

**BIG BOXES, RATIONAL RESPONSES:**  
**Improving the Legal Defensibility of Large-Scale  
Retail Development Controls**

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*“The difficulties involved in developing rational schemes of land use controls become insuperable when zoning or changes in zoning are followed rather than preceded by study and consideration.”<sup>1</sup>*

## **I. Introduction**

The relatively sudden predominance of large-scale or “big-box” retail has resulted in regulations that vary in their degree of rationality. A lack of a rational basis in some cases has encouraged legal challenges and corporate-sponsored ballot box initiatives, a handful of which have succeeded in reversing regulations. Now that the shock of the big-box phenomenon has passed, it is time for officials to revisit their large-scale retail controls to determine if they are vulnerable to legal challenge or even achieving their intended community objectives.

A key understanding is that there is no “one size fits all” best practice for regulating this type of land use. The consumer popularity and sales tax revenues of big-box retail make it tempting to promote development with little extraordinary oversight. A growing number of impact studies demonstrate that large-scale retail yields different fiscal impacts under different economic conditions. In this emerging reality, community objectives might be best served by a range of regulatory approaches. This article highlights the efforts of municipal, county and state governments across the country that have refined their large-scale retail regulations to address potential negative impacts and respond more directly to varied economic conditions. An approach based in careful study such as the impact studies mentioned above might enhance the legal defensibility and effectiveness of these regulations.

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<sup>1</sup> *Udell v. Haas*, 235 N.E.2d 897, 901 (N.Y. 1968).

Part II of this article reviews the legal defensibility and rational basis of three popular approaches to controlling large-scale retail development: (i) size restrictions; (ii) design guidelines; and (iii) formula business ordinances. Examples of each approach and how they have been subject to legal challenge and legal inquiry offer insight into how these might be refined to better reflect a rational basis and a valid exercise of local police power.

Part III presents comprehensive plan language that enhances the legal defensibility of large-scale retail regulations. Even municipalities in states that do not require consistency between land use regulations and comprehensive plan policies would be wise to consider codifying such language to strengthen the rational basis of their development restrictions.

Part IV of this article proposes a set of model district large-scale retail regulations that correspond to the range of economic conditions that would benefit from a more individualized approach. The six proposed districts are: Central Business, Urban Redevelopment, Neighborhood Retail, Main Street, Commercial Corridor, and Highway Commercial.

## **II. Evaluation of Current Approaches**

Approaches to large-scale retail controls sometimes appear more confused than rational. The goal is to mitigate potential negative impacts from development of that magnitude on the environment; community character; wages and labor; local merchants; or the municipal cost of servicing that land use. Identifying the proper tool to achieve this goal, however, is essential to its being both effective and able to withstand legal challenge. City Councilors in Hercules, California recently voted to use eminent domain to prevent the development of a Wal-Mart on the city's waterfront after the retailer refused the City's offer to purchase the property.<sup>2</sup> The use of a controversial municipal power to prevent large-scale retail development demonstrates why

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<sup>2</sup> Patrick Hoge, *Vote Goes Against Wal-Mart: Council OKs Using Eminent Domain to Block Retailer*, S.F. CHRON., May 24, 2006.

some regulations need revisiting. In this case, Wal-Mart had already agreed to scale down its project from 167,000 square feet to 100,000 square feet and to design it with an “attractive, village-like appearance.”<sup>3</sup> Under the City’s current regulations, Wal-Mart was within the letter of the law. Municipalities will need to be more proactive in matching their regulations to community goals if they want to avoid finding themselves in a similar position of last resort.

The three most prevalent approaches to regulating large-scale retail are: size restrictions; design guidelines; and less commonly, formula business ordinances. All three are incorporated into conditional use reviews, which are growing increasingly common and will be discussed in greater detail in the Model Approaches section of this article. This section reviews: (i) examples of each approach, (ii) the legal challenges and legal questions raised by each approach, and (iii) how a rational basis for each approach might enhance its legal defensibility and effectiveness.

#### A. *Size Restrictions*

Size restrictions at first appear to be the most straightforward means to regulate or prevent the development of large-scale retail in one’s community. As applied, size restrictions have proved problematic, yet they remain attractive because of generally accepted rules that allow municipalities to anticipate store formats by square footage.

Put simply, “big boxes” tend to be larger than 50,000 square feet of gross leasable area (GLA). Independent retailers generally remain below 20,000 square feet, while national chain drugstores and grocery stores often range from 20,000 square feet to 50,000 square feet. Large-scale retailers specializing in one category of retail items such as home improvement materials or home furnishings (“category killers”) may be as large as 100,000-125,000 square feet. Above

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

that square footage, retail formats are generally limited to superstores, such as Wal-Mart Supercenters and Super Targets, which offer a broad range of items including groceries.<sup>4</sup>

The most common size restriction is the size cap. While these are generally implemented at the local level, the Retail Industry Leaders Association reports that state legislatures in California, Maine, Minnesota, New York, New Jersey, Rhode Island and Vermont have considered size limits on large-scale retail since 2005.<sup>5</sup>

## 1. SIZE RESTRICTIONS: EXAMPLES

An informal survey reveals a range of size caps and the following municipal characteristics:

- Hailey, Idaho: retail capped at 36,000 square feet<sup>6</sup> (2000 population, 6,200; median household income, \$51,347; land area, 3.2 square miles).<sup>7</sup>
- Ashland, Oregon: retail capped at 45,000 square feet<sup>8</sup> (2000 population, 19,522; median household income, \$32,670; land area, 6.5 square miles).<sup>9</sup>
- Rockville, Maryland: retail capped at 65,000 square feet<sup>10</sup> (2000 population, 47,388; median household income, \$68,074; land area, 13.4 square miles).<sup>11</sup>
- Belfast, Maine: retail capped at 75,000 square feet<sup>12</sup> (2000 population, 6,381; median household income, \$32,400; land area, 34.0 square miles).<sup>13</sup>

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<sup>4</sup> For additional information on large-scale retail formats and average square footage amounts, *see* URBAN LAND INSTITUTE, *DOLLARS AND CENTS OF SHOPPING CENTERS* (forthcoming, 2006) and JENNIFER EVANS-CROWLEY, *PAS REPORT 537: MEETING THE BIG BOX CHALLENGE: PLANNING, DESIGN, AND REGULATORY STRATEGIES* (2006).

<sup>5</sup> *See* RETAIL INDUSTRY LEADERS ASSOCIATION, *STATE LEGISLATIVE MATRIX*, Mar. 27, 2006 at <http://www.retail-leaders.org/new/resources/Matrix%203-30-06.pdf> (last visited June 4, 2006). For up-to-date news and listings of municipalities that have enacted or are considering enacting size caps, *see* the New Rules advocacy organization website at <http://www.newrules.org/retail/size.html> (last visited May 19, 2006).

<sup>6</sup> HAILEY, ID., *ZONING ORDINANCE*, art. 4.5 & 4.7 (Article 4.12 also identifies a “Service Commercial Industrial District” that caps retail buildings or structures at 25,000 square feet).

<sup>7</sup> As mentioned above, this is an informal survey. These figures are intended to provide readers with a snapshot of the cited municipality relative to their own municipalities’ characteristics. These are available for free on the City Data website at [www.city-data.com](http://www.city-data.com) (last visited May 19, 2006).

<sup>8</sup> ASHLAND, OR., *CODE* § 18.72.050 (2003).

<sup>9</sup> From the City-Data website at <http://www.city-data.com/city/Ashland-Oregon.html> (last visited June 3, 2006).

<sup>10</sup> ROCKVILLE, MD., *CODE* § 25-332 (2000).

<sup>11</sup> From the City-Data website at <http://www.city-data.com/city/Rockville-Maryland.html> (last visited June 3, 2006).

- Northampton, MA: retail capped at 90,000 square feet<sup>14</sup> (2000 population, 28,978; median household income, \$41,808; land area, 34.5 square miles).<sup>15</sup>

These rough figures suggest that the size cap increases in proportion to the land area of the host community. Would the scale of municipal land area be a rational basis for setting a size restriction? Few zoning ordinances include in the language of their size cap a rational basis for the square footage limitation, although this would enhance the regulation's defensibility.

## 2. SIZE RESTRICTIONS: CHALLENGES

First and foremost, regardless of rationality, a size cap may wholly ineffective if it is not carefully written. A Dunkirk, Maryland 75,000 square foot size cap did not prevent Wal-Mart from constructing a cumulative 98,000 square feet of GLA on two adjacent parcels.<sup>16</sup> A handful of municipalities have avoided similar fates by specifying in their size caps that retailers occupying multiple buildings will be treated as a single retail use.<sup>17</sup>

Even if a size restriction is written to be effective, it may not be written to discourage legal challenge. In an article published recently in *Urban Lawyer*, Brannon Denning and Rachel Lary suggest that municipalities should consider the intent of their size cap controls and how this manifests in the language of the regulation.<sup>18</sup> Of primary concern to Denning and Lary are ordinances that state as their purpose the desire to “protect existing businesses” (Hood, Oregon

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<sup>12</sup> BELFAST, ME., CODE § 102-768 (2001) (this size cap was enacted by voter referendum).

<sup>13</sup> From the City-Data website at <http://www.city-data.com/city/Belfast-Maine.html> (last visited June 3, 2006).

<sup>14</sup> NORTHAMPTON, MA. CODE § 5.2 (2002).

<sup>15</sup> From the City-Data website at <http://www.city-data.com/city/Northampton-Massachusetts.html> (last visited June 3, 2006).

<sup>16</sup> See Amit R. Paley, *Adjacent Wal-Marts May Dodge Curbs*, WASHINGTON POST, March 7, 2005 at B1; Sarah K. Wiebenson, *Wal-Mart Circumvents Local Laws—Again*, ZONING PRACTICE, April 2005 at 7.

<sup>17</sup> The New Rules website cites size caps enacted in Agoura Hills, California; Tuolumne County, California; Hailey, Idaho; Talbot County, Maryland; and Santa Fe, New Mexico and as more effectively written. See [www.newrules.org/retail/size.html](http://www.newrules.org/retail/size.html).

<sup>18</sup> Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 4, 907 (2005).

ordinance limiting commercial buildings to 50,000 square feet<sup>19</sup>); to “protect smaller stores” (Oakland City Council member supporting a 10,000 foot restriction on grocery stores<sup>20</sup>); and to “support small locally owned businesses” (Warwick, New York comprehensive plan limiting businesses to 60,000 square feet<sup>21</sup>). Denning and Lary argue that such language arouses suspicion under the “dormant commerce clause doctrine” (DCCD) of the U.S. Constitution.

The DCCD is a *de facto* limit on state and local regulation of commerce based in Article I § 8 of the United States Constitution, which grants Congress the power to regulate commerce “among the several states.”<sup>22</sup> Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond* explained the importance of the DCCD:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.... Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.<sup>23</sup>

This emphasis on the consumer benefit of free trade has been the primary rationale behind Wal-Mart’s and others’ objections to the regulation of large-scale retail.<sup>24</sup> Denning and Lary write:

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<sup>19</sup> Denning and Lary, *supra* note 18 at 913.

<sup>20</sup> *Id.* (citing *Sprawl-Busters, City Council Votes to Adopt Zoning that Caps Size of Food Sales*, Oct. 23, 2003, available at <http://www.sprawl-busters.com/search.php?readstory=1275> (last visited June 2, 2006)).

<sup>21</sup> Denning and Lary *supra* note 18, at 914 (citing TOWN OF WARWICK, NY. COMPREHENSIVE PLAN § 3.4 at 62 (1999), available at <http://www.greenplan.org/id6.htm> (last visited June 2, 2006)).

<sup>22</sup> U.S. CONST., art. I § 8.

<sup>23</sup> *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

<sup>24</sup> A number of impact studies on Wal-Mart directly address the issue of consumer benefit. See Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, J. APPLIED ECONOMICS (forthcoming); GLOBAL INSIGHT, THE ECONOMIC IMPACT OF WAL-MART (2005) (commissioned by Wal-Mart for their November 2005 conference on Wal-Mart fiscal impacts); Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart’s Effect on Retail Prices*, 58 J. URBAN ECONOMICS, 203; UBS INVESTMENT RESEARCH, PRICE GAP TIGHTENS, COMPETITION LOOKS HOT HOT HOT (2003); Stephen Arnold, et al., *The Impact of a Market Spoiler on Consumer Preference Structures (or, What Happens When Wal-Mart Comes to Town)*, 5 J. RETAILING AND CONSUMER SERVICES, 1 (2000).

The courts generally frown upon land use controls that might be interpreted to interfere with free market competition. But there have been some cases where development restrictions with little basis in demonstrated impacts were upheld out of deference to local authority. See e.g. *Manalapan Realty, L.P. v. Township Committee of the Township of Manalapan*, 639 A.2d 318 (N.J. Super. Ct. App. Div. 1994) (validating a zoning amendment enacted in response to a proposed Home Depot store). Possibly because the Government Antitrust Act of 1984 immunizes local governments from antitrust damage claims even if it has acted beyond its authority or in bad faith

To the extent that size-cap ordinances are enacted for the *purpose* of insulating local retailers from out-of-state competition – where evidence of purpose is nonexistent or ambiguous – where the ordinances primarily *affect* out-of-state economic actors, and not their in-state competitors, these ordinances violate the DCCD.<sup>25</sup>

DCCD case law offers some guidance to municipalities considering rewriting their size cap ordinances to achieve greater protection from DCCD claims.

a. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*<sup>26</sup>

In the *Oregon* decision, a violation of the DCCD is interpreted as “differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter.” Whether a size limit that is written to be facially neutral (most are not as egregiously protectionist as the examples cited by Denning and Lary above) in effect provides differential treatment to these businesses (“discriminatory effects”) may decide whether or not the cap violates the DCCD.

b. *Pike v. Bruce Church, Inc.*<sup>27</sup>

The decision in *Pike v. Bruce Church, Inc.* established a balancing test to determine whether burdens on out-of-state economic interests “clearly exceed” benefits to local economic interests (discriminatory effects). Denning and Lary contend that some size cap ordinances are vulnerable to challenge under this interpretation of the DCCD because they strip competitive advantages from out-of-state competitors and otherwise benefit in-state economic actors.<sup>28</sup>

Despite this vulnerability, DCCD challenges to large-scale retail regulations are rare.

Denning and Lary cite one case filed against the Town of East Hampton, New York.

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to protect local businesses, anti-competitive complaints have generally been based on DCCD violations rather than claims of government antitrust activity. *See* 5 U.S.C.A. §§ 34-36.

In some cases, government concern for large-scale retailer anticompetitive behavior is justified. *See, Fed. Trade Common. v. Staples, Inc. and Office Depot, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (a proposed Staples-Office Depot merger is denied based on findings that Staples charged significantly higher prices in metropolitan areas where it faced no office “category killer” rival), <http://www.ftc.gov/os/1997/04/pubbrief.htm> (last visited April 3, 2006).

<sup>25</sup> Denning and Lary, *supra* note 18 at 916.

<sup>26</sup> 511 U.S. 93, 99 (1994).

<sup>27</sup> 397 U.S. 137, 142 (1970).

<sup>28</sup> Denning and Lary, *supra* note 18 at 933.

c. *Great Atlantic & Pacific Tea Company v. East Hampton*<sup>29</sup>

In 1998, the Great Atlantic & Pacific Tea Company (A&P) applied for a permit to construct a 34,000 square foot supermarket in East Hampton, New York. Soon thereafter, the Town enacted a moratorium on all retail development over 20,000 square feet, resulting in a ban on all retail over 10,000 square feet and grocery stores in excess of 25,000 square feet. A&P claimed discrimination under the DCCD, both in purpose and in effects. The claim was denied in light of the ordinance's equal application to intrastate and out-of state large retailers, regardless of its intent.<sup>30</sup>

To the Town's credit, it enacted a moratorium and not a size cap directly, but it is not clear how the Town arrived at a 25,000 square foot cap on grocery stores and not a 35,000 square foot cap that would have permitted the development of the A&P. In this case, the regulation withstood a DCCD challenge. What if the regulation had been challenged on other grounds? Did the size cap have a rational basis?

### 3. SIZE RESTRICTIONS: RATIONAL BASIS

When considering whether a size cap is a rational exercise of municipal police power, one must seek a relationship between *size* and public health, safety, general welfare, aesthetics, or community character.<sup>31</sup> Ideally, the cap is based in a finding that is easily translated into a specific square footage amount.

Traffic congestion, as it impacts the safety and welfare of the public, offers perhaps the clearest rational basis on which to regulate differently the development of various retail formats.

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<sup>29</sup> 997 F. Supp. 340 (E.D.N.Y. 1998).

<sup>30</sup> Denning and Lary, *supra* note 18 at 949.

<sup>31</sup> *Berman v. Parker*, 348 U.S. 26 (1954) considerably expanded the concept of local zoning authority established in *Euclid v. Ambler Realty*, 272 U.S. 365(1926) to include the regulation of aesthetics and community character. This basis was reaffirmed in *Belle Terre v. Boraas*, 416 U.S. 1 (1974).

A rough comparison of Institute of Traffic Engineers (ITE) data provides insight into the range of traffic impacts generated by retail. A municipality seeking to base its cap on traffic generation should consider a more thorough analysis that takes into consideration local characteristics.

### Approximation of Vehicle Trip Generation by Retail Format

Store Format	Hardware Store	Supermarket	Specialty Retail Center	Discount Retailer	Discount Club	Home Improvement Superstore	Discount Superstore	Shopping Center
ITE Code	816	850	814	815	861	862	813	820
Average Square Footage <sup>32</sup>	27,000	41,000	51,000	106,000	113,000	119,000	158,000	386,000
Average Trips Per Week <sup>33</sup>	11,400	34,800	14,500	43,100	33,600	25,600	48,900	111,800

Institute of Traffic Engineers, *Trip Generation*, 7<sup>th</sup> Edition (2003).

Although there is evidence of a relationship between size and vehicle trip generation rates—for example, the smaller number of trips per week generated by a 27,000 square foot hardware store versus an 119,000 square foot home improvement superstore—size is clearly not the only determinant of vehicle trip generation rates. Between the similarly sized discount retailer and discount club, for example, the former generates significantly more vehicle trips per week.

Even this very basic rational inquiry into size and impacts helps explain why some municipalities enact size restrictions that relate to specific retail formats and not to store size alone. For example, the figures above suggest that discount superstores are the highest free-standing retail trip generator. The City of Oakland, California, amended its municipal code to define what is described in this article as a “superstore” as larger than 100,000 square feet, devoting over ten percent of its sales floor area to non-taxable merchandise (i.e., grocery items).

<sup>32</sup> Using an average of the average store sizes surveyed by the Institute of Traffic Engineers (ITE) for each format.

<sup>33</sup> These figures were roughly approximated by adding weekday trip averages with Saturday and Sunday trip averages. Sample sizes vary, and the original publication contains more detailed information on traffic generation during peak hours. *See* INSTITUTE OF TRAFFIC ENGINEERS, *TRIP GENERATION*, 7th Edition (2003).

The City proceeded to not allow this use in any of its commercial districts, while exempting discount clubs and other bulk merchandisers that charge a membership fee or otherwise restrict sales.<sup>34</sup> This approach corresponds to the difference in traffic generation indicated for each of these retail formats. A recent decision of the Fifth District Court of Appeals in California reflects judicial support for a more nuanced approach to size restrictions. The ordinance in question was based upon concern for socioeconomic impacts (on unionized grocery employees and local merchants) as well as the more quantifiable impact of traffic congestion.<sup>35</sup>

a. *Wal-Mart Stores, Inc. et al. v. City of Turlock et al.*<sup>36</sup>

In 2003, the City of Turlock, California enacted an ordinance to prohibit the development of “superstores,” defined as retail establishments over 100,000 square feet devoting more than five percent of its sales floor area to non-taxable merchandise. Wal-Mart opposed the ordinance on the grounds that a supercenter would generate fewer vehicle trips and “the attendant environmental impacts of congestion and air pollution” than a multi-tenant shopping center containing the same facilities (an assertion supported by the informal findings of the table

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<sup>34</sup> CITY OF OAKLAND, CA, CODE § 17.10.345 (2003).

<sup>35</sup> A handful of impact studies were prompted by the California grocery worker strike in response to Wal-Mart’s plans to develop numerous superstores in that state. *See*, UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, HIDDEN COST OF WAL-MART JOBS: USE OF SAFETY NET PROGRAMS BY WAL-MART WORKERS IN CALIFORNIA (2004); J. DAMOOEI & A. AKBARI, THE IMPACT OF BIG BOX STORE EXPANSION ON VENTURA COUNTY: ANALYSIS OF CURRENT SOCIOECONOMIC STATUS OF UNIONIZED EMPLOYEES OF GROCERY STORES (2000) (prepared for the United Food and Commercial Workers Union Local 1036); MARLON BOARNET & RANDALL CRANE, THE IMPACT OF BIG BOX GROCERS ON SOUTHERN CALIFORNIA: JOBS, WAGES, AND MUNICIPAL FINANCES (1999) (prepared for the Orange County Business Council).

The 2004 Berkeley report cited above is joined by additional studies that document the public cost of low-wage jobs. *See e.g.*, GOOD JOBS FIRST, DISCLOSURES OF EMPLOYERS WHOSE WORKERS AND THEIR DEPENDENTS ARE USING STATE HEALTH INSURANCE PROGRAMS (2005); MICHAEL J. HICKS, DOES WAL-MART CAUSE AN INCREASE IN ANTI-POVERTY PROGRAM EXPENDITURES? (2005).

Concern for the public cost of low-wage labor prompted legislation in Maryland that will require employers with more than 10,000 workers in that state to dedicate at least eight percent of their employee expenditures to health care coverage. Unions continue to push for similar legislation in at least 30 other states, *see* Reed Abelson & Michael Barbaro, *Law Aimed at Wal-Mart May Be Hard To Replicate*, N.Y. TIMES, Jan. 16, 2006.

<sup>36</sup> 41 Cal. Rptr. 3d 420 (Cal. Ct. App. 2006).

above). The language of the ordinance itself argues that one should not take store format trip generation figures at face value:

the City's current distribution of neighborhood shopping centers provide convenient shopping and employment in close proximity to most residential neighborhoods..., and the distribution of shopping and employment creates a land use pattern that reduces the need for vehicle trips and encourages walking and biking for shopping, services, and employment.<sup>37</sup>

In January 2005, a California Superior Court ruled in favor of the City, stating that the size restriction was a proper exercise of the City's police power, even if it did have "an anticompetitive effect."<sup>38</sup> In April 2006, the Appellate Court dismissed as putting the "cart before the horse" Wal-Mart's argument that prohibiting a superstore in Turlock would lead to the construction of a superstore in a nearby community, forcing residents of Turlock to "travel great distances to take advantage of the lower prices and expanded product offerings that would be available."<sup>39</sup>

Beyond traffic impacts, a size restriction may be rationally implemented for the purpose of protecting a municipality's community character. Like traffic impacts, community character may be measured using a fairly straightforward visual survey; in this case by surveying the scale of existing buildings. To avoid potential complications with prohibiting large-scale retail altogether, a municipality may impose a maximum *footprint* restriction that reflects the scale of existing development. A footprint cap was enacted in Madison, Wisconsin, limiting individual commercial establishments to a 100,000 square-foot footprint and reviewing buildings over that square footage for stormwater management, energy efficiency, and green building design.<sup>40</sup> Given a footprint maximum, most retailers would prefer not to develop multi-story facilities but

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<sup>37</sup> *Id* at 423.

<sup>38</sup> *Id* at 426.

<sup>39</sup> *Id* at 436.

<sup>40</sup> MADISON, WI., GENERAL ORDINANCES § 32.02(4)(f)(3) (2005).

a desire to enter more densely developed urban markets has already generated a number of two- and multi-story big-box formats.<sup>41</sup>

Another way to responsibly use a size restriction to protect community character is to require a special permit for any building that is larger than the scale of existing buildings or for development that exceeds a designated level of vehicle trip generation. This form of size restriction provides greater discretion for local regulators, and yet, combined with clearly stated objectives and standards, such reviews can offer greater predictability for developers.

The evolution of size restrictions in Bennington, Vermont demonstrates this move toward size triggers for review in lieu of size caps. In April 2005, a ballot initiative funded by a Wal-Mart developer overturned a 50,000 square foot size cap enacted only four months earlier.<sup>42</sup> Town leaders responded with a bylaw that triggers a community impact review for any single retail store exceeding 50,000 square feet. A special permit may be granted after a review of the development's projected municipal costs; public improvements; tax revenues; impact on property values; net job loss or creation; and portion of the development's revenue that will be retained and re-directed back into the local economy.<sup>43</sup> This bylaw served as the model for legislation recently enacted by the Vermont Senate that would require any single retail store exceeding 75,000 square feet to undergo a review for community and *regional* impacts to

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<sup>41</sup> See Jennifer Evans-Crowley *supra* note 4 at 15.

<sup>42</sup> Janet E. Milne, *Foreword: The Big Box Challenge*, VERMONT J. OF ENV. LAW SYMP. 2005, 1 (citing David Gram, *Vermont Voters Back a Bigger Wal-Mart*, VALLEY NEWS (April 6, 2005) at A1). For more information on Wal-Mart's ballot initiative approach to defeating size restrictions, see Editorial, *In California, Wal-Mart Hits a Wall*, NEW YORK TIMES, Apr. 11, 2004 (Wal-Mart's \$1 million ballot initiative failed to gain the support necessary to develop a 130,000 square foot store in suburban Los Angeles); JEFFREY KAPLAN & JEFF MILCHEN, *BALLOT INITIATIVES HIJACKED BY CORPORATIONS* (March 7, 2004) available at [http://reclaimdemocracy.org/corporate\\_speech/overturn\\_bellotti\\_initiatives.html](http://reclaimdemocracy.org/corporate_speech/overturn_bellotti_initiatives.html) (last visited June 2, 2006).

<sup>43</sup> BENNINGTON, VT., *LARGE SCALE RETAIL BYLAW* (2005).

inform the local project approvals process.<sup>44</sup> Size triggers for development review will be discussed in greater detail in the Model Approaches section at the end of this article.

### *B. Design Guidelines*

Design guidelines blend the police powers to protect community character and to regulate aesthetics.<sup>45</sup> A typical big-box design regulation includes some conditions that are purely aesthetic, such as architectural detailing and appropriate exterior materials. This level of design is expensive to implement and therefore fundamentally antithetical to the low-cost nature of big-box retail. The economics of aesthetic requirements make it difficult to justify them in areas with low sales revenues, and these should not be seen as an integral component to mitigating large-scale retail. On the other hand, it may be rational in these areas to require performance-based design conditions rooted in the health, safety or welfare of the public, such as standards to improve pedestrian safety or environmental impact mitigations.

#### 1. DESIGN GUIDELINES: EXAMPLES

Design guidelines take many forms: simple or complex; containing suggested or required design features; and applying to all retail development or to individual projects through a development review process. Large-scale retail design guidelines in particular often follow the framework of the standards enacted in Fort Collins, Colorado in 1995, following a six-month moratorium on this type of development.<sup>46</sup> The Fort Collins standards are organized into two categories: “aesthetic character” (facades and exterior walls; smaller retail stores; detail features; roofs;

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<sup>44</sup> S.B.175, 2006 Leg., 69<sup>th</sup> Sess. (amending Vt. Stat. Ann., tit. 24 § 4412) available at <http://leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/senate/S-175.HTM> (last visited May 28, 2006).

<sup>45</sup> See origin of these police powers in the cases cited in *supra* note 31.

<sup>46</sup> FORT COLLINS, CO., ORDINANCE NO. 111 (1994). For other examples of large-scale retail development moratoria, see OLYMPIA, WA., RESOLUTION NO. M-1589 (Feb. 2005); SAN JUAN BAUTISTA, CA., ORDINANCE 2004-06 (adopted Nov. 2004); EASTON, MD., AMENDED ORDINANCE 390 (adopted Sept. 1999).

materials and colors; entryways; and back and side facades); and “site design and relationship to surrounding community” (entrances; parking lot orientation; back sides; outdoor storage, trash collection, and loading areas; pedestrian flows; central features and community spaces; and delivery/loading operations).

Examples of adaptations to the Fort Collins model include those that respond to local conditions, by specifying vernacular design features (e.g. Sahuarita, Arizona, landscape provisions requiring water harvesting mechanisms and a materials list including adobe and native stone<sup>47</sup>) or by integrating local cultural and economic heritage (e.g. Sequim, Washington, landscape and buffering provisions encouraging the use of lavender plants to represent the area’s “growing agri-lavender business”<sup>48</sup>).

## 2. DESIGN GUIDELINES: CHALLENGES

Design guidelines for large-scale retail are not without their drawbacks. For one, retailers benefit from the brand recognizability manifested in a unique outward appearance. The vulnerability of large-scale retail design controls to challenge under trademark law is discussed in detail in a Duke Law Journal Note by Akila Sankar McConnell.<sup>49</sup>

McConnell focuses on Section 1121(b) of the Lanham Act, a provision that protects corporations from state or municipal “alterations” to federally registered trademarks.<sup>50</sup> These

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<sup>47</sup> SAHUARITA, AZ., ZONING CODE § 18.82.70 (n.d.).

<sup>48</sup> SEQUIM, WA., DESIGN STANDARDS & GUIDELINES FOR LARGE RETAIL ESTABLISHMENTS (2003).

<sup>49</sup> Akila Sankar McConnell, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, DUKE L. J. 53: 1537-1567 (2004).

<sup>50</sup> 15 U.S.C. § 1121 (2000).

might include a corporation's *distinctive* "identifying mark"<sup>51</sup> or colors<sup>52</sup>; its "trade dress" such as product packaging<sup>53</sup> or the décor of an establishment<sup>54</sup>; but not its functional elements.<sup>55</sup>

Legal defensibility under this provision appears to hinge on the uniform application of a trademark restriction. At the hearings for the Section 1121(b) amendment to the Lanham Act before the House Judiciary Committee, it was determined that these trademark protections would not interfere with uniformly imposed zoning requirements, such as sign regulations or historic district design guidelines.<sup>56</sup> A design restriction that is written into standards for all commercial development within a district would therefore be more legally defensible than a restriction that is imposed as a result of a discretionary design review.

McConnell cites contradictory decisions by the Ninth Circuit Court of Appeals in *Blockbuster Videos, Inc. v. City of Tempe*<sup>57</sup> and the Second Circuit Court of Appeals in *Lisa's Party City v. Town of Henrietta*<sup>58</sup> as complications to an otherwise straightforward means to evaluate the legal defensibility of large-scale retail design guidelines. These two decisions disagree on whether the legislative history (i.e. the comments made during the Section 1121(b) hearings) are relevant or whether the statutory language is sufficiently clear as to what

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<sup>51</sup> See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d. 4, 9 (2d Cir. 1976) (establishing a hierarchy of distinctiveness).

<sup>52</sup> See *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 161 (1995).

<sup>53</sup> See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212 (2000) (product packaging may be considered inherently distinctive).

<sup>54</sup> See *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 767 (1992).

<sup>55</sup> See 15 U.S.C. § 1052(e)(5) (2000) (providing an ex parte bar on the registration of trademark symbols that are functional).

<sup>56</sup> Sankar McConnell, *supra* note 49 at 1551 (citing the statement of Rep. Barney Frank in *Lanham Trademark Act Amendment: Hearing on H.R. 5154 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 97th Cong. 10-11 (1982)).

<sup>57</sup> 141 F.3d. 1295 (9th Cir. 1998) (the clear statutory language of Section 1121(b) does not require referring to the provision's legislative history, i.e. the Commissioner's response to Rep. Frank's line of questioning in the House Judiciary Committee hearing, for an interpretation of the provision).

<sup>58</sup> 185 F.3d 12 (2d Cir. 1999) (a town ordinance restricting the color of exterior signs does not alter the company's trademarked logo because all other uses of the logo were unimpaired).

constitutes an “alteration” to a registered trademark.<sup>59</sup> In *Blockbuster*, the court determined that a building design standard could *prevent* the inclusion of a trademark feature (e.g. an awning with a logo on it) but it could not require altering that trademarked feature (e.g. black lettering instead of yellow lettering on that awning).<sup>60</sup> In *Lisa’s Party City*, the court ruled that a uniformly applied restriction (e.g. all awnings must have black lettering) does not violate Section 1121(b).<sup>61</sup>

McConnell’s analysis of the provision suggests a two-pronged evaluation of the applicability of Section 1121(b) protections to an individual retailer: (i) are the retailer’s exterior colors a registered trademark? and (ii) is the retailer’s formula façade design trademarked as part of its “trade dress”?<sup>62</sup> The first question is necessary because McConnell has identified a loophole whereby retailers may trademark their exterior colors alone—as opposed to a trademarked “general color” that may be applied both inside and outside—making it difficult to argue under the decision in *Lisa’s Party City* that a municipality has left the trademarked colors at the interior untouched.<sup>63</sup> The second question is of greater concern when evaluating the regulation of trademarked features on the facades of non-discount or smaller format retail establishments. McConnell cites the Supreme Court’s decision in *Two Pesos, Inc. v. Taco Cabana* whereby the design of the exterior of a Mexican-themed restaurant was protected for its inherently distinctive and non-functional design.<sup>64</sup> McConnell notes that this may not be as much of a concern for attempts to regulate large-scale retail façades: the low-cost elements typical of big-box construction may not be similarly interpreted as distinctive.<sup>65</sup>

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<sup>59</sup> Sankar McConnell, *supra* note 49 at 1554-1555.

<sup>60</sup> *Blockbuster Videos, Inc.*, 141 F.3d. at 1300.

<sup>61</sup> *Lisa’s Party City*, 185 F.3d. at 15.

<sup>62</sup> Sankar McConnell, *supra* note 49 at 1561-1562.

<sup>63</sup> *Id* at 1556-1557.

<sup>64</sup> *Two Pesos, Inc.*, *supra* note 54.

<sup>65</sup> Sankar McConnell, *supra* note 49 at 1562.

Aside from concern for large-scale retail trademark protections, municipalities employing or considering design restrictions should also take into account the economic reality of the design elements being requested. Should a superstore in a rural area with no adjacent development maintain a zero lot-line setback or be designed to look like Jefferson's Monticello? Such a scenario exemplifies why each municipality or county ought to consider what is economically appropriate to their location before adopting design restrictions employed elsewhere.

Although purely aesthetic regulations have produced a visual improvement over typical, low-cost large-scale retail construction, a recent editorial in *Congressional Quarterly's* *Governing* magazine cites the pitfalls of heralding such advances.<sup>66</sup> The author writes:

The current design debate only distracts from the most serious problems with big boxes: zoning. ... True rethinking of the big box will require more than Mediterranean stucco. It will mean finding ways to integrate massive retail spaces with housing and offices in ways that are both good for the community and good for sales. Most communities aren't at this stage yet.<sup>67</sup>

It is clearly not economically feasible to require a high level of design in every type of commercial district. What, then, is a reasonable litmus test for implementing large-scale retail design guidelines?

### 3. DESIGN GUIDELINES: RATIONAL BASIS

Increased competition for consumers in high-income markets has developers spending more on building design without government coercion. In these areas, it is more likely that local officials will be *offered* a vernacular design option (e.g. Wal-Mart Stores, Inc. has a virtual patternbook of Alpine, Coastal, Mediterranean, or Mission-style store designs).<sup>68</sup>

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<sup>66</sup> The editorial points to an *Architectural Record* article on well-designed big boxes. See Sam Lubell, *Is There Hope for the Big Box?* ARCHITECTURAL RECORD (August 2005) at 68.

<sup>67</sup> Editorial, *Like Putting Mascara on a Battleship*, GOVERNING (October 2005) at 16.

<sup>68</sup> Lubell, *supra* note 66 at 70.

In some areas, design controls or design review may be rationally enforced to protect a distinct community character. This is most reasonable in areas where the economic interests of a municipality are closely tied to its character. For example, municipalities with historic tourist destinations or other select areas where commercial property values could be unusually affected by development that is not in keeping with the scale and character of existing buildings.

It is relatively easy to determine whether or not an area's economy is dependent on tourist dollars and whether tourists are attracted to the destination because of its unique character. The rationality of adopting design controls in these areas will be discussed in greater detail in the next section on Formula Business Ordinances. It is more difficult, however, to identify a local character that is otherwise worthy of protection. Does a suburban commercial corridor, for example, have an aesthetic "character" that new development should adhere to? Is it worth exposing the municipality to challenges under Section 1121(b) protections or other claims if it does not? This issue is worthy of consideration when evaluating whether to include aesthetic controls in local large-scale retail regulations.

It is easier to argue that performance-based design controls are a valid exercise of police powers. In an area with a high degree of pedestrian activity, it is reasonable to require minimal curb cuts and a façade that enlivens the street. In a rural area with little opportunity for pedestrian access and low land values, a costly design feature such as sixty percent façade transparency may be unreasonable, while the high cost of servicing a greenfield location may justify energy efficiency standards or an impact fee. A performance-based standard worthy of consideration in any location is high quality construction that facilitates dividing the box into multiple bays to allow these structures to be more easily adapted to smaller retail or other uses in the future.

### C. *Formula Business Ordinances*

Regulating formula businesses is another way that municipalities restrict or prohibit the development of large-scale retail stores. Some formula business ordinances, like the size caps discussed earlier, prohibit formula retail altogether, some control their development through conditional use review, while others allow only a limited number of establishments.

#### 1. FORMULA BUSINESS ORDINANCES: EXAMPLES

The typical formula business ordinance establishes its purpose; the relationship between this and local comprehensive plan policies; a definition for formula businesses; and the manner in which the development of such businesses will be regulated. Formula retail definitions commonly refer to trademarked or standardized merchandise, uniforms, décor, architecture, and signs.

An example of a municipality that prohibits all formula retail is San Juan Bautista, California.<sup>69</sup> Following a year-long moratorium, local officials voted to ban formula and large-scale retail businesses out of concern for the area's dependence on tourism revenue. This ordinance defines "large-scale retail business development" as a structure that is designed to "accommodate an occupancy of greater than 5,000 square feet by any one retail establishment."<sup>70</sup> In essence, the San Juan Bautista ordinance is a size cap restriction.<sup>71</sup>

Other formula business ordinances instead use the formula business definition to trigger a conditional use review. The Sausalito, California formula business ordinance requires any new development or cumulative expansion of a formula business over 500 square feet to undergo a conditional use review to ensure that the development is "compatible with existing surrounding uses, and...designed and...operated in a non-obtrusive manner to preserve the community's

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<sup>69</sup> SAN JUAN BAUTISTA, CA. ORDINANCE 2004-06 (2004).

<sup>70</sup> *Id* at 2.

<sup>71</sup> The Bristol, Rhode Island formula business ordinance similarly restricts commercial development in its historic district to 2,500 square feet. *See* BRISTOL, RI., ZONING ORD., § 28-1 (2004).

distinctive character and ambiance.”<sup>72</sup> Following a twice-extended moratorium on non-residential development, the City of Calistoga, California enacted an ordinance requiring a conditional use review of all formula retail establishments and development over 20,000 square feet.<sup>73</sup> Along with standards to ensure compatibility of design with local character, development must also be “consistent with the historic, rural, small town atmosphere of Calistoga.”<sup>74</sup>

A third, less common, approach is to limit the *number* of formula establishments. Arcata, California, for example, permits formula restaurants only if they replace an existing establishment. In effect, only nine formula restaurants are allowed.<sup>75</sup>

## 2. FORMULA BUSINESS ORDINANCES: CHALLENGES

In the examples listed above, the language of the formula business ordinances do not refer to whether these businesses are locally or nationally owned. Defining what constitutes a formula business without making this distinction is essential to their withstanding legal challenges under the Dormant Commerce Clause Doctrine (DCCD) discussed in the section of this article on Size Restrictions. In the same article by Denning and Lary cited in that section, the authors review a case where a formula business ordinance was challenged unsuccessfully under the DCCD.

### a. *Coronadans Organized for Retail Enhancements v. Coronado*<sup>76</sup>

A group of retail property owners in Coronado, California filed against an ordinance that prohibits formula businesses from having a street frontage greater than 50 linear feet or a height greater than two stories (except for grocery stores, banks, savings and loans,

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<sup>72</sup> SAUSALITO, CA, CODE, § 10.44.240 (n.d.).

<sup>73</sup> CALISTOGA, CA. CODE § 17.40.070 (1996).

<sup>74</sup> *Id.*

<sup>75</sup> ARCATA, CA. CODE tit. IX (2002).

<sup>76</sup> 2003 WL 21363665 (Cal. Ct. App. June 13, 2003) (unpublished).

restaurants, and theaters). A special permit is also required to open a new formula business or expand a formula business by more than 500 square feet.

The petitioners claimed the ordinance facially violates the DCCD. The ordinance states that:

the addition of formula businesses in the commercial areas, if not monitored and regulated, will serve to frustrate [the] goal of a diverse retail base with a unique retailing personality comprised of a mix of businesses ranging from small to medium to large and from local to regional to national. Specifically the unregulated and unmonitored establishment of additional formula retail uses will unduly limit or eliminate business establishment opportunities for smaller or medium sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers, thereby decreasing the likelihood of a diversity of retail activity.<sup>77</sup>

Although the language above explicitly mentions national and local retailers, it is only to point out that the *market* has produced discriminatory effects. The trial court found for the City, as did the appellate court, citing the *Pike*-balancing test<sup>78</sup>, the standard applied in *Waste Management of Alameda County, Inc. v. Biagini Waste Recycling Reduction Systems*<sup>79</sup> and *Great Atlantic & Pacific Tea Co., Inc.*<sup>80</sup> (no differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter). The court rejected the claim that the Coronado ordinance had a discriminatory purpose, citing language in the ordinance that describes its purpose to “provide for an economically viable and diverse commercial area that is consistent with the ambiance of the city.”

Denning and Lary contend that the appeals court in *Coronadans* erred in declaring the ordinance “evenhanded” instead of “facially neutral,” which would have left open the question of the ordinance’s potential discriminatory *effects* under the DCCD. This issue does not appear to concern local regulators, who remain confident in their equal application of the law to intrastate and interstate merchants as evidenced by the following example.

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<sup>77</sup> CORONADO, CA., FORMULA RETAIL ORDINANCE, 2 (2000).

<sup>78</sup> *Pike*, *supra* note 27.

<sup>79</sup> 63 Cal. App. 4th 1488, 1495 (Cal. Ct. App. 1998).

<sup>80</sup> *Great Atlantic & Pacific Tea Co.*, *supra* note 29.

b. Memo from the Arcata City Attorney: Legal Restrictions on Formula Restaurant Ordinances<sup>81</sup>

A year after the Coronado property owners filed suit, the City Attorney in Arcata, California was requested to comment on the “legal parameters” of their formula restaurant ordinance.<sup>82</sup> The City Attorney defended its validity, also citing the *Pike*-balancing test<sup>83</sup> and the ruling in *Oregon Waste Systems*<sup>84</sup>, as well as the decisions in *Penn Central Transportation Co. v. New York*<sup>85</sup> and *Metromedia, Inc. v. City of San Diego*<sup>86</sup> (an exercise of police power is considered legitimate if it serves local goals such as the preservation of local character and economic development).

As demonstrated by the challenges discussed in this section and in the section on Size Restrictions, it is difficult to use the DCCD to reverse large-scale retail regulations. Because of the trademarked features of formula business establishments, municipalities that do not prohibit formula businesses altogether should keep a watchful eye on the Lanham Act Section 1121(b) protections discussed in the section of this article on Design Guidelines to ensure that they are not requiring alterations to trademarked features that could be challenged in court.

### 3. FORMULA BUSINESS ORDINANCES: RATIONAL BASIS

From the outcome of the challenges discussed above, formula business ordinances are most rationally based in the power to protect a unique local character, and the restrictions must be applied equally to in-state and out-of-state economic interests.

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<sup>81</sup> CITY ATTORNEY OF ARCATA, CA, LEGAL RESTRICTIONS ON FORMULA RESTAURANT ORDINANCES (January 17, 2002) (prepared at the request of the City Director of Community Development).

<sup>82</sup> *Id* at 1.

<sup>83</sup> *H.P. Hood & Sons, Inc.*, *supra* note 27.

<sup>84</sup> *Waste Management of Alameda County, Inc.*, *supra* note 79.

<sup>85</sup> 438 U.S. 104 (1978).

<sup>86</sup> 26 Cal.3d. 348 (Cal. Sup. Ct. 1980).

Whether to use a formula business or size trigger as the basis for a development review of large-scale retail depends upon the impact of development needing mitigation. If community character is of greatest importance, a formula business trigger may provide the most rational basis for review. Examples of both are included in the Model Approaches section of this article.

In some of the examples and cases cited in this section, the legitimacy of the regulation was reinforced by state-level policies supporting local discretion. In some states, large-scale retail regulations are *required* to be consistent with the policies of an adopted comprehensive plan.

### **III. Comprehensive Plan Policies**

There are three types of relationships between general plan or comprehensive plan policies and land use regulations, according to Daniel J. Curtin in his piece for the Vermont Journal of Environmental Law Big Box Symposium.<sup>87</sup> The “unitary view” employed in Arkansas, Connecticut, Illinois, New York, and Massachusetts—and likely a majority of the states—does not require a comprehensive plan to be prepared separately from zoning regulations. The “planning factor view” employed in Missouri, Montana, New Jersey, and Vermont treats a comprehensive plan policy as one of multiple factors that should be taken into account when reviewing land use regulations. Lastly, the “plan as the constitution of law view” employed in Florida, Oregon, and Washington affords plan policies a quasi-constitutional status.<sup>88</sup> Policies to support large-scale retail regulations are therefore more crucial in states with the latter view.

Regardless of state statute, comprehensive plan policies that support large-scale retail regulations safeguard against claims that a policy or decision was “arbitrary or capricious.”<sup>89</sup>

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<sup>87</sup> Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County’s Police Power and Its Comprehensive Plan*, VER. J. ENV. L. SYMP. 2005.

<sup>88</sup> *Id* at 43-44.

<sup>89</sup> An exercise of power that violates the due process “arbitrary or capricious” standard is one that uses a means with no substantial relation to an end. *See Mugler v. Kansas* 123 U.S. 623, 661 (1887) (“If [a] statute purporting to have

Ideally, these policies are grounded in rigorous impact studies the findings of which reinforce a rational basis for the regulation. If a policy that regulates large-scale retail appears not to be in accordance with a municipality's comprehensive plan, the municipality might consider adopting a plan amendment to reflect the objective of the regulation.

Some policies refer to the objective of preserving local character. The Port Townsend, Washington formula business ordinance, for example, cites a comprehensive plan policy that calls for economic development to “balance economic vitality with stability, environmental protection, and preservation of our small town atmosphere.”<sup>90</sup>

Other policies reflect concern for the potential wage and labor market impacts of large-scale retail.<sup>91</sup> The Port Townsend formula business ordinance also cites a comprehensive development plan policy to encourage the location of businesses that provide a “family wage”: jobs that pay a wage or salary that allows an individual or family to purchase a home, feed and clothe a family, pay for medical care, take a vacation, save for retirement, and send the kids to college.<sup>92</sup>

A handful of comprehensive plan policies support concentrating commercial development into central areas to support the vitality of existing retail merchants.<sup>93</sup> Regulations restricting all

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been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.”).

<sup>90</sup> PORT TOWNSEND, WA., CODE § 17.05 (2005) (citing PORT TOWNSEND, WA. COMPREHENSIVE PLAN at 147 (n.d.)).

<sup>91</sup> A handful of studies have attempted to isolate the impact of Wal-Mart on local wages and employment. See DAVID NEUMARK, ET AL., THE EFFECTS OF WAL-MART ON LOCAL LABOR MARKETS (November 2005) (working paper No. 11782 for the National Bureau of Economic Research), available at <http://www.nber.org/papers/w11782> (last visited March 20, 2006); EMEK BASKER, JOB CREATION OR DESTRUCTION?: LABOR MARKET EFFECTS OF WAL-MART EXPANSION (2004); CHIRAG MEHTA, RON BAIMAN & JOE PERSKY, THE ECONOMIC IMPACT OF WAL-MART: AN ASSESSMENT OF THE WAL-MART STORE PROPOSED FOR CHICAGO'S WEST SIDE (2004); B.A. KETCHUM & J.W. HICKS, WAL-MART AND MAINE: THE EFFECT ON EMPLOYMENT AND WAGES (1997).

<sup>92</sup> *Id.* (citing the PORT TOWNSEND, WA. COMPREHENSIVE DEVELOPMENT PLAN, 14).

<sup>93</sup> A number of studies have examined the impact of large-scale retail on smaller merchants. Their findings confirm concerns that there is a considerable negative impact if a merchant is in direct competition with a discount retailer, although non-competing merchants may experience a rise in sales. See GEORGEANNE ARTZ & JAMES MCCONNON, JR., THE IMPACT OF WAL-MART ON HOST TOWNS AND SURROUNDING COMMUNITIES IN MAINE (2001); Mark Peterson & Jeffrey E. McGee, *Survivors of 'W-Day': An Assessment of the Impact of Wal-Mart's Invasion of Small Town Retailing Communities*, 28 INT'L. J. RETAIL AND DISTRIBUTION MGMT., 170 (2000) (businesses with less than \$1 million in sales experience a negative impact that is greatest among those located in the central business district

retail to these areas could put large-scale retailers up against size caps or triggers for conditional use review that require compatibility with local character. A comprehensive plan policy in Kent County, Maryland, encourages new development to “occur in and around existing towns, villages, and neighborhoods, thereby preserving our rural character, agricultural lands, and environment.”<sup>94</sup> A comprehensive plan policy in Skaneateles, New York recommends that the village commercial center remain the center for shopping in the community, rather than allow competing shopping centers to provide basic goods and services.<sup>95</sup>

Codifying language such as the examples cited above would clarify the rational basis of any form of large-scale retail development restriction.

#### **IV. Model Approaches**

Planner/lawyer Dwight Merriam rightly describes large-scale retail regulation as a “pig in the parlor” issue.<sup>96</sup> The potential negative impacts examined in the impact studies cited throughout this article depend largely on location; from urban to rural, across a number of different economic conditions. Advocacy organizations are sometimes frustrated by this changing

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and lessened among those with a change in retail strategy); Sharon M. Davidson & Amy Rummel, *Retail Changes Associated with Wal-Mart's Entry into Maine*, 28 INT'L. J. RETAIL AND DISTRIBUTION MGMT., 162 (2000) (host towns experience an increase in sales while neighboring towns decline or increase at a slower pace); David P. Brennan & Lorman Lundsten, *Impacts of Large Discount Stores on Small US Towns: Reasons for Shopping and Retailer Strategies*, 28 INT'L. J. RETAIL AND DISTRIBUTION MGMT., 155 (2000); KENNETH STONE, IMPACT OF WAL-MART PHENOMENON ON RURAL COMMUNITIES (1997); J. F. HORNBECK, THE DISCOUNT RETAIL INDUSTRY AND ITS EFFECT ON SMALL TOWNS AND RURAL COMMUNITIES (1994) (prepared as a CRS Report for Congress, the Library of Congress); John Ozment & Greg Martin, *Changes in the Competitive Environments of Rural Trade Areas: Effects of Discount Retail Chains*, 21 J. BSN. RES., 277 (1990) (comparing discount retail store impacts in host and non-host communities between 1977 and 1982, the authors found that the decline in the number of retail establishments in non-host communities was three times as great); LORI FRANZ & EDWARD ROBB, EFFECT OF WAL-MART STORES ON ECONOMIC ENVIRONMENT OF RURAL COMMUNITIES (1989) (a study of the impact Wal-Mart entry on 14 rural counties in Missouri—financed by Wal-Mart Stores, Inc.).

<sup>94</sup> KENT COUNTY, MD. COMPREHENSIVE PLAN, RETAIL ELEMENT (n.d.) available at <http://www.kentcounty.com/gov/planzone/compplan.htm#BAC> (last visited June 2, 2006).

<sup>95</sup> SKANEATELES, NY., COMPREHENSIVE PLAN: LOCAL DEVELOPMENT POLICY; BUSINESS AND INDUSTRY (2005).

<sup>96</sup> Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperer*, VER. J. ENV. L. SYMP., 13 (quoting the decision in *Euclid v. Ambler Realty, Inc.* (supporting the constitutionality of zoning, Justice Sutherland wrote: “A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard”). See *Euclid supra* note 31.

prognosis of impacts from municipality to municipality.<sup>97</sup> Paul Tischler, of TischlerBise consultants maintains that the fiscal impact of development varies according to: (i) state/local revenue structures; (ii) assessed values of new development; (iii) characteristics of new development (spatial and demographic); (iv) levels of municipal service; and, (v) existing infrastructure capacity.<sup>98</sup>

With this in mind, the goal of the model approaches is to move away from a “one size fits all” way of regulating large-scale retail to create a range of regulatory responses that respond to the Tischler criteria. Ideally, by creating a set of regulations with broad applicability there will be no areas of weaker control. As Merriam wrote in his piece for the Vermont Journal of Environmental Law Big Box Symposium:

Development will flow to those areas of weaker planning and regulation.... It will not in the end be stopped; instead it will be driven to a sub-optimum location, which in the end may be worse than prohibiting it elsewhere.<sup>99</sup>

If applied broadly, such approaches could help move the economic development environment away from there being clear “winners” and “losers” in the competition for large-scale retail revenue and the fight against superstore sprawl.<sup>100</sup>

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<sup>97</sup> In response to a proposed large-scale retail development proposed in Littleton, New Hampshire in 2004, a community group cited a consultant’s assessment of retail development on the tax base of Concord, New Hampshire conducted in 1995. This was called “balderdash” by the consulting firm, which was now contracting with the Littleton project developer. The consultant argued that the figures were out of date and specific to Concord. See Gary E. Lindsley, *Proposed Rezoning Becomes a Hot Button*, THE CALEDONIAN-REC. (March 8, 2004). For the original study, see RICHARD GOTTSCHNEIDER, RKG ASSOCIATES, UNDERSTANDING THE TAX BASE CONSEQUENCES OF LOCAL ECONOMIC DEVELOPMENT PROGRAMS (1995).

<sup>98</sup> Paul Tischler, *Does New Growth Pay for Itself?* TISCHLER & ASSOCIATES, INC. FISCAL & ECONOMIC NEWSLETTER NO. 42, available at <http://www.tischlerbise.com/downloads/Newsletter42.pdf> (last visited June 4, 2006).

<sup>99</sup> Merriam, *supra* note 96 at 13.

<sup>100</sup> While some municipalities dedicate millions of dollars in subsidies to attract large-scale retail development, others go to great lengths to discourage the same. In what will likely have a cooling effect on large-scale retail development, the Chicago City Council is considering an ordinance that would require all stores over 75,000 square feet or companies with over \$1 billion in sales to pay their employees \$10 an hour or more, plus \$3 an hour in benefits. See Gretchen Reuthling, *In Chicago, New Pay Law is Considered for Big Stores*, N.Y. TIMES, May 28, 2006. For information on the public funding used to attract large-scale retail development, see GOOD JOBS FIRST, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS NEVER-ENDING GROWTH (2004); POLICY MATTERS OHIO, WAL-MART SPECIAL: OHIO JOB TAX CREDITS TO AMERICA’S RICHEST JOB RETAILER (2002).

Each model approach (i) reviews the character of the district type in a “purpose” section to establish the potential negative impacts of large-scale retail development<sup>101</sup>; (ii) presents the regulatory mechanisms for controlling large-scale retail; and (iii) proposes interventions to mitigate negative impacts or promote development that benefits the objectives of each type of commercial district. The districts are: Central Business, Urban Redevelopment, Neighborhood Retail, Main Street, Commercial Corridor, and Highway Commercial. These are not meant to be all-inclusive, but rather examples that local governments can adapt to their land use regulations.

#### A. *Central Business District*

In a high land-value Central Business District<sup>102</sup>, limited land availability minimizes potential negative impacts that may stem from large-scale retail land use. In this district, it is in the retailer’s best interest to design a storefront that adds to the character of the district to attract pedestrian consumers. Design and other development review criteria should be consistent with existing Downtown Design Guidelines that apply to all commercial development in that district.

##### 1. PURPOSE

The purpose and intent of the Central Business District is to promote the vitality of the community by supporting the continuing commercial development of the downtown. The district is designed to accommodate a wide mix of land uses ranging from commercial and office to residential and public spaces, both active and passive. The Central Business District is intended to meet the needs of the city and region as its urban center; to provide for neighborhood, local,

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<sup>101</sup> The language of this section should be supported by comprehensive plan policies in states where this is mandatory or to merely reinforce the rational basis of the regulation.

<sup>102</sup> Low land-value downtown districts will be addressed in the next district type.

and regional commercial and office needs; and to accommodate the changing needs of transportation and integrate the new modes of transportation and related facilities.<sup>103</sup>

## 2. REGULATION

The trigger for review in the Central Business District should be the square footage of the maximum footprint, applied equally to all retail development of that size.

### a. Footprint size restriction

No single new retail business establishment shall exceed a building footprint of \_\_\_\_\_ square feet as defined by the exterior walls. Other separately owned retail establishments not associated with the proposed establishment shall not be counted towards the \_\_\_\_\_ square foot limit.<sup>104</sup>

### b. Conditional use review

Buildings with a total square footage at or exceeding the footprint maximum may be reviewed by the Urban Design Commission and Plan Commission for (i) structured or underground parking facilities; (ii) energy efficient design; (iv) green building design; and (v) the use of a green roof or other stormwater management best practices.<sup>105</sup>

## 3. MITIGATIONS

**Structured or Underground Parking.** When a multi-story garage is proposed for a street where the predominant use is retail or business services, the garage's ground level street frontage (except for driveways and pedestrian entrances) must be improved with retail and business services. Ground-floor and second-floor spaces improved with retail, business service or other active uses must include display windows, lighting, architectural treatments or landscaping to enhance the

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<sup>103</sup> Adapted from VISALIA CA. ZONING CODE, ch.17.18.010 (n.d.).

<sup>104</sup> Adapted from MADISON, WI., GENERAL ORDINANCES § 32.02(4)(f)(3) (2005).

<sup>105</sup> *Id.*

pedestrian environment. On the upper levels, parking may be screened by business or residential uses, glazing, metal grillwork, louvers and other architectural treatments.<sup>106</sup>

Green Roofs. Buildings with green roofs in the Central Business District are eligible for a density bonus, provided they meet the criteria established by the City Department of the Environment. Bonuses are awarded according to the following: (area of roof landscaping in excess of fifty percent of net roof area divided by the lot area) x 0.30 x Base FAR.<sup>107</sup>

### *B. Urban Redevelopment*

This district type refers to a blighted area that is in need of development subsidies to promote revitalization. Often these are characterized by a special designation, such as an Enterprise Zone, federal Empowerment Zone, or a local redevelopment agency project area. The development subsidies available to retailers in this area make it necessary to include greater oversight of impacts on local wages and employment<sup>108</sup> or impacts on existing merchants<sup>109</sup> that are already being supported by public expenditures.

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<sup>106</sup> Adapted from the CHICAGO, IL., ZONING ORDINANCE §17.11.0206 (f) (n.d.).

<sup>107</sup> Excerpted from CHICAGO, IL. ZONING ORDINANCE § 17.4.1015 (a) (includes a detailed description of the eight criteria for approval of the bonus). The City of Chicago is currently considering a matching program using TIF funds to encourage privately developed green roofs downtown. For more information on this initiative, see Gary Washburn, *City Plan Would Pay a Bonus for 'Green Roofs,'* CHI. TRIB., May 24, 2006.

<sup>108</sup> See impact studies cited in *supra* note 91.

<sup>109</sup> See KENNETH STONE, ET AL., THE ECONOMIC IMPACT OF SUPERCENTERS ON EXISTING BUSINESSES IN MISSISSIPPI (2002); Ken Jones & Michael Doucet, *Big Box Retailing and the Urban Retail Structure: The Case of the Toronto Area*, 7 J. OF RETAILING AND CONSUMER SERVICES, 233 (2000); Stephen Arnold & Monika Narang Luthra, *Market Entry Effects of Large Format Retailers*, 28 INT. J. RETAIL AND DISTRIBUTION MGMT., 139 (2000); Kathleen Seiders, et al., *The Impact of Supercenters on Traditional Food Retailers in Four Markets*, 28 INT. J. RETAIL AND DISTRIBUTION MGMT., 181 (2000); GEORGEANNE ARTZ, THE IMPACT OF WAL-MART ON RETAIL MARKET STRUCTURE IN MAINE (1999); Michael Hicks & Kristy Wilburn, *The Regional Impact of Wal-Mart Entrance: A Panel Study of the Retail Trade Sector in West Virginia*, 31 REV. OF REGIONAL STUDIES, 305 (1999); EDWARD SHILS, MEASURING THE ECONOMIC AND SOCIOLOGICAL IMPACT OF THE MEGA-RETAIL DISCOUNT CHAIN STORES ON SMALL ENTERPRISE IN URBAN, SUBURBAN AND RURAL COMMUNITIES (1997).

## 1. PURPOSE

Urban Redevelopment District policies should seek to (i) ensure that that any expenditure of public funds produces a net gain to district residents and (ii) respond to studies that question the fiscal efficiency of subsidizing or even allowing large-scale retail development (superstores in particular) in publicly subsidized redevelopment areas.<sup>110</sup> The population densities of urban areas make these potentially profitable market areas, despite lower incomes per household. Local regulators should not feel that they have to “give away the store” to attract development.<sup>111</sup>

## 2. REGULATION

In Los Angeles, California, a conditional use review is required of all major development projects within the City’s designated Economic Assistance Areas, with these districts identified on an “Economic Assistance Areas Map.”<sup>112</sup> The trigger for conditional use review—the definition of a “major” retail development project—is the construction of, the addition to, or the alteration of any buildings or structures which create or add 100,000 or more square feet.<sup>113</sup>

### a. Conditional use review

The City Planning Commission shall make the following findings: (i) the major development conforms with any applicable specific and/or redevelopment plan; (ii) the project provides a

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<sup>110</sup> See NATE STONE & CHRIS NEVITT, *NEW LIGHT ON A BAD DEAL: PREVIOUSLY WITHHELD DURA DOCUMENTS MAKE THE CASE AGAINST WAL-MART AT ALAMEDA SQUARE* (2003) (a brief prepared by the Front Range Economic Strategy Center for the United Food and Commercial Workers Local 7) (\$10 million in taxpayer subsidies of a Wal-Mart development may undermine the Denver Urban Renewal Authority (DURA) investments in a major grocery store and smaller businesses in the redevelopment district); DAVID KARJANEN & MURTAZA BAXAMUSA, *SUBSIDIZING WAL-MART: A CASE STUDY OF THE COLLEGE GROVE REDEVELOPMENT PROJECT* (2003) (research report prepared by the Center on Policy Initiatives for the California Partnership for Working Families) (Wal-Mart received nearly \$10 million in direct taxpayer subsidies despite low-wage job creation and no environmental or other form of project review because of vested rights from a 1987 development permit).

<sup>111</sup> For more information on large-scale retailer entry into urban markets, see Robert Manor, *Wal-Mart Targeting Inner City for Buildup*, CHI. TRIB., April 5, 2006; Tim Craig, *Going Downtown, Ka-Ching!* DSN RETAILING TODAY, October 27, 2004; Debbie Howell, *Suddenly City: Chains Answer Urge to Go Urban*, DSN RETAILING TODAY, May 9, 2005; CONSTANCE BEAUMONT, *BETTER MODELS FOR SUPERSTORES: ALTERNATIVES TO BIG-BOX SPRAWL* (1997).

<sup>112</sup> LOS ANGELES, CA., MUNICIPAL CODE § 12.24(14)(a) (2004).

<sup>113</sup> *Id.*

compatible arrangement of uses, buildings, structures, and improvements in relation to neighboring properties; (iii) the project complies with the height and area regulations of the zone in which it is located; and, (iv) the use would have no material adverse impact on properties, improvements or uses, including commercial uses, in the surrounding neighborhood.<sup>114</sup>

b. Fiscal impact analysis for superstores<sup>115,116</sup>

Prior to approval of a Superstore located in an Economic Assistance Area, the City Planning Commission or the City Council on appeal shall find, after consideration of all economic benefits and costs, that the Superstore would not materially adversely affect the economic welfare of the Impact Area<sup>117</sup>, based upon information contained in an economic impact analysis report (“the report”) submitted by the applicant.

The applicant shall prepare and submit the report to the CDD or CRA, where appropriate, for review in conjunction with its application to the Department of Planning. The report shall be reviewed by the Department or Agency and/or a consultant, if deemed necessary by the Department or Agency, and paid for in full by the applicant.

The report shall identify whether: (i) efforts to establish a market larger than 200,000 square feet within the Impact Area have been successful or whether the proposed use will have an adverse impact or economic benefit on grocery or retail shopping centers in the Impact Area; (ii) the Superstore would result in the physical displacement of any businesses, and, if so, the nature

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<sup>114</sup> Adapted from LOS ANGELES, CA., MUNICIPAL CODE § 12.24(14)(b) (2004).

<sup>115</sup> For additional examples of fiscal impact analysis triggered by large-scale development, *see* GREENFIELD, MA., MAJOR DEVELOPMENT REVIEW RULES & REGULATIONS § 3.2.5 (2003); HOMER, AK., ZONING CODE § 21.61.105 (f) (2003); and DELAWARE, OH., ZONING CODE § 1191 (2001).

<sup>116</sup> The Los Angeles Code defines a “superstore” as a retailer with a total sales floor area exceeding 100,000 square feet that devotes more than 10 percent of its sales floor area to the sale of non-taxable merchandise. This definition excludes wholesale clubs or other establishments that sell primarily bulk merchandise and charge membership dues or otherwise restrict merchandise sales to customers paying a periodic assessment fee. This definition excludes the sale or rental of motor vehicles, except for parts and accessories, and the sale of materials used in construction of buildings or other structures, except for paint, fixtures, and hardware. *See* LOS ANGELES, CA. MUNICIPAL CODE § 12.24(14)(a) (2004).

<sup>117</sup> An “impact area” is defined as the three-mile radius surrounding the site of the proposed development. *See* LOS ANGELES, CA., MUNICIPAL CODE § 12.24(14)(d)(1).

of the displaced businesses, or whether the Superstore would create economic stimulation in the Impact Area; (iii) the Superstore would require demolition of housing, or any action or change that results in a decrease of extremely low, very low, low or moderate income housing on site; (iv) the Superstore would result in the destruction or demolition of any park or other green space, playground, childcare facility, or community center; (v) the Superstore would provide lower cost and/or higher in quality goods and services to residents than currently available within the Impact Area; (vi) the Superstore would displace jobs within the Impact Area or provide job creation (for the purposes of this determination, the applicant must identify the number of jobs displaced or created, the quality of jobs, whether the jobs are temporary or permanent, and the employment sector in which the lost jobs are located); (vii) the Superstore would have a fiscal impact either positive or negative on City tax revenue; (viii) any restrictions exist on the subsequent use of the property on which the Superstore is proposed to be located<sup>118</sup>; (ix) the Superstore will result in any materially adverse or positive economic impacts or blight on the Impact Area; and (x) any measures are available which will mitigate any materially adverse economic impacts, if necessary.<sup>119</sup>

### 3. MITIGATIONS

Under the Los Angeles model, a project determined to have a positive impact should be approved. If it is determined to have a negative impact, the project may be denied, or fiscal mitigation measures such as an impact fee or development exaction may be imposed to offset negative impact findings as a condition of approval. If the Los Angeles model is considered too

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<sup>118</sup> Municipalities are growing wise to this issue of lease restrictions on vacated commercial property. The Chicago City Council recently enacted the first-ever prohibition on private agreements for lease restrictions on grocery store or drug store property in excess of 7,500 square feet “so as to prohibit, or have the economic and practical effect of prohibiting the reuse of such property for more than one year.” The ordinance exempts a restriction for relocation within one mile for up to three years. *See City Council Bans Land Covenants*, CRAIN’S CHI. BUS., Sept. 15, 2005.

<sup>119</sup> Adapted from LOS ANGELES, CA., CODE § 12.24(14)(d)(2).

onerous to attract investment in the Urban Redevelopment District, there is also the option of the following conditional use mitigations that do not stem from a rigorous fiscal analysis.

Any ground floor space greater than \_\_\_\_\_ square feet per single-tenant space must: (i) add a desired “targeted” business; (ii) provide a public benefit by contributing to a balance of small, medium and large-sized businesses to diversify the district’s business mix; and (iii) be a good neighbor and contribute to the community life of the district by participating in community activities such as (a) membership in local merchant, resident, and neighborhood improvement organizations and assessment districts; (b) hiring to the greatest extent feasible local residents; and (c) hosting or participating in festive or charitable neighborhood activities.<sup>120</sup>

### *C. Neighborhood Retail*

A Neighborhood Retail District serves local demand for goods and services, with a mix of businesses with the potential to attract community-wide consumers. It is generally characterized by pedestrian-orientation and proximity to local transit.

#### 1. PURPOSE

Regulations in the Neighborhood Retail District should safeguard against negative traffic and pedestrian impacts and encourage development that enhances district character. Land values in Neighborhood Retail Districts are not sufficiently high enough to mitigate the potential negative impacts of large-scale retail.

#### 2. REGULATION

The trigger for development regulation in this district combines a square footage and a vehicle trip generation rate. Greenfield, Massachusetts sets its trigger at 20,000 square feet or 500+

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<sup>120</sup> Adapted from SANTA CRUZ CA., MUNICIPAL CODE § 24.10.2301 (2000).

vehicle trips per day.<sup>121</sup> Middletown, Rhode Island sets its review trigger at 30,000 square feet or 1,000+ vehicle trips per day.<sup>122</sup> Conditional review of retail development should address both traffic and local character impacts. A footprint restriction should be enacted in conjunction with conditional review to allow larger, multi-story retail if its design satisfies the review criteria.

The wide variation in character among Neighborhood Retail Districts within a city recommends a flexible approach to the prohibition or restriction of formula businesses. In San Francisco, formula businesses are prohibited in two Neighborhood Retail Districts with particularly unique characters and permitted with conditional review in others. The ordinance leaves open the opportunity for residents to petition to have formula retail prohibited or allowed as-of-right in their Neighborhood Retail District as well.<sup>123</sup>

a. Footprint restriction

The footprint maximum should be set at the same square footage amount as the conditional review trigger, which reflects the scale of existing development. No single new retail business establishment shall exceed a building footprint of \_\_\_\_\_ square feet as defined by the exterior walls. Other separately owned retail-business establishments, entertainment, office, and residential uses not associated with the proposed business establishment shall not be counted towards the \_\_\_\_\_ square foot limit.<sup>124</sup>

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<sup>121</sup> GREENFIELD, MA., ZONING BYLAW § 7.12.2.1 (2003).

<sup>122</sup> MIDDLETOWN, RI., ZONING CODE, art. 3 §304A (2002).

<sup>123</sup> SAN FRANCISCO, CA., PLANNING CODE §703.3(a)(10).

<sup>124</sup> Adapted from MADISON, WI., GENERAL ORDINANCES § 32.02(4)(f)(3) (2005) (maximum footprint of 100,000 square feet). *See also*, ASHLAND, OR. MUNICIPAL CODE § 18.72.050(C)(2) (2003) (new buildings or expansions of existing buildings may not exceed a footprint of 45,000 square feet in the Downtown Design Standards Zone).

b. Conditional use review

The goal of the conditional use review is to encourage a mix of uses; ensure compatibility with residential uses on adjacent streets; and contribute to the attractiveness and recognizability of the district. Higher density, mixed use development should be encouraged at transit stops.

Traffic Impacts. The proposed development must be reviewed according to the following: (i) effect of the proposed development on traffic conditions on abutting streets; (ii) vehicular circulation in relation to the adjoining street system; (iii) adequacy of traffic signalization, traffic channelization, left-turn lanes and roadway widths of adjoining streets; (iv) adequacy of vehicular stacking lanes and or distances; and, (v) adequacy of pedestrian drop-off areas.<sup>125</sup>

Compatibility with Community Character. Design review should be performance-based and kept at a minimum to allow retailers to distinguish themselves. Buildings should have (i) a continuous or mostly continuous façade that abuts or is very close to the sidewalk; (ii) doors and entrances that abut the sidewalk; and (iii) have storefront windows abutting the sidewalk.<sup>126</sup> Parking lots and parking structures may not visually dominate the urban setting and should enhance the districts' aesthetic qualities and natural surroundings. Parking facilities shall be designed and landscaped with increased emphasis on pedestrian ways that provide public connectivity to and through the site.<sup>127</sup> Landscaping is required in order to improve the aesthetic quality of the built environment, promote retention and protection of existing vegetation, reduce the impacts of development on the natural environment, enhance the value of current and future development and increase privacy for residential zones.<sup>128</sup>

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<sup>125</sup> Adapted from the traffic impact study criteria from New Canaan, Connecticut (as cited in, Charles Reed, *Impact Statements and Analysis Studies Required by Development Codes*, 14 THE ZONING REPORT (1996)).

<sup>126</sup> Adapted from CHICAGO, IL., ZONING CODE §17.4.0502 (n.d.).

<sup>127</sup> Adapted from HOMER, AK., ZONING CODE § 21.61.105(g)-(h) (2003).

<sup>128</sup> *Id.*

Formula Businesses. In Neighborhood Retail Districts where the community has appealed to the City to allow formula businesses only after a conditional use review, the proposed development must satisfy a review of following considerations in addition to the traffic and compatibility considerations above: (i) the existing concentrations of formula retail uses within the neighborhood commercial district; (ii) the availability of other similar retail uses within the neighborhood; (iii) the compatibility of the proposed formula retail use with the existing architectural and aesthetic character of the neighborhood commercial district; (iv) the existing retail vacancy rates within the Neighborhood Retail District; and (v) the existing mix of citywide-serving retail uses and neighborhood-serving retail uses within the District.<sup>129</sup>

### 3. MITIGATION

A project may be denied based on the Conditional Use Review if the development is deemed to have a significantly negative impact on traffic congestion or neighborhood character. The following mitigations are available to improve the compatibility of the project design.

Parking Facilities. The visual impacts of parking lots shall be mitigated through landscaping, screening, or situating parking areas away from the front of buildings adjacent to arterials.<sup>130</sup>

Landscape Plan. A landscaping plan shall provide for landscape planting that minimizes visual, sound, and other negative impacts. The materials selected shall be compatible with the climate, planting location, and landscape function. The landscaping plan shall include the retention of natural vegetation to the greatest extent possible.<sup>131</sup>

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<sup>129</sup> Adapted from SAN FRANCISCO, CA., PLANNING CODE § 303 (2004). For well-written findings on why it is rational to regulate formula businesses in Neighborhood Retail Districts, *see* SAN FRANCISCO, CA., PLANNING CODE § 703.3 (a)(1)-(10) (2004).

<sup>130</sup> Adapted from HOMER, AK., ZONING CODE § 21.61.105(g)-(h) (2003).

<sup>131</sup> *Id.*

#### D. *Main Street*

A Main Street District is a commercial area with a distinct character that forms part of the basis for the area's economy. This district may constitute the entire downtown of a smaller municipality. Large-scale retail is inherently out of scale with this district and should only be allowed following a strict conditional use review. A formula business ordinance can ensure that smaller chain retailers are also reviewed for district compatibility.

##### 1. PURPOSE

The continued vitality of the City's economy is dependent in part upon tourism and upon the ability of the City's Main Street District to attract both residents and visitors. Retail development that conflicts with District character, and that is out of scale in relation to the current pattern of development in the District, creates a threat to the public health, safety, and general welfare by threatening the City's continued economic vitality. A decline in the vitality of the Main Street District will diminish employment opportunities for small business owners and employees who are residents of the City and the surrounding region.<sup>132</sup>

##### 2. REGULATION

The trigger for Conditional Use Review should be set at a square footage that is in keeping with the scale of existing commercial development. As in the Urban Redevelopment District, the inclusion of a fiscal impact analysis is justified by the area's dependence on the economic and employment impacts of development in this district. The demonstrated negative impacts of superstores located in proximity to the small merchants that characterize a Main Street District<sup>133</sup> form the basis for combining the review trigger with a size cap.

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<sup>132</sup> Adapted from SAN JUAN BAUTISTA, CA., ORDINANCE 2004-06 (2004).

<sup>133</sup> See impact studies referenced in *supra* note 109.

a. Size cap

Retail over 100,000 square feet that combines retail sales with dedicating more than \_\_ percent of the sales floor area to non-taxable merchandise are not permitted in this district.

b. Conditional use review

Retail over \_\_\_\_\_ square feet must undergo a Conditional Use Review. The Development Review Board must find that the project will not have an undue impact on local wages, housing costs or on the ability of the town to provide municipal services and facilities through the diminution of property values and/or tax revenues resulting from the loss of economic viability of existing commercial enterprises. The evaluation should include: (i) projected costs arising from the demand for and required improvements to public services and infrastructure, including roads; (ii) value of improvements to public services and facilities to be provided by the project; (iii) projected tax revenues to be generated by the project; (iv) projected impact on property values in the community and the potential loss or increase in municipal tax revenues resulting from the proposed project; (v) projected net job loss or creation caused by the project and the resulting potential loss or increase in tax revenues; and, (vi) estimated share of revenue generated by the project that will be retained and re-directed back into the local economy.<sup>134</sup>

c. Formula business review

*See* Conditional Use Review criteria for Formula Businesses listed in the Neighborhood Retail District approach above.<sup>135</sup> In the Main Street District, this review is triggered by the store format, rather than by a designated square footage amount.

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<sup>134</sup> Adapted from BENNINGTON, VT. LARGE SCALE RETAIL BYLAW (2005).

<sup>135</sup> Adapted from SAN FRANCISCO, CA., PLANNING CODE § 17.303 (2004).

*E. Commercial Corridor*

Commercial Corridor Districts are typically suburban and increasingly characterized by large-scale retail development. In higher income communities, these districts are being developed as “lifestyle” centers anchored by large-scale retail. The redevelopment of older Commercial Corridor Districts (strip commercial) into denser, clustered commercial subdivisions should be encouraged. These areas serve an auto-oriented, community-wide consumer base.

1. PURPOSE

Because Commercial Corridor Districts are generally well-served by arterial roads and have little adjacent development to which new development design needs to be compatible, concern for traffic and design impacts is diminished. The largely “greenfield” nature of this type of development and concern for competition with nearby Neighborhood Retail and Main Street commercial districts form the basis for development review and prohibition of superstores.

2. REGULATION

The trigger for review in the Commercial Corridor District should be set at a square footage amount that by community standards would be considered a “major” project.

a. Size cap

Retail over 100,000 square feet that combines retail sales with dedicating more than \_\_ percent of the sales floor area to non-taxable merchandise are not permitted in this district.

b. Development review

New construction over \_\_\_\_\_ square feet or a change of use for projects over \_\_\_\_\_ square feet should meet the following minimum performance standards: (i) all commercial subdivisions shall cluster the proposed development according to a Cluster Plan; (ii) development and

redevelopment within the Commercial Corridor shall be directed away from environmentally sensitive areas; and (iii) development shall be designed to avoid or minimize development on lands capable of sustained agricultural production as evidenced by soils, recent agricultural use, and/or surrounding agricultural use.<sup>136</sup>

### 3. MITIGATIONS

Cluster Plans. Cluster plans shall use site designs that maximize contiguous open space, respect the natural topography and character of the site, and employ wastewater treatment alternatives to allow more compact development. Efforts should be made to improve the appearance of existing strip development through frontage buildings, sign control, infill, relocation of parking, landscaping, and the placement of utilities underground.

Development adjacent to an agricultural use shall maintain or provide a thickly vegetated buffer to prevent conflicts between the development and existing uses.

Best management practices (BMPs) for stormwater runoff mitigation should be encouraged to maintain the productivity of adjacent agricultural lands and minimize the use of chemical fertilizers and pesticides that could adversely impact the environment.<sup>137</sup>

#### *F. Highway Commercial*

Commercial districts farther from the urban core and existing infrastructure will generally experience higher costs of service and environmental impacts from commercial development. Permitted uses in Highway Commercial Districts are typically those that serve travelers, such as motels, fast food, rest stops, gas stations and convenience stores.<sup>138</sup> With its direct access to

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<sup>136</sup> Adapted from CAPE COD COMMISSION (BARNSTABLE COUNTY), REGIONAL POLICY PLAN § 1.2.1-1.3.3 (2003).

<sup>137</sup> *Id.*

<sup>138</sup> For examples of existing Highway Commercial Districts *see* VISALIA, CA., ZONING CODE § 17.18.010 (n.d.); SKANEATELES, NY., ZONING LAW § 148-3(A)(3) (review draft, January 31, 2005).

regional auto corridors, there is an opportunity to integrate large-scale retail into this district type. If there are no nearby town centers, this is the one location where superstores may be allowed without concern for impacts on local merchants. Residents in these areas have limited access to alternative retail formats and would benefit from being able to meet a large portion of their needs for goods and services in one location.

## 1. PURPOSE

Designating a suitable location for a Highway Commercial district will ensure that development in rural areas has the least possible impact on the environment and municipal costs of service. The purpose of the Highway Commercial District is to allow only those uses that depend primarily on automobile access; require large amounts of land; involve frequent, short-term visits by customers; and are inappropriate for the town center. This district is not intended to include uses that could be readily accommodated in the town center.<sup>139</sup>

Because rural areas in which Highway Commercial Districts might be located are often unincorporated, a regional approach is suggested. The County Planning Commission and Economic Development Advisory Board should assess the existing merchant mix and retail offerings within the county; identify retail gaps; and recommend appropriately zoned land for the Highway Commercial District. These districts should be located on major arteries that the Planning Commission determines are capable of handling the traffic generated.<sup>140</sup>

## 2. REGULATION

After the rational process of designating the Highway Commercial District, additional regulation of large-scale retail development should be minimal other than to mitigate potential

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<sup>139</sup> Adapted from SKANEATELES, NY., ZONING LAW § 148-3(A)(3) (review draft, January 31, 2005).

<sup>140</sup> Adapted from the KENT COUNTY, MD., COMPREHENSIVE PLAN § 4.B (n.d.).

environmental or traffic impacts. Ideally, these districts are Planned Developments, to ensure maximum coordination of vehicular circulation and other site design features. The trigger for a conditional use review should be set at a high square footage amount. In the Milton, Wisconsin Highway Commercial District, this trigger is set at 50,000 square feet or a combination of indoor and outdoor sales when outdoor sales exceed 15 percent of total sales area.<sup>141</sup>

a. Conditional use review

Traffic impacts. Prior to development approval, the traffic engineer shall compete and present a traffic impact analysis following state DOT guidelines. Vehicle access shall be designed to accommodate peak on-site traffic volumes without disrupting traffic on public streets or impairing pedestrian safety. Where the project will cause off-site public roads, intersections, or interchanges to function below Level of Service C, the City may deny the application, require a size reduction in the proposed development, or require that the developer construct and/or pay for required off-site improvements.<sup>142</sup>

3. MITIGATION

Site Design. Mitigation measures required by the Conditional Use Review shall be accomplished through adequate parking lot design and capacity; access drive entry throat length, width, design, location, and number; traffic control devices; and sidewalks. All projects shall have direct access to an arterial street, or shall dedicate public roads which shall have direct access to an arterial street. The site design shall also provide direct or vehicular or pedestrian connections to adjacent land uses if required by the City.<sup>143</sup>

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<sup>141</sup> MILTON, WI., ZONING ORD. § 78.681-78.689 (n.d.).

<sup>142</sup> Adapted from MILTON, WI., ZONING ORD. § 78.681-78.689 (n.d.).

<sup>143</sup> *Id.*

Environmental Impacts. Development adjacent to an agricultural use shall maintain or provide a thickly vegetated buffer to prevent conflicts between the development and existing uses. Best management practices (BMPs) for stormwater runoff mitigation should be encouraged to maintain the productivity of agricultural lands and minimize the use of chemical fertilizers and pesticides that could adversely impact the environment.<sup>144</sup>

Impact Fees. If the Conditional Use Review determines that an impact fee is necessary to offset the negative impacts of development, this fee should relate to the municipal cost of servicing that land use. Burlington, Vermont requires \$625 per 1,000 square feet in new retail development to cover traffic impacts; \$168 for fire; and \$298 for police.<sup>145</sup> Montpelier, Vermont assesses a \$500 impact fee per thousand square feet of retail or \$750 per thousand square feet of shopping center development over 10,000 square feet. All impact fees and interest accretions should be expended only to fund those capital projects attributable to the development.<sup>146</sup>

## **V. Conclusion**

The approaches proposed in this article are intended to provide a framework by which municipalities may evaluate their existing controls on large-scale retail development. Each of these approaches was informed by a preliminary review of common large-scale retail regulations, their legal defensibility, and their effectiveness. This review also emphasized the importance of crafting well-written regulations. Municipalities revising their regulations should keep an eye toward Dormant Commerce Clause Doctrine (DCCD) challenges, Section 1121(b) of the Lanham Act trademark protections, and whether or not regulation language is supported by comprehensive plan policies.

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<sup>144</sup> *Id.*

<sup>145</sup> BURLINGTON, VT. IMPACT FEE ADMINISTRATIVE REGULATIONS, available at: [http://www.ci.burlington.vt.us/planning/zoning/fee\\_impact.html](http://www.ci.burlington.vt.us/planning/zoning/fee_impact.html) (last visited April 5, 2006).

<sup>146</sup> MONTPELIER, VT., ZONING ORDINANCE, art. 12.

Additional means to mitigate the impact of large-scale retail development may help achieve community objectives. Most of these, however, are not common practice and must yet be tested for their effectiveness and legal defensibility. For example, some of the impact studies cited in this article found that at the regional level there is a fixed “retail pie” from which merchants draw consumers and local governments draw sales tax revenues. Under these circumstances, a region may prosper while individual municipalities cannibalize one another’s sales and property tax base. The California State Legislature passed a bill in 1999 that prohibits the relocation of major retailers without an agreement between the former and present host communities to share the sales tax revenue. This policy reflects a reasonable concern that local political will to regulate large-scale retail development will waver out of fear that these stores will relocate to an adjacent community. Among other potential complications, however, the statute defines “major retailer” as merely a store exceeding 75,000 square feet. The California Court of Appeals recently upheld the application of the statute to a businesses-to-business distribution center with only a minor retailing component.<sup>147</sup> This example reinforces the need to base any approach to regulating large-scale retail development—especially untested, novel approaches—in a valid police power and rational basis. A possible revision to this approach is to enact a “clawback” provision triggered by the relocation of a large-scale retailer that dedicates more than 50 percent of its floor area to retail sales, which has received public development subsidies.

The goal is to take the guesswork out of crafting large-scale retail regulations for any commercial district across the country. The rational inquiry involved in developing these approaches should assist local governments in adapting them to existing districts with assurance that their legal defensibility and effectiveness have received careful consideration.

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<sup>147</sup> See Strafford Publications, *B2B Distribution Center Same as Big-Box Retailer, In Court’s Eyes*, TAX INCENTIVES ALERT (January 2005).