commerce.

#### **4.8.4 Transportation and Parking**

The transportation effects of superstores can be addressed through limits on parking spaces and transportation impacts. Staff in Greenfield, Massachusetts evaluate any new retail business that is either expected to generate 500 or more vehicle trips per day or is 20,000 square feet or larger.<sup>110</sup> Through an impact assessment process, big box proposals are assessed for projected traffic impacts including pedestrian movement, traffic flow and parking. Proposed developments can be denied because of negative traffic impacts that are not adequately mitigated.

### **4.9 COMMUNITY IMPACT ASSESSMENTS**

Many communities now require new developments to undergo an environmental or community impact assessment process. The purpose is to generate information about the impact of the development that will assist the local government to make informed decisions about whether or not the development is beneficial. The information is weighed against the goals enumerated in the community plan, and evaluated through zoning and other regulations. Community impact assessment are usually paid for by the developer and may be required to include information about impacts to the existing community economy, employment, municipal finance and taxation, infrastructure, transportation, community land use, regional land use, and environmental health. Communities are particularly concerned with ensuring full-cost accounting for every development so that impacts and benefits can be rationally weighed in development decisions.

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<sup>108</sup> Resolution to amend Chapter 250 of the Ordinance of the Incorporated Village of Port Jefferson (amending section 250-9), June 26, 2000 (as reproduced in full at [www.newrules.org/retail/portjefferson](http://www.newrules.org/retail/portjefferson), last visited December 26, 2001).

<sup>109</sup> Ordinance No. 89-28 of the City of Winslow, Washington (amending the comprehensive plan and the Winslow zoning ordinance). The Council found that one fast-food restaurant “...in the High School Road zone was a sufficient maximum number of that use for the village character of Winslow to be preserved.” (as stated in the “Whereas” section of the ordinance).

<sup>110</sup> See notes 113-114 below.

Impact assessments can be required as part of a zoning ordinance or bylaw, pursuant to DPA designations dealing with the natural environment or commercial districts, or as a stand alone review ordinance or bylaw.<sup>111</sup> Most local governments require the developer to fund the assessment, conducted by a mutually agreed upon consultant. Some local governments employ in-house environmental or other planners who review the reports and make recommendations to Council.<sup>112</sup> Other local governments hire consultants or leave it to the Planning Board or staff to review the reports and make recommendations.

The Town of Greenfield Planning Board adopted a Major Development Review (MDR) process in 1991.<sup>113</sup> The purpose of the MDR is to provide the Special Permit Granting Authority with enough information to determine what impacts a proposed development will have on the community.<sup>114</sup> The review process is triggered by any development that is 20,000 square feet or larger in non-industrial zones, generates 500 or more vehicle trips per day, subdivides 40 or more acres, or creates 40 or more dwelling units. The MDR must evaluate the positive, negative and neutral impacts of the development and identify how negative impacts will be mitigated to meet the Town's design guidelines.

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<sup>111</sup> Greenfield, Massachusetts is an example of a jurisdiction where a community impact assessment process has been incorporated into a zoning ordinance. The province of British Columbia enables local governments to require development information as part of DPAs. *Local Government Act*, S.B.C. 2000, s.879.1 (1) For the purposes of section 920.1, a community plan may do one or more of the following:

- (a) specify circumstances in which development approval information may be required under that section;
- (b) designate areas for which development approval information may be required under that section;
- (c) designate areas for which, in specified circumstances, development approval information may be required under that section.

(2) A community plan that specifies circumstances or designates areas under subsection (1) must describe the special conditions or objectives that justify the specification or designation.

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920.1 (1) For the purposes of this section, "development approval information" means information on the anticipated impact of the proposed activity or development on the community including, without limiting this, information regarding impact on such matters as

- (a) transportation patterns including traffic flow,
- (b) local infrastructure,
- (c) public facilities including schools and parks,
- (d) community services, and
- (e) the natural environment of the area affected.

<sup>112</sup> For example, the District of Saanich in British Columbia employs a full-time environmental planner who reviews development and infrastructure applications. If the development meets the municipal requirements, the planner approves it. If it may have adverse ecological effects, the planner can negotiate with the applicant or refer the proposal for a full social and environmental impact review.

<sup>113</sup> Town of Greenfield Planning Board Major Development Review Rules and Regulations for Impact Statements (adopted June 17, 1991) and Town of Greenfield Zoning Bylaw Amendment (adopted March 20, 1991). See Appendix I for the full text of the Greenfield Impact Statement process.

<sup>114</sup> The Town of Greenfield Zoning Ordinance now reads:

#### 7.12.1 Purpose

The purpose of reviewing major developments is to provide for detailed review and approval of certain uses which have the potential for significant impact to the environment, abutting properties, Town services, traffic patterns, the economy of the Town, the character of the Town, or the public health, safety, and welfare of Town residents.

The MDR sets out detailed standards against which the development must be evaluated in the areas of traffic, municipal utilities and services, environment, community, and fiscal impacts. Of note are requirements that the proposed development not harm historic aesthetics, ecological functions, local employment, land values, and tax revenues. The Special Permit Granting Authority may only issue a permit for a major development if it does not adversely impact the environment, Town, neighborhood, and adjacent properties. The Authority may also impose conditions and limitations in the permit to ensure that the major development conforms to community goals and pays for itself.

#### **4.10 MUNICIPAL FINANCE**

Recognizing that new development should not be subsidized by existing taxpayers, local governments are using a number of strategies to require developers to pay fees to offset some of the infrastructure costs municipalities incur with new developments. Development cost charges (DCCs), exaction fees, or impact fees help to finance the capital cost of roads, water and sewer infrastructure, drainage, and parkland acquisition and improvement. They must not be excessive nor deter development. Developers may be required to pay charges relating to the planning, public consultation, engineering design, parkland acquisition, legal costs, contract administration and construction of such projects. The presence, or lack of DCC requirements is a municipality's primary means of subsidizing new development. DCCs generally do not pay for a significant amount of the cost of new services and infrastructure. Many local governments waive or decrease DCC requirements to encourage commercial and large-scale residential development.

On the one hand, DCCs are an important tool to ensure that developments pay for themselves. On the other hand, the difficulty of quantifying the economic impact of new development on municipal infrastructure and servicing is difficult. DCCs are also limited in scope: they can be levied only in the municipality where the development is located. They generally do not account for regional and ecological impacts.

One innovative approach is the use of distance-based impact fees, employed by the City of Lancaster, California.<sup>115</sup> A surcharge is levied on new development that occurs beyond the five mile radius of the central city core. Development further away from the core is more expensive for the city to provide servicing and thus a higher impact fee is assessed. This system discourages sprawl, promotes a more cohesive and orderly development pattern, and supports downtown businesses. Since the model was implemented in 1993, no new development has occurred outside the central core.

Finally, a coalition of organizations concerned about employment in Gary, Indiana convinced the City and state legislature to create new laws canceling municipal tax abatement packages for corporations that failed to create the number of jobs promised. The group discovered that the businesses were receiving significant subsidies from local governments and creating only a fraction of the jobs promised as part of the tax abatement

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<sup>115</sup> A typical new house located within the core, for example, would incur an impact fee of \$5,500. The same house located one mile beyond the core would incur a fee of \$10,800. Lancaster City Code, Chapter 16:54 Development Impact Fees at 16:54:030. [www.cityoflanasterca.org](http://www.cityoflanasterca.org) (last visited December 24, 2001).

package.<sup>116</sup> The success of the Calumet Project for Industrial Jobs in pushing for strict conditions on any corporate subsidies is an excellent example of the citizen efforts that are behind most innovative approaches to curbing suburban expansion and big box sprawl.

#### 4.11 CITIZEN INITIATIVES AND ENFORCEMENT

The local momentum to curb big box sprawl is astounding. Groups from all sectors – environmental,<sup>117</sup> agricultural,<sup>118</sup> heritage preservation,<sup>119</sup> urban development,<sup>120</sup> smart growth,<sup>121</sup> labor,<sup>122</sup> and local sustainability<sup>123</sup> – identify sprawl and the proliferation of superstores as an issue of concern for their constituencies. The backbone of this national movement are the citizens of neighborhood groups who attend municipal council meetings, sign petitions, garner media attention, and devote incalculable hours to restrain the status quo of retail development.<sup>124</sup>

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<sup>116</sup> [www.newrules.org/gov/gary.html](http://www.newrules.org/gov/gary.html) The City of Gary ordinance establishes several criteria for companies seeking abatements. They must pay the median wage or higher for that industry, provide complete health coverage for employees, demonstrate financial need, and disclose the number of jobs to be created and lost. If a business does not meet its employment targets, the subsidy will be cancelled.

<sup>117</sup> The Sierra Club has a Sprawl Campaign [www.sierraclub.org](http://www.sierraclub.org) (last visited December 22, 2001).

<sup>118</sup> As noted above, the American Farmland Trust identifies suburban development as a primary loss of farmland, and has published several reports on the costs of suburban development in comparison to redeveloping urban areas. Supra note 12.

<sup>119</sup> The National Trust for Historic Preservation has published several reports and books dealing specifically with superstore sprawl, including Beaumont, supra note 15. For this group, economic development outside of traditional city and village cores is one of the leading threats to preserving historic properties. [www.nthp.org](http://www.nthp.org) (last visited December 22, 2001).

<sup>120</sup> The Brookings Institution funds research on various urban development and housing issues. Many of their papers point to the barriers to achieving smart growth. For example, a recent paper by Professors Joseph Persky and Haydar Kurban concludes that federal funding, as evidenced by the flow of federal dollars to the Chicago metropolitan area, helps to facilitate the decentralization of population and the concentration of urban poverty. Do Federal Funds Better Support Cities or Suburbs?: A Spatial Analysis of Federal Spending in the Chicago Metropolis (Discussion Paper, November 2001). [www.brookings.edu](http://www.brookings.edu) (last visited December 22, 2001).

<sup>121</sup> [www.smartgrowth.org](http://www.smartgrowth.org). State and provincial land use groups have been working on containing urban areas for the past quarter century. The most famous of these is 1000 Friends of Oregon. The Growth Management Leadership Alliance, an umbrella organization of state and provincial smart growth groups, has a membership of over 20 organizations, including the first Canadian provincial initiative, Smart Growth British Columbia ([www.smartgrowth.bc.ca](http://www.smartgrowth.bc.ca)).

<sup>122</sup> The labor organization, Good Jobs First, is dedicated to the preservation and creation of living wage employment. In addition to publishing the reports on labor and smart growth and the effects of superstores on labor, Good Jobs First, [www.goodjobs.org](http://www.goodjobs.org) (last visited December 26, 2001). The American Federation of Labor-Council of Industrial Organizations recently passed its first resolution addressing smart growth and urban sprawl. The resolution underscores the harm sprawl causes to working families and authorizes the AFL-CIO to speak out in the smart growth debate. passed its first-ever resolution on urban sprawl and smart (as discussed on the Growth Management Leadership Alliance listserve, December 17, 2001, on file with author).

<sup>123</sup> [www.newrules.org](http://www.newrules.org)

<sup>124</sup> The movement against big box stores is international in scope. For example, after the felling of an oak tree in Golden Hill, a suburb north of Bristol, Ian Martin helped found the National Sensitive Sites Alliance (NSSA) to oppose superstores on greenfield sites. Charlie Jacoby, The superstore is back in town. (implications for countryside and city), *Geographical Magazine*, v66, n6 (June, 1994) 22.

While it is beyond the scope of this paper to detail this extensive work, it is clear that big box development is questioned exclusively by community groups and citizens. All of the cases challenging the appropriateness of big box stores, discussed in this paper, and many of the innovative solutions, were initiated by concerned citizens or community organization. This conclusion points to the reality that citizens are the primary enforcers of community plans and zoning regulations. The challenge of curbing the sprawl of big box stores rests with people who ensure that their local government is vigilant in upholding the community vision, as implemented through each development application.

## **5. INNOVATIVE LOCAL RESPONSES TO BIG BOX RETAIL DEVELOPMENT: CASE STUDIES OF PRESERVING COMMUNITIES AND THE ENVIRONMENT**

In practice, citizens and local governments use a combination of strategies to regulate big box stores. Ideally, zoning provisions based on smart growth principles are created through local planning processes before superstore rezoning applications arise. However, in many cases, citizens opposed big box development without specific zoning rules in place. Local governments can still deny rezoning applications that are inconsistent with the general development policy of the municipality, however these types of decisions are not always sustained by the courts as noted above.

In this section I present three community-based efforts that resulted in better environmental, transportation and local economy outcomes than if a big box store had opened. Two important lessons emerge from these examples. First, an effective state or provincial growth management regime is invaluable in helping communities to foster land uses that contribute substantively to the quality of life of the region. Second, an energetic and engaged citizenry is necessary to ensure local government compliance with ordinances and by-laws, and also to demonstrate to council citizen's commitment to innovative solutions.

### **5.1 LAWRENCE, KANSAS – RELYING ON STRONG COMMUNITY PLANS<sup>125</sup>**

The City of Lawrence, Kansas relied on their ten year old downtown community plan commitments to reject a rezoning for 61 acres of farmland at the edge of the City for a regional shopping center. The downtown plan goals were to channel 70 percent of all new retail business into the compact, pedestrian-oriented Central Business District.

The proposed development generated widespread public interest and the rezoning hearing stretched over several weeks with over 400 people attended. The City Commission denied the zoning on the basis that it would stimulate urban sprawl, destroy downtown businesses, and diminish the value of farmland. It would also jeopardize the significant public investment in the downtown area over the past thirty years and create new demands for servicing on the outskirts of the City.

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<sup>125</sup> The information in this section is based on Beaumont's account of the Lawrence story. Supra note 15 at 68-70.

The developer sued the City and lost as the court found that preserving the vitality of the downtown area was a legitimate interest, and that the denial of the rezoning was rationally connected to that purpose. As a postscript, the City Commission has since approved several big box developments that will weaken the Central Business District. While a strong community plan was the basis of the success in this case, this new sprawl development demonstrates the need for effective political strategies to ensure smart growth goals are implemented in support of the plan.

## **5.2 GREENFIELD, MASSACHUSETTS – USING POLITICAL CAMPAIGNS<sup>126</sup>**

Some community opposition to big box development transforms into a purely political strategy. This was the case in Greenfield, Massachusetts in 1992 and 1993 when citizens stopped the development of a Wal-Mart store and limited commercial stores to 40,000 square feet. Three key factors helped the Greenfield Community Preservation Coalition to garner enough support to stop the development.

First, the town conducted an independent analysis, paid for by Wal-Mart, of the store's fiscal and economic impact on the town. Although the report was not released in time to educate residents before voting in a non-binding referendum on whether or not they wanted commercial development along the highway, its alarming conclusions attracted more attention to the issue and secured the support of some key members of the business community in opposing the retail development.

The second important element of this case study is the coalition membership from all sectors of the community. Several business and other organizations made public statements about the negative impacts of the proposed store, which moved the debate from the fringes of local politics and into the center.

Finally, the Coalition hired a consultant to design a campaign strategy for the second referendum in which citizens would approve or reject the rezoning for the Wal-Mart site. The resulting comprehensive strategy was run like an eight week political campaign. It included strategies for media, grassroots organizing, radio advertising, voter polling, a Get Out the Vote initiative, and poll watching. As one of the advertisements for the campaign stated: "There's one thing you can't buy at Wal-Mart: small town quality of life. Once you lose it, you can't get it back." The Coalition efforts, particularly the poll watching and phoning supporters to ensure that they voted, paid off. The rezoning was rejected by citizens by a nine vote margin.

## **5.3 NELSON, BRITISH COLUMBIA – BUYING COMMUNITY COHESION<sup>127</sup>**

When the Buildings Corporation of British Columbia (BCBC) announced it was going to sell one of the few remaining undeveloped waterfront parcels in the small town of Nelson, British Columbia, it became clear that an adjoining mall would expand to include a stand alone Wal-Mart. Over 4000 citizens opposed the development through

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<sup>126</sup> The information in this section is based on Beaumont's account of the Greenfield story. Supra note 15 at 57-65.

<sup>127</sup> The content of this section was gleaned from a posting by the Central Waterfront Group to the Livable Communities listserve, moderated by Smart Growth B.C. ([www.smartgrowth.bc.ca](http://www.smartgrowth.bc.ca)), October 30, 2001 (on file with author).

letters, rallies, full page advertisements in the local newspaper, and a petition. The town council declined to buy the property and refused to take a role in crafting a community-based opportunity for this land.

Between October 1 and 15, 2001, a former town councilor enlisted 15 investors who submitted a competitive bid for the land which included a commitment to develop the land in keeping with the goals of the Nelson community plan. Their vision for the land was to develop a number of mixed-use projects, including senior's housing and some retail. BCBC chose the investors, now known as the Central Waterfront Group, as the new owners. Crucial to this local victory was BCBC's mission to "choose business practices which consider the full financial and environmental implications" and "achieve the best solutions for the best value."

The Central Waterfront Group will hold the land until covenants can be secured that will ensure it is developed in keeping with the town's community plan. They will then work with developers to realize the plan's goals. The Group is also committed to creating an open community process. They are providing written updates in the local newspaper and holding open houses to discuss development plan and design ideas.

The private community solution in Nelson is a powerful example of a community's reaction to the development of a piece of land that is so central to its character that individuals are willing to become developers to ensure the integrity of the town's culture. When the local government was unwilling to act, citizens resorted to market mechanisms to secure the implementation of the community vision set out in the community plan. This level of commitment demonstrates the depth of concern about community livability and how it is intricately linked to land use development in the future.

## **6. CONCLUSION**

The proliferation of big box retail stores contributes to urban sprawl and has negative environmental, transportation and economic impacts on communities. The superstore formula mandates the development of big box stores outside of urban areas on large tracts of land, shifting retail activity out of existing commercial areas and from local retailers. Central business districts decline, jobs are lost, and automobile-dependent shopping becomes the norm.

The land use development regime accords local governments significant flexibility in addressing the impacts of big box retail uses. Courts generally defer to local governments that promulgate regulations to further public health, safety and morals, and that do not discriminate against a specific big box tenant or owner. Through the use of zoning regulations such as limitations on the square footage of new retail space, local governments are shaping commercial development to better reflect the vision and goals contained in community plans.

The impetus for this change in commercial development comes almost exclusively from citizens who are concerned about the quality of life in their communities. They are initiating the judicial review of zoning decisions and lobbying to change development regulations to ensure that development follows the smart growth principles of urban containment and environmental protection. Their overarching goal is

to maintain the character and culture of their community in the face of the homogenizing influence of big box expansion.

Looking beyond the scope of this paper, the missing element in this discussion is a commitment by these same citizens to using purchasing power to maintain community cultures and economies. The valuation of “small is beautiful” goes beyond formalist legal mechanisms to cultural practices of consumer spending. Given the declining median income in the United States, and increasing acceptance of big box bargains, it is unclear whether few examples presented in this paper will become the norm. It is heartening to note, however, that contrary to the threat of takings claims by developers, local governments and communities do have a wide array of mechanisms with which to manage growth. It is this essence of local control that both enrages and activates individuals in their role as citizens.

Appendix I

Greenfield Panning Board  
MAJOR DEVELOPMENT REVIEW  
RULES & REGULATIONS FOR IMPACT STATEMENTS  
Adopted June 17, 1991  
SECTION 1

Purpose

The purpose of an impact statement is to provide the Special Permit Granting Authority with sufficient information to conduct a detailed review of uses which have the potential for significant impact on the Town. The impact review process is intended to promote and protect the natural resources and aesthetic qualities of the Town, and to mitigate any adverse impact to the Town services, traffic patterns, abutting properties, the economy of the Town, the character of the Town, or the public health, safety and welfare of Town residents.

SECTION 2

Applicability and Procedure

2.1 These Rules and Regulations are applicable to impact statements required and submitted in accordance with the Greenfield Zoning Bylaw and the Greenfield Subdivision Regulations.

2.2 The most recent edition of the Institute of Transportation Engineers (ITE), Trip Generation Manual shall be used to determine if the proposed project meets the 500 vehicle trips per day threshold requiring Major Development Review under Section 7.12.2.1. of the Greenfield Zoning Bylaw. If the ITE Trip Generation rates are not applicable or the use is not included in the manual, the estimated vehicle trips per day shall be verified by the Greenfield Department of Public Works.

2.3 Ten (10) copies of the impact statement shall be submitted along with all other forms, plans and information required for special permit applications under Major Development Review, Section 7.12. of the Greenfield Zoning Bylaw and for subdivision applications under section 3.5 of the Greenfield Subdivision Regulations.

2.4 The Special Permit Granting Authority may waive strict compliance with the submittal requirements of these Rules and Regulations by a majority vote of the Board if, in its opinion, the information required is deemed unnecessary or inapplicable to the review of the project. Request for waivers shall be made in writing to the Board and shall state the reasons and supporting justifications for granting the waiver. Applicants are encourage to discuss the requirements of the impact statement with the Board or Planning Department staff prior to preparation of the statement.

2.5 The impact statement shall be prepared by an interdisciplinary team of professionals qualified to evaluate all facets of the proposed project which may include but is not limited to engineers, architects, landscape architects, environmental scientists, and planners.

SECTION 3

Contents of the Impact Statements

3.1 The impact statement shall include the following elements:

1. A detailed description of the proposed project and its design features, including existing conditions on the site and in the vicinity of the project.
2. Identification and assessment of the impacts of proposed project, including positive, negative, and indirect impacts.
3. An evaluation of how the project will meet the design standards required in these Rules and Regulations.
4. Proposed measures to mitigate adverse impacts and/or maximize positive impact including design modifications and provision of infrastructure or public service improvements sufficient to support the project. Any adverse impacts which cannot be mitigated shall be identified. Mitigation measures to be implemented by the applicant shall be identified.

3.2 Impact Assessment

The Impact Statement shall assess the following areas of potential impact.

3.2.1 Traffic Impact

1. Existing Traffic Conditions:

Average daily and peak hour volumes, sight distances, street capacity, level of service, physical characteristics of the streets, number and location of driveways and intersections, average and peak speeds, accident data, pedestrian movement, and public transportation and traffic controls for streets and intersections adjacent to the project and for streets and intersections which will experience a 10% increase

in peak hour traffic as a result of the project or which will experience a reduction in the level of service as a result of the project, and for failing streets and intersections which will experience an increase in traffic as required by the Board.

2. Projected Traffic Conditions:

Average daily and peak hour traffic projections and directional distribution of site generated traffic, sight distances at proposed driveway intersections with streets, on-site traffic circulation and parking layout, pedestrian movement and background traffic conditions for the design year including any planned roadway/traffic improvements and other proposed projects in the vicinity of the site.

3. Projected Traffic Impact

Evaluate how the proposed project will affect traffic conditions and streets and intersections adjacent to and those likely to be affected by the proposed project including level of service, traffic flow, turning movements, sight distances, traffic controls, pedestrian movement, and public transportation.

3.2.2 Impact to Municipal Utilities/Services

1. Water Supply: Describe the proposed water supply system including average daily and peak water demand; location, sizing, and accessibility to municipal water mains; and water pressure and flows available at the site. Evaluate the capacity of the Town's water supply and distribution system to adequately service the projected water and fire flow needs of the project; the need for pumping stations, standpipes, or improvements to the water system required to service the project. Estimate the cost and discuss the responsibility for construction of improvements and on-going maintenance. Consultation with the Department of Public Works is required.

2. Sewage Disposal: Describe the proposed sewage disposal system including average daily and peak wastewater discharges to the municipal sewer system; composition and concentration of wastewater; location, sizing, and pumping stations, forced mains or other system improvements required to adequately service the project. Evaluate the capacity of the sewage treatment plant and the sewerage system to accommodate the wastewater flows. Evaluate the need for pre-treatment of wastewater to achieve compliance with the Greenfield Sewer Use Regulations. Estimate the cost and discuss the responsibility for construction of system improvements and on-going maintenance. Consultation with the Department of Public Works and the Department of Environmental Protection is required.

3. Storm Drains: Describe the proposed surface drainage system including pre and post runoff calculations; the location, sizing, accessibility, and proposed discharges to the municipal storm drains. Evaluate the capacity of the existing storm drains to accommodate projected storm water runoff. Estimate the cost and discuss the responsibility for construction of storm drain improvements and on-going maintenance. Consultation with the Department of Public Works is required.

4. Solid Waste Disposal: Describe the quantity and composition of projected solid wastes to be generated by the project including average weekly volume in cubic yards of refuse generated; recycling potential; method of on-site storage and collection. Evaluate the impact to the municipal landfill, recycling facility, and transfer station including available landfill capacity and costs of collection and disposal. Consultation with the Department of Public Works is required.

5. Emergency Services: Describe the anticipated fire and police protection needs including time and demand on municipal personnel; provision for alarms or warning devices; on-site fire fighting and security capabilities; need for increased municipal personnel or equipment. Estimate the cost and discuss the responsibility for providing emergency protection to the project. Consultation with the Police and Fire Department is required.

6. Schools: Describe the projected impact to the public school system including kindergarten, primary, and secondary levels. Identify the schools to be affected; projected number of students by housing type (i.e. single-family, apartments, townhouses) and number of bedrooms (i.e. one-bedroom two-bedroom etc.); the ability of the schools to absorb the additional enrollment including impact on classroom size, school bus routing changes, and the annual cost per student to the school system. Projected number of students shall be based on relevant data for the region, Massachusetts, or the northeast. Consultation with the School Department is required.

3.2.3 Environmental Impact

1. Describe the existing physical and ecological characteristics of the site and in relation to surrounding land including topography, slope, soils, wetlands, surface water, vernal pools, flood plains, depth to groundwater, drainage patterns, type and coverage of vegetation, wildlife and wildlife habitat, identification of any rare or endangered plant or animal species, relationships to public or private water supply wells and

recharge areas or public water supply reservoirs, Consultation with the Conservation Commission, Department of Public Works, and the Massachusetts Natural Heritage Program is required.

2. Identify and evaluate the potential impacts of the project on air quality, surface water, wetlands, groundwater, plant and wildlife species, temperature, wind, and noise levels on-site and off-site which will be affected by the project.

3. Specifically evaluate the impact of storm water, runoff, flooding, erosion, sedimentation, grading changes, increased impervious surface, discharges to groundwater, pumping of groundwater, wetlands disruption, and changes to vegetative cover. Provide the location and results of any test pits, soil borings, and percolation tests performed on the site.

4. Describe the types, quantities, use and storage methods for hazardous materials and wastes to be used or generated by the project. What measures will be taken to prevent a release into the environment?

5. Describe proposed mitigation measures for impacts identified above.

#### 3.2.4 Community Impacts

1. Describe the surrounding neighborhood and any scenic, unique geological, historical, or archeological features and recreational areas on the site or in the vicinity of the site which could be affected by the project.

2. Describe the layout of the proposed project in detail (site plans may be used) including scale, placement, and design of buildings and structures; lighting; parking areas; open space; relationship to scenic views from the site; views of the project from distant vantage points and from adjacent properties and public ways.

3. Evaluate the proposed architectural design in relationship to surrounding land uses and prevailing architectural style including major design elements such as scale, materials, color, setbacks, roof lines.

4. Identify the impacts to historic properties, districts, or areas, and any archaeological sites on the property or in the vicinity of the project. Consultation with the Historic Commission is required.

5. Describe any recreational facilities proposed for the site and provision of public recreational or open spaces. Estimate the off-site recreational demands of the proposed project and its impact to municipal recreational facilities and programs. Consultation with the Recreation Commission is required.

6. Residential projects should be evaluated in relationship to the type and scale of surrounding residential uses. Evaluate the project in meeting the housing needs of Greenfield and discuss any provision for affordable housing. Consultation with the Greenfield Housing Partnership and the Office of Planning & Community Development is required.

7. Non-residential projects should estimate the number and types of jobs to be created by the project, estimate the amount of local labor to be used, and evaluate the impact of the project on existing employers in the community.

8. Estimate the amount, type, and location of spin-off development resulting from construction of the project and its likely impact on the community including changing land use patterns, development pressure on surrounding neighborhoods, impact to the downtown business district, impact to important natural resources, traffic, and Town services.

9. Identify and evaluate the potential impacts to neighboring communities resulting from the project.

#### 3.2.5 Fiscal Impact

1. Evaluate the projected costs and benefits to the community resulting from the project including:

a) Projected costs arising from increased demand for and required improvements to public services and infrastructure.

b) Value of improvements to public services and infrastructure to be provided by the project.

c) Projected tax revenues to be generated by the project.

d) Projected impact of the project on surrounding land values and any potential loss or increase in tax revenues to the Town.

e) Short-term and long-term projection of increased Town revenues and costs resulting from the proposed project.

2. Evaluate the market and financial feasibility of the project. Include any market studies prepared for the project and any plans for phased construction.

### **SECTION 4**

#### Development Impact Statements

The Special Permit Granting Authority shall consider the following standards when reviewing development impacts in addition to the special Permit and Site Plan criteria required in Sections 8.3 and 8.4 of the Greenfield Zoning Bylaw.

#### 4.1 Traffic Standards

1. The Level of Service (LOS) of all streets and intersections evaluated under Section 3.2.1 shall not be reduced. Level of Service shall be determined in accordance with the most recent edition of the Highway Capacity Manual, Highway Research Board, National Academy of Science - National Research Council. See attached appendix for summary description of LOS.
2. The design goal for all streets, signalized intersections, and turning movements at unsignalized intersections shall be LOS C or better. For streets and intersections currently functioning at LOS C or better, mitigation measures shall be provided to maintain or improve the existing LOS. Where the existing LOS is D, mitigation measures shall at a minimum, maintain the existing conditions or upgrade the LOS to C or better.
3. For all streets and intersections which are currently failing (LOS E or worse), the goal of mitigation measures is to provide a LOS D or better. At a minimum, existing conditions at failing streets and intersections shall not be further degraded as a result of the project.
4. Driveways shall be located to limit conflict points with existing driveways and intersections and shall meet intersection design standards for secondary roads required in the Greenfield Subdivision Regulations.
5. Shared driveways and service roads shall be used to control access onto existing streets.
6. The impact of increased turning movements shall be mitigated.
7. The project shall be sited and driveways located to prevent routing of non-residential traffic to and through residential streets.
8. Pedestrian and bicycle circulation shall be separated from motor vehicle circulation as far as practicable.

#### 4.2 Municipal Utilities/Services Standards

1. The public water, sewer, and drainage systems in the vicinity of the site shall be adequate to serve the proposed project. If public utilities are not adequate to serve the project, the reviewing authority may require, as a condition of approval, off-site improvements to increase the capacity of such utilities sufficient to serve the project.
2. All utilities shall be placed under ground where physically feasible.
3. All commercial and industrial discharges to the sewage treatment plant shall be pretreated if required by the Water Department of Public Works to prevent overloading of the treatment plant. All discharges shall be in compliance with the Greenfield Sewer Use Regulations.
4. On-site storm water management measures shall be required to ensure that the rate of runoff from the site to the municipal storm sewer is not increased. Provision shall be made for on-going maintenance of on-site storm water management facilities connected to the public storm drain.
5. The Town may require recycling and/or commercial refuse disposal to prevent overloading of the municipal landfill and transfer station.
6. Municipal police and fire services shall not be strained by the proposed project. Adequate fire flows shall be available at the site. Improvements to the water system may be required to provide adequate service or on-site alternatives owned and maintained by the landowner may be required.
7. Provision of school bus service shall not require additional routes or buses at the expense of the Town. Phasing of residential development may be required to ensure that the public school system can meet the increased enrollment resulting from the project.

#### 4.3 Environmental Standards

1. The project shall not create any significant emission of noise, dust, fumes, noxious gases, radiation, water pollutants, or any similar significant adverse environmental impact.
2. The project shall not cause erosion, flooding, sedimentation, or increase the rate of runoff from the site. Provision shall be made for attenuation of runoff pollutants. Groundwater recharge shall be provided where the Town deems it important.
3. The project shall be designed to minimize the destruction of wetlands, unique natural features, wildlife habitat, and rare or endangered species. Special effort shall be made to maintain wetlands, wetland buffer zones and corridors between wetlands and wooded uplands; wildlife travel corridors; existing diversity at plant communities; and to avoid alteration of areas most difficult to replicate.
4. The project shall not result in a reduction of groundwater recharge, deteriorate surface or groundwater, or negatively impact any public water supply recharge area or watershed. Commercial and industrial discharges of process waste water to the ground shall not be permitted.
5. Best available measures shall be used to prevent a discharge or spill of hazardous materials or wastes into the environment.

6. Buffers, setbacks, landscaping, and traffic circulation patterns shall be used to mitigate noise and air pollution impacts.

#### 4.4 Community Standards

1. Provision shall be made for preserving historical features of the site. The project shall be compatible with the character and scale of neighboring properties especially historic structures or areas.

2. Building materials, architecture, and building placement shall minimize the visibility of buildings from distant vantage points, minimize obstruction of scenic views visible from public ways, and ensure compatibility with neighboring properties.

3. On-site recreation areas shall be provided for residential developments in areas where public recreational facilities are not available or if the capacity of nearby recreational facilities would be overburdened by the project.

4. Project siting and design shall be consistent with existing local plans and policies adopted by the Planning Board, Recreation Commission, Conservation Commission, Board of Selectmen or Town Council.

5. Adverse impact to the downtown business district shall be minimized through the use of joint marketing, hours of operation, products offered, and other measures to collaborate with downtown businesses.

#### 4.5 Fiscal Impact Standards

1. The proposed project shall not have a significant adverse impact on the Town in terms of balancing as near as possible the cost of public services and public revenue provided through taxes and other income. The reviewing authority may require phasing of the project to minimize negative fiscal impacts to the Town over the short term.

2. The project shall be designed to minimize any negative impacts to adjoining property values.

3. The applicant shall demonstrate the financial ability to complete the project and to achieve long-term financial stability.

### Zoning Bylaw Amendment

Adopted March 20, 1991

## 7.12 MAJOR DEVELOPMENT REVIEW

### 7.12.1 Purpose

The purpose of reviewing major developments is to provide for detailed review and approval of certain uses which have the potential for significant impact to the environment, abutting properties, Town services, traffic patterns, the economy of the Town, the character of the Town, or the public health, safety, and welfare of Town residents.

### 7.12.2 Application

The provisions of this section shall apply to the following uses:

1. All uses that generate 500 vehicle trips per day or more.

2. All uses that create 40 or more dwelling units.

3. All subdivisions of land into 40 or more lots.

4. All non-residential uses of 100,000 square feet of gross floor area or more in the Planned Industry District and 20,000 square feet or more of gross floor area in all other districts.

5. Any expansion of an existing use in which either the expansion or the expansion combined with the existing use meets or exceeds the above thresholds, and the expansion also exceeds twenty percent (20%) of the existing vehicle trips per day, or dwelling units, or lots, or gross floor area or 5,000 square feet whichever is more.

### 7.12.3 Review Procedures

Uses subject to this section shall require a permit and site plan approval in accordance with Sections 8.3 and 8.4 of this Bylaw. The Special Permit Granting Authority shall be as follows:

1. For all uses which require a special permit in accordance with other sections of this Bylaw, the Special Permit Granting Authority (SPGA) for major developments shall be the same as the SPGA already designated.

2. For all uses which do not require a special permit in other sections of this Bylaw, the Special Permit Granting Authority shall be the Planning Board.

### 7.12.4 Submittal Requirements

In addition to the submittal requirements for special permits and site plans in Sections 8.3 and 8.4 of this Bylaw, the following information shall also be submitted:

1. Facade elevations of any new construction and/or alteration to any existing building or structure.

2. Photographs showing the proposed building site and surrounding property.
3. An impact statement prepared in accordance with the Major Development Review Rules and Regulations for Impact Statements.

The Special Permit Granting Authority may waive strict compliance with the submittal requirements if, in its opinion, the information required is deemed unnecessary or inapplicable to the review of the projects.

#### 7.12.5 Criteria for Approval of a Major Development

The Special Permit Granting Authority may issue a special permit for a major development only after finding that the proposed project will not adversely impact adjacent properties, the neighborhood, the Town or the environment. The following criteria shall be considered:

1. The special permit criteria in Section 8.3.6 of this Bylaw.
2. The site plan approval guidelines in Section 8.4.5 of this Bylaw.
3. The standards for evaluating the impacts of a project set forth in the Major Development Review Rules and Regulations for Impact Statements.

#### 7.12.6 Conditions, Safeguards, Limitations for a Major Development

In granting a special permit for a major development, the Special Permit Granting Authority may impose conditions, safeguards, and limitations. Such conditions, safeguards, and limitations shall be in writing and may include but are not limited to the following:

1. Roadway construction improvements, bridge improvements, access and traffic controls, integration of public transportation, or other measure to mitigate adverse impacts.
2. Additional or alternative means of pedestrian movement within the site and leading to the site.
3. Provision for privately owned utilities, emergency services, or improvements to Town services required to adequately serve the needs of the proposed project, such as drainage, water, and sewer improvements.
4. Requirements for pre-treatment of wastes and management of storm water runoff on-site to mitigate impact to the Town's sewers and storm drains.
5. Additional buffer zones, screening, and set-backs.
6. Provision for open space or preservation of views.
7. Alterations or restrictions in the appearance of structures or landscaping to preserve property values, preserve aesthetic or historic features, maintain compatibility with existing uses, and promote the attractiveness of the Town.
8. Provision for phasing construction of the development.
9. Provision for measures to mitigate impact to existing commercial areas particularly the downtown Central Commercial District.
10. Provisions for mitigating any other adverse impacts identified in the impact statement or by the Special Permit Granting Authority.