

SHINING THE LIGHT ON GREYFIELDS: A WAL-MART CASE
STUDY ON PREVENTING ABANDONMENT OF BIG BOX
STORES THROUGH LAND USE REGULATIONS

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I. INTRODUCTION

Shopping trends in the United States have changed dramatically over the last few decades with the introduction of the large-scale discount retailer. Wal-Mart is the forerunner in the retail market and dominates competition through the use of its big box stores.¹ Started by Sam Walton in 1962,² there are now over 3,443 Wal-Mart stores in the United States and another 2,757 international locations.³ These “big boxes” consist of at least 100,000 and up to 235,000 square feet of retail space or more, depending on whether a grocery store is integrated into the building.⁴ Wal-Mart chooses to build its stores as large as possible, allowing goods to be purchased from suppliers in bulk; the larger the stores, the greater the savings.⁵ Wal-Mart then passes on the savings to its consumers,

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¹ See, e.g., AL NORMAN, SLAM-DUNKING WAL-MART!: HOW YOU CAN STOP SUPERSTORE SPRAWL IN YOUR HOMETOWN 15–16 (1999).

² See Wal-Mart Facts, The Wal-Mart Story, <http://www.walmartfacts.com/content/default.aspx?id=1> (last visited May 1, 2008) [hereinafter The Wal-Mart Story].

³ WAL-MART, 2007 ANNUAL REPORT 18–19 (2007) [hereinafter 2007 ANNUAL REPORT], available at http://www.walmartstores.com/Files/2007_annual_report.pdf. Since the 2006 Annual Report, another 154 Wal-Mart stores opened in the United States and another 472 locations opened internationally. See WAL-MART, 2006 ANNUAL REPORT 14 (2006) [hereinafter 2006 ANNUAL REPORT], available at http://media.corporate-ir.net/media_files/irol/11/112761/2006_annual_report.pdf.

⁴ Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L. 7, 7 (2004–2005) (citing the American Planning Association’s definition of a big box retail store as a stand-alone store of at least 100,000 square feet). Per Wal-Mart’s 2006 Annual Report, the average size of a supercenter is 187,000 square feet and the traditional discount store averages 102,000 square feet. 2006 ANNUAL REPORT, *supra* note 3, at 21.

⁵ Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 941–42 (2005).

resulting in its mass popularity among the public and nationwide competition because smaller stores do not have the capacity to purchase in bulk to the same extent that Wal-Mart can.⁶ In addition, consumers love the low prices that Wal-Mart provides, which are about eight to twenty percent below other retailers.⁷

Despite all the criticism the company endures due to its health insurance policy,⁸ low wages,⁹ and environmental wastefulness,¹⁰ Wal-Mart can bring a number of benefits to a community. Wal-Mart brings jobs and sales tax revenue along with low prices, including a recently-unveiled low-cost pharmaceutical program.¹¹ In addition, the company announced a major change in environmental policy through the construction of experimental eco-friendly stores¹² and a goal to conserve energy through the sale of fluorescent light bulbs.¹³ The success of Wal-Mart's large stores encourages the company to build more stores, each bigger and better than the last one. Per the Wal-Mart Realty website, "Wal-Mart Stores and Sam's Clubs are often so successful that they outgrow their buildings and relocate to better serve our customers."¹⁴ While the growth of the company is great for Wal-Mart, the costs to the public are plainly visible.

As Wal-Mart continues to be profitable, the company wants the

⁶ *Id.*; see also Merriam, *supra* note 4, at 7–8.

⁷ George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 838 (2006).

⁸ See Wakeup Wal-Mart, Why Wal-Mart Must Change, <http://www.wakeupwalmart.com/change/> (last visited May 1, 2008) (summarizing the main criticisms against Wal-Mart). The "Wakeup Wal-Mart Campaign" works to change the harmful practices of Wal-Mart by notifying shoppers of the company's questionable practices. *Id.*

⁹ See *id.*

¹⁰ See Wakeup Wal-Mart, The Real Facts About Wal-Mart, <http://www.wakeupwalmart.com/facts/> (last visited May 1, 2008).

¹¹ See Wal-Mart Facts, Wal-Mart Launches Phase Two of Prescription Program with New \$4 Medications and Increased Savings, <http://www.walmartfacts.com/articles/5314.aspx> (last visited May 1, 2008).

¹² See Wal-Mart Facts, Wal-Mart to Open First High-Efficiency Store; Supercenter Expected to Use 20 Percent Less Energy, <http://www.walmartfacts.com/articles/4716.aspx> (last visited May 1, 2008). The high-efficiency stores require less energy through an innovative heating and air conditioning system that reuses heat produced by the refrigeration system. *Id.*

¹³ Wal-Mart Facts, Wal-Mart Announces Goal of Selling 100 Million Energy Efficient Light Bulbs, <http://www.walmartfacts.com/articles/4630.aspx> (last visited May 1, 2008).

¹⁴ Wal-Mart Realty, Economic Development, <http://walmartrealty.com/ECD/ECDHome.html> (last visited May 1, 2008) [hereinafter Wal-Mart Realty, Economic Development]. Sam's Club is a subsidiary of Wal-Mart. See 2007 ANNUAL REPORT, *supra* note 3, at 28.

stores to be as large as possible. It is common practice for the company to pick up and abandon one store and build in another location down the road that is bigger. For instance, in Phenix City, Alabama, the company built a Super Wal-Mart while abandoning a traditional store just down the road, which remained empty for over six years.¹⁵ Another example is in La Junta, Colorado, where an empty Wal-Mart sits only a quarter mile from a new store.¹⁶ The abundance of big boxes created over the last two decades has caused vacant retail space to exceed the retail market.¹⁷ As a result, abandoned Wal-Mart stores sit empty, creating large concrete and asphalt eyesores in communities. These giant empty retail stores have become prevalent enough to earn the name “greyfields.”

Greyfields can be defined as “old, obsolete and abandoned retail and commercial sites [with] thousands of square feet of retail space surrounded by seas of gray pavement.”¹⁸ These abandoned buildings tend to sit vacant for years and are one of the most visible indicators of urban sprawl.¹⁹ The basic configuration of the big box, with thousands upon thousands of square feet, makes it difficult to find a new use for the building; the number of businesses that can use so much floor space is limited,²⁰ plus the lack of windows and interior walls deter potential buyers.²¹ While communities around the country have found creative ways to reuse empty big boxes, such as for elementary schools, churches, and call centers,²² Wal-Mart should be held accountable for the abandoned store that it leaves unoccupied.

Though many people would like to see Wal-Mart prevented from abandoning smaller stores in order to operate its excessively large

¹⁵ Erin Simpson, *Wal-Mart on Council's Agenda Tuesday*, COLUMBUS LEDGER-ENQUIRER, Dec. 11, 2005.

¹⁶ Robert Barba, *Wal-Mart: Ex Stores Not Dumped*, DENV. POST, Oct. 5, 2004, at C3. The article title is misleading in the sense that the La Junta store remains empty. *Id.*

¹⁷ Jessica LeVeen Farr, *The Ghost-Box Dilemma: Communities Cope with Vacant Retail Property*, 15 PARTNERS IN COMMUNITY & ECON. DEV. (2005), available at <http://www.frbatlanta.org/invoke.cfm?objectId=971ACF44-5056-9F06-9942BBD252D33052&method=display>.

¹⁸ KENNETH M. CHILTON, SE. REG'L ENVTL. FIN. CTR., UNIV. OF LOUISVILLE, GREYFIELDS: THE NEW HORIZON FOR INFILL AND HIGHER DENSITY REGENERATION 1 (2005), <http://cepm.louisville.edu/PDFdocs/greyfieldS2.pdf>.

¹⁹ Brannon P. Denning, *Retail Store Size-Cap Ordinances: Legitimate Land Use Regulations or Unconstitutional Economic Protectionism?*, 20 PROB. & PROP. 9, 9 (2006).

²⁰ See Shannon Tan, *Proposal Restricts Big Stores*, ST. PETERSBURG TIMES, Aug. 16, 2005, at 1.

²¹ *Id.*

²² Farr, *supra* note 17.

stores in their communities, the reality is that the company is not likely to change its company development philosophy. Instead, municipalities must adopt effective land use ordinances to help control the aesthetic, environmental, and economic effects Wal-Mart has on the community. In addition, local governments should enact regulations for the permitting process that aid in the prevention of greyfields.

This Article will first address the growth of Wal-Mart and the impact the company has on other retailers, followed by a discussion on the problems abandoned properties create for a community. Second, land use controls and other zoning laws will then be examined with suggestions for municipality techniques that have been successful in preventing abandoned retail space. Third, whether and how New York counties, cities, and towns would be able to prevent a big box retailer from simply abandoning stores and leaving communities with greyfields is discussed.

II. THE RAPID GROWTH OF WAL-MART AND EFFECTS ON OTHER RETAILERS

Sam Walton opened the first Wal-Mart in 1965 as a “mom and pop” discount retail store,²³ the same type of general store that cannot compete against Wal-Mart today. Walton soon expanded to fifteen stores, and the company boomed after it was offered on the New York Stock Exchange in 1970.²⁴ Between 1986 and 1996, net sales increased by an average of 27.6 % per year, and the company was twenty-eight times larger by 2003.²⁵ Super Wal-Marts—which are traditional Wal-Marts with the addition of grocery stores—experienced an increase in sales of over twenty-eight percent in the last ten years,²⁶ making them the second largest grocer in the United States.²⁷ In 2004, a Super Wal-Mart opened in America every 1.65 days.²⁸ Wal-Mart’s 2006 Annual Report indicates that

²³ The Wal-Mart Story, *supra* note 2.

²⁴ *Id.*

²⁵ AL NORMAN, THE CASE AGAINST WAL-MART 1 (2004).

²⁶ Janet E. Milne, *Symposium 2005 Forward: The Big Box Challenge*, 6 VT. J. ENVTL. L. 6, 6 (2004–2005) (citation omitted). A traditional Wal-Mart occupies an average of 102,000 square feet, while a Super Wal-Mart averages 187,000 square feet. 2006 ANNUAL REPORT, *supra* note 3, at 21.

²⁷ MARLON BOARNET & RANDALL CRANE, THE IMPACT OF BIG BOX GROCERS ON SOUTHERN CALIFORNIA: JOBS, WAGES, AND MUNICIPAL FINANCES 1 (1999), available at http://www.coalitionclc.org/big_box_study.pdf.

²⁸ Lefcoe, *supra* note 7, at 834 (citing Karrie Jacobs, *Massive Markets*, METROPOLIS, June

the company is still growing at an incredible rate. Within the fiscal year ending January 1, 2006, Wal-Mart opened the doors of 267 superstores, 24 traditional stores, and 15 smaller neighborhood markets.²⁹

In terms of net sales, in 2006 Wal-Mart earned \$312,427,000,000—a 9.4 percent increase from 2005.³⁰ While it appears that Wal-Mart is unstoppable in terms of growth, net sales slowed by approximately two percent compared to the previous two years.³¹ Additionally, stock prices decreased by one-third this past decade.³² With Wal-Mart stock on the decline, abandonment of smaller traditional stores becomes even more prevalent as the company strains to maximize profits. Not surprisingly, 134 traditional stores closed while 276 supercenters opened in the 2006 fiscal year.³³

Consumers attracted to the convenience of Wal-Mart's one-stop shopping philosophy frequent shopping malls and small specialty stores less often, resulting in more vacant retail space beyond abandoned big boxes.³⁴ The boost in demand for discount retail stores, with their wider selection and accessibility, has a strong impact on malls—especially the large anchor stores such as Macy's and JC Penney that tend to have more specialized merchandise.³⁵ These anchor stores are forced to close their doors as a result of Wal-Mart competition, leading to additional vacant retail space. In 2005, a spokesperson for the International Council of Shopping Centers stated that the group expected the number of malls to drop from 1,200 to 900.³⁶ Only two enclosed malls were expected to open in the United States in 2005.³⁷ Malls used to snub the idea of

2004, at 106, *available at* <http://www.metropolismag.com/cda/story.php?artid=216>).

²⁹ 2006 ANNUAL REPORT, *supra* note 3, at 15.

³⁰ *Id.*

³¹ *See id.* at 13.

³² Floyd Norris, *The Nation; Swiping at Industry From Atop the Stump*, N.Y. TIMES, Aug. 20, 2006, § 4, at 44. The decrease in stock price is significant when compared to the 1,100 % increase in stock price during the 1990s. *Id.*

³³ *See* 2007 ANNUAL REPORT, *supra* note 3, at 26.

³⁴ *See* CHILTON, *supra* note 18, at 1, 2.

³⁵ *See* Samuel R. Staley, Op-Ed., *Kmart, the Big Box, and the Role of Planning in American Cities*, PLANETIZEN, Mar. 18, 2002, <http://www.planetizen.com/node/45>.

³⁶ Terry Pristin, *Commercial Real Estate; Shopping Malls Adopting New Strategies to Survive*, N.Y. TIMES, Mar. 2, 2005, at C7. The International Council of Shopping Centers has not yet published statistical data past 2005. *See* INT'L COUNCIL OF SHOPPING CTRS., NUMBER OF U.S. SHOPPING CTRS. 1970-2005, http://www.icsc.org/srch/rsrch/scope/current/num_shoppingcenters06.pdf (last visited May 1, 2008).

³⁷ Pristin, *supra* note 36.

discount stores, but as anchor stores are pulling out, malls are beginning to welcome the idea of discount stores such as Wal-Mart moving in.³⁸

It is impossible for the small business owner to compete with Wal-Mart's prices and large selection of items.³⁹ These "mom and pop" stores are forced to specialize in higher-priced, more unique items and drop lower-priced merchandise from their shelves.⁴⁰ Small and large retailers alike are threatened by the discount retailer, and many are eventually pushed out of the market.

In addition, Wal-Mart has been charged with opening two stores in close proximity to each other to really squeeze out the competition in the area.⁴¹ Once there is no competition left, Wal-Mart may choose to abandon one store, thus reducing the operating costs of running two stores when the community has no choice as to where to shop. The final result is shocking—competing retailers are forced out of the market, and the municipality must deal with both the closed smaller shops as well as the abandoned big box.

III. THE PROBLEM OF GREYFIELDS

A. *Why Big Box Stores Are Abandoned*

Big box retailers abandon stores because they need more shelving space to increase product selection.⁴² Building a new, larger store is more cost effective than renovating a traditional store to increase merchandise space. The bigger the store, the more profit there is to be made. While there is nothing wrong with profit motivation, big boxes, such as Wal-Mart, do little to hide or maintain the property voluntarily. The old, obsolete buildings sit unoccupied as giant concrete and asphalt grey boxes, creating an eyesore for the community.⁴³ While the abandoned stores are aesthetically

³⁸ See, e.g., Sandra Jones, *New Wardrobe for Old Malls: Discount Chains Shop Space Where Department Stores Once Ruled*, CRAIN'S CHI. BUS., Apr. 5, 2004, at 15; Pristin, *supra* note 36.

³⁹ See Lori Smith, *The G&T Survey: Battling the Big Boxes and Dollar Stores*, GIFTS & TABLEWARES, Jan. 1, 2006, at 40.

⁴⁰ See *id.* But see David Gram, *Vermont Latest Battleground on Containing Stores' Growth; But City's Vote Favors Wal-Mart's Bid for Bigger Unit*, HOUS. CHRON., Apr. 6, 2005, at 8 (arguing smaller, more personal stores can be competitive "because they're apples and oranges").

⁴¹ Farr, *supra* note 17.

⁴² See *id.*

⁴³ *Id.*

unpleasing, they also contribute to urban sprawl in areas that are prime for retail development. Otherwise, the retailer would not have selected the location in the first place. The abandoned stores are “a visible sign of economic decline and disinvestment.”⁴⁴ These greyfields have more of an effect on small towns that offer a different quality of life than large cities; there is “less congestion, a slower pace, and a sense of community” in the small town, thus making a greyfield more prevalent and having a greater impact on the health, safety, and general welfare of the community.⁴⁵

B. *The Big Box Epidemic*

Currently, thousands of abandoned big boxes litter municipalities across the United States,⁴⁶ though the exact number of greyfields is unknown.⁴⁷ For example, Columbus, Ohio, had sixty-nine abandoned big boxes⁴⁸ and Charlotte, North Carolina, held over thirty in 2005.⁴⁹ Wal-Mart Realty listed nearly 210 abandoned Wal-Mart and Sam’s Clubs stores on its own website.⁵⁰ The problem of greyfields will only get worse in the Northeast as large discount stores corner more and more of the retail market.⁵¹ Trends indicate that new stores will eventually be abandoned for larger stores, leaving the old concrete and asphalt buildings vacant. With the number of greyfields increasing as big box retailers prefer to build new buildings for new stores, and with the amount of retail space exceeding the demand, the gap will only increase as old retail space

⁴⁴ *Id.*

⁴⁵ Bryan J. Paulsen, *Smart Moves in Small Towns: Creative Reuse Strategies Help Put Local Communities on the Map*, COM. INV. REAL EST., July-Aug. 2004, available at http://www.ciremagazine.com/article.php?article_id=92.

⁴⁶ *An Act to Impose a Gross Receipts Tax on “Big Box” Stores: Hearing on LD 1553 Before the H. Comm. on Tax’n*, 2005 Leg., 122d Sess. (Me. 2005) (statement of Stacy Mitchell), available at <http://www.newrules.org/retail/042502testimony.pdf>. Stacy Mitchell is a senior researcher for the Institute for Local Self-Reliance and the author of two books, *THE HOMETOWN ADVANTAGE* and *BIG BOX SWINDLE*, that both address retail urban sprawl. She advises communities around the country on how to curb sprawl while enhancing downtown areas in an economically sustainable fashion. *Id.*

⁴⁷ See CHILTON, *supra* note 18, at 2; see also Mitchell, *supra* note 46.

⁴⁸ Mitchell, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Wal-Mart Realty, Advanced Building List, <http://walmartrealty.com/Buildings/PrintableBuilding/AdvBldgList.html> (last visited May 1, 2008) [hereinafter Wal-Mart Realty, Advanced Building List].

⁵¹ See Mitchell, *supra* note 46 (arguing that since Wal-Mart corners a quarter of the retail market in the Midwest and only ten percent of the market in Maine, the company is likely to begin opening more and more stores in the Northeast to maximize profits nationally).

remains vacant and unused.⁵²

The abandoned big box is often unsuitable, or at least unattractive, for other uses because of the lack of interior structure and lack of exterior design. The big box retailer constructs its stores with a certain floor plan to match its other stores,⁵³ which is often unsuitable for other uses without major renovations.⁵⁴ The big box does not contain many interior walls and instead resembles a warehouse once the retailer leaves.⁵⁵ A business willing to reuse the building normally must construct interior walls, wire for telephones, add plumbing, install carpet, or otherwise retrofit the space to accommodate the new use.⁵⁶ In addition, the exterior of the big box also deters reuse because the building typically does not have windows.⁵⁷ Natural light is a commodity desired by many future owners, who must then install windows or skylights to make the space more attractive. Similarly, the exterior materials of concrete and asphalt, with no variations across the façade, also make for an unappealing reuse site.⁵⁸

Besides aesthetics, greyfields present myriad problems to communities. If the new, larger store is not in the same municipality as the abandoned store, there is a loss of tax revenue.⁵⁹ In addition, replacement leases are difficult to find because there are a limited number of potential renters that need 100,000 square feet or more of space. Surrounding businesses are also adversely affected because they are accustomed to, and rely upon, the traffic that the big box previously brought to the area for their own sustainability.⁶⁰ Imagine a strip mall with two anchor retailers and five smaller stores. If the anchor stores abandon the location, the smaller businesses suffer because the consumer is less likely to

⁵² Farr, *supra* note 17.

⁵³ Merriam, *supra* note 4, at 18.

⁵⁴ Wal-Mart prefers to have a specific layout for its merchandise. This enables customers to walk in to an unfamiliar Wal-Mart, but know exactly where an item is because the item is in the same place in all the stores. *See id.* (stating that “[s]tandardization is central to profitability and customer satisfaction”).

⁵⁵ Akila Sankar McConnell, Note, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, 53 DUKE L.J. 1537, 1538 (2004).

⁵⁶ *See, e.g.*, LISA REAGAN ET AL., BUILDING COMMUNITY: A POST-OCCUPANCY LOOK AT THE MARYVALE MALL ADAPTIVE REUSE PROJECT 2–3 (2006), available at <http://www.cefpi.org/pdf/issuetrak0206.pdf> (describing challenges a school district met while retrofitting a shopping mall for an elementary school).

⁵⁷ *Id.*

⁵⁸ *E.g.*, Merriam, *supra* note 4, at 19.

⁵⁹ Farr, *supra* note 17.

⁶⁰ *See id.*

travel to the strip mall. Abandoned stores and parking lots also attract vandalism and other crimes, putting additional strains on local law enforcement.⁶¹

Furthermore, abandoned stores have an environmental impact on communities by contributing to urban sprawl and straining the natural environment.⁶² When a retailer abandons a small store and builds a larger store farther away from the urban core, consumers must drive longer distances, worsening traffic congestion and pollution.⁶³ Runoff from parking lots that are not even being used may also negatively impact the community's water quality.⁶⁴ Generally, big box retailers do not want to spend money on landscaping the grounds surrounding the store, resulting in an abandoned big box that is far more noticeable and ugly. The greyfields' impact on the community's general health, safety, and welfare is likely to increase proportionately to other indicators of urban sprawl.

IV. LEGAL STRATEGIES TO MINIMIZE THE IMPACT OF ABANDONMENT

The U.S. Department of Commerce published the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act as model statutes for zoning and planning in the 1920s, to guide states in granting authority to local governments to enact zoning and planning legislation.⁶⁵ Through these state enabling acts, a local government may use its police power to decide which development goals it wants to be part of its comprehensive plan.⁶⁶ The basis for any regulation is that it must be in accordance with the local comprehensive plan, which in turn must promote the health, safety, and general welfare of the public.⁶⁷ In order for a

⁶¹ *Id.*

⁶² See Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado, as a Case Study*, 37 URB. LAW. 299, 301–02 (2005).

⁶³ *Id.* at 302.

⁶⁴ *Id.*

⁶⁵ MORTON GITELMAN ET AL., CASES AND MATERIALS ON LAND USE 282–83 (6th ed. 2004).

⁶⁶ See Milne, *supra* note 26, at 3; see also Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County's Police Power and Its Comprehensive Plan—California's Experience*, 6 VT. J. ENVTL. L. 31, 34–35 (2004-2005) (discussing the police power in relation to land use and Supreme Court decisions).

⁶⁷ See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” (internal citation omitted)).

zoning ordinance to be valid, “(1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a ‘reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.’”⁶⁸

Communities nationwide have successfully enacted land use ordinances to curb the growth of big box retailers and prevent greyfields. While some regulations can prospectively prevent ugly abandoned buildings, others encourage the reuse of retail stores once the retailer abandons the premises.

Furthermore, by enacting zoning and land use regulations, a community can decrease the supply of available space that Wal-Mart may consider for future store locations. The restrictions put on land parcels are directly proportional to increased prices of available land.⁶⁹ Since there are fewer locations available, the big box retailer may be more willing to look at reuse instead of building a new store to eventually abandon.⁷⁰

For instance, scarcity of vacant land has an effect on the Portland, Oregon, market.⁷¹ Due to the shortage of commercial land, retailers are having a difficult time finding their way into the market.⁷² Businesses are thus pushed to consider reuse just to get into the market. The strict zoning ordinances work. Wal-Mart does not advertise *any* vacant Wal-Marts in Portland or in the entire state of Oregon.⁷³ What follows are a series of strategies that municipalities can employ to minimize the negative impacts of greyfields.

A. Adaptive Reuse

Since communities cannot arbitrarily prevent a discount retailer such as Wal-Mart from opening a store, adaptive reuse policies can minimize the effects of an abandoned big box. “Adaptive reuse is the imaginative reworking of existing buildings to accommodate

⁶⁸ McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1242 (N.Y. 1985) (citations omitted).

⁶⁹ See Tom Daykin, *Incredible HULKS Keeping Empty Big-Box Retailers from Becoming Community Eyesores*, MILWAUKEE J. SENTINEL, Oct. 3, 2004, at D1.

⁷⁰ See *id.*

⁷¹ Emily Tsao, *Big Box Stores Recycle Empty Buildings in Portland, Ore.*, THE OREGONIAN, Dec. 21, 2003, available at 2003 WLNR 13923971.

⁷² *Id.* According to Reis, a real estate data company based in New York, the average national vacancy rate is 7.7 %, which is comparably high to Portland’s vacancy rate of only 4.8 %. *Id.*

⁷³ See Wal-Mart Realty, Advanced Building List, *supra* note 50.

new uses.”⁷⁴ Introduced by the Urban Land Institute in 1978 as a way to deal with empty buildings,⁷⁵ the three-step process to successful adaptive reuse includes (1) determining what new use can occupy the space after design and engineering considerations,⁷⁶ (2) performing a cost analysis to determine whether the reuse is economical,⁷⁷ and (3) obtaining “gap’ financing,” if necessary, from the municipality.⁷⁸ Businesses and governments that have followed these principles have retrofitted big boxes for a variety of purposes, such as schools, churches, and medical centers.⁷⁹

The benefits of reusing abandoned big box sites often include the same benefits that attracted the retailer to the particular location in the first place. For example, Wal-Mart would have originally wanted its store in a well-populated area that would easily attract customers.⁸⁰ In addition, the locations are often near interstate exchanges and other high-traffic areas, with streets and parking lots already accommodating the building.⁸¹ While the cost of retrofitting a retail store can be fairly expensive, usually the cost is less than new construction.⁸²

On the downside, there are several challenges to adaptive reuse of greyfields. While the most obvious use, and easiest to retrofit, would be another retail store, several factors may weigh against another retailer. For example, shopping demographics are consistently changing, as evidenced by the abandonment of the big box, in the first place, and the proliferation of greyfields.⁸³ Second,

⁷⁴ LAMBDA ALPHA INT’L, BALTIMORE 2000: A YEAR LATER, PART 2—URB. DEV. REV. (2005), <http://www.lai.org/go/library/publications/Baltimore2.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* Financing usually comes from tax funds that help finance the retrofitting of the abandoned building, providing an incentive to companies that are willing to reuse buildings rather than building new ones. *See id.*

⁷⁹ *See, e.g.*, Julia Christensen, Big Box Reuse, <http://www.bigboxreuse.com> (last visited May 1, 2008).

⁸⁰ CHILTON, *supra* note 18, at 2, 3–4.

⁸¹ *See* Leah B. Garris, *Real Estate According to Wal-Mart*, BUILDINGS MAG., Mar. 1, 2006, at 40, available at http://www.buildings.com/functions/print_article.aspx?contentID=2980.

⁸² *See* Farr, *supra* note 17.

⁸³ *See, e.g.*, John D. Hastie, *Lease Termination Agreements*, 100 A.L.I.-A.B.A. 631, 635 (2006) (explaining that the retrofit market is extremely competitive with the closure of Montgomery Ward and reductions of K-Mart, Sears, and JC Penny). Traditional shopping malls also face the threat of abandoning anchor stores, resulting in more closures and additional unoccupied retail space. *See* Pristin, *supra* note 36. Shopping demographics are likely impacted by the surge of Internet sales as well as consumers opting for the absolute lowest discount prices that Wal-Mart can provide. *See* Denning & Lary, *supra* note 5, at 941–42.

retailers often have a specific store blueprint that they do not want to compromise and would thus rather build from scratch.⁸⁴ Third, the retail market may not be able to support a competitor store, especially if a store such as Wal-Mart simply moved to a nearby, larger location.⁸⁵

The big box retailer typically does not take into consideration how to accommodate new uses when constructing new windowless, concrete buildings with no interior subdivisions.⁸⁶ Other businesses and corporations that are willing to consider reuse face significant design challenges, including difficulty in breaking up the interior into smaller spaces⁸⁷ and improving the exterior façade of the building to make it somewhat aesthetically pleasing.⁸⁸

Despite significant limitations, successful adaptive reuses of abandoned Wal-Marts and other retail spaces offer encouragement to businesses and governments to consider retrofitting greyfields for other uses. Big boxes have been reused for “government complexes, call centers, schools, churches, auto dealerships, storage facilities, medical facilities, museums, recreational facilities, and office space.”⁸⁹

The local government is one popular candidate to take over abandoned retail space. Government offices and schools have taken advantage of the lower cost of retrofitting a building,⁹⁰ which also sets a good example for other private companies to follow.⁹¹ For example, in Phoenix, Arizona, a school district transformed the Maryvale Mall into two elementary schools.⁹² The retrofitted mall also benefits the entire community by serving as the local family

⁸⁴ Farr, *supra* note 17.

⁸⁵ CHILTON, *supra* note 18, at 3–4.

⁸⁶ Wal-Mart Realty claims that their goal is to find tenants for empty stores. Wal-Mart Realty, Economic Development, *supra* note 14. The company does nothing voluntarily in its construction methods to encourage adaptive reuse. The typical Wal-Mart is made entirely out of concrete and asphalt with no windows and high flat ceilings. In addition, the store layout has entries on only the front of the building, with one large parking lot situated in front. This design is hardly conducive to attracting new uses once the building is no longer profitable for Wal-Mart. For a description of the aesthetically unpleasing aspects of big boxes, see generally Merriam, *supra* note 4.

⁸⁷ Paulsen, *supra* note 45.

⁸⁸ See Chris Duerksen & Robert Blanchard, *Belling the Box: Planning for Large-Scale Retail Stores*, Proc. of the 1998 Nat. Planning Conf., AM. INST. OF CERTIFIED PLANNERS (1998), available at <http://design.asu.edu/apa/proceedings98/Duerk/duerk.html>.

⁸⁹ Farr, *supra* note 17.

⁹⁰ See CHILTON, *supra* note 18, at 6.

⁹¹ See Paulsen, *supra* note 45.

⁹² Reagan, *supra* note 56, at 1.

resource center.⁹³ The abandoned mall was an ideal choice for the growing Phoenix community because of its large size, the more affordable cost compared to building new schools, quick construction time, and vast parking lots ideal for playground space.⁹⁴ In addition, the empty mall was in a central community location.⁹⁵ Designers were able to overcome the challenge of the lack of windows by positioning classrooms around skylights.⁹⁶ The project was so successful that the school district now plans to locate its administrative offices in an abandoned retail store.⁹⁷

Another example of a creative adaptive reuse of abandoned retail space is Hormel Foods' use of an abandoned K-Mart in Austin, Minnesota.⁹⁸ Hormel Foods not only located its headquarters in an abandoned K-Mart, but also retrofitted the space for a "Spam Museum."⁹⁹ While having to gut the interior, cut windows, and redo the exterior in brick, the company still saved significant construction time.¹⁰⁰ Right off the interstate,¹⁰¹ the location was ideal for road-tripping tourists as well as employees. The old K-Mart's two-story tire center was perhaps the most promising architectural aspect, and the additional level made an ideal entrance for the museum.¹⁰²

Not only can businesses and governments retrofit abandoned retail space, but big boxes can also reuse abandoned office space. Adaptive reuse in New York City is an old concept that the big box is just now tapping into. While retailers like Wal-Mart traditionally choose suburban communities for store locations, the population density and high average income in New York City provide quite an

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 1–2, 3.

⁹⁵ *Id.* at 4. Of course, Wal-Mart should also be encouraged to occupy empty anchor stores in malls. The emergence of the discount retailer played a part in the decline of sales in traditional shopping malls. With prime locations, easy traffic access, and parking lots already in place, Wal-Mart should consider reusing the space. See Merriam, *supra* note 4, at 14.

⁹⁶ Reagan, *supra* note 56, at 2.

⁹⁷ *Id.*

⁹⁸ Christensen, *supra* note 79. Julia Christensen is an artist who travels around the country photographing and researching the reuse of abandoned big box stores. Julia Christensen, <http://www.juliachristensen.com/JULIACHRISTENSEN.shortbio.html> (last visited May 1, 2008). Her big box reuse website is an excellent source to view pictures of creative adaptive reuses of greyfields. Christensen, *supra* note 79. Examples also include churches, a justice center, schools, and even an indoor racetrack (which unfortunately recently went out of business). *Id.*

⁹⁹ Paulsen, *supra* note 45.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

incentive to reuse existing buildings.¹⁰³ For example, Home Depot opened a store in an old office building in Manhattan.¹⁰⁴ While the renovation costs exceed the price of building a new store in the suburbs, the expected profit far outweighs the initial financial burden.¹⁰⁵ Home Depot had to make many concessions to fit into the office space,¹⁰⁶ but the move gives proof that big box retailers, such as Wal-Mart, are also capable of reusing abandoned space.

B. Zoning Ordinances

1. Aesthetic Specifications in Zoning Ordinances

To ease adaptive reuse, aesthetic specifications in zoning ordinances are an ideal tool to force retailers to build more convertible stores.¹⁰⁷ For example, communities may tailor ordinances to require the use of building materials other than concrete, varying of roof lines, breaking up the façade of the building, and requiring a certain number of trees per parking spots. Evanston, Wyoming, has such a zoning ordinance for large retail establishments that incorporates design standards to “reflect the architectural characteristics and community heritage of the City and ensure compatibility with adjacent land uses.”¹⁰⁸

Big box retailers should be required to add windows and use exterior materials other than concrete, such as brick, stone, or wood.¹⁰⁹ However, a corporation such as Wal-Mart is likely to resist any push to change the standardized appearance of its stores.

¹⁰³ Lawrence Anderson & David Silver, *Rethinking Retail: Adaptive Reuse Offers Creative Alternatives for Suburban Retailers Seeking Success in Urban Markets*, COM. PROP. NEWS, Mar. 16, 2005, § 6.

¹⁰⁴ The Home Depot, <http://homedepot.com> (follow “Store Finder” hyperlink; then follow “Store # 6175” hyperlink).

¹⁰⁵ Anderson & Silver, *supra* note 103.

¹⁰⁶ *See id.* (stating that retailers are being forced “to rethink their traditional prototypes”).

¹⁰⁷ Milne, *supra* note 26, at 5.

¹⁰⁸ EVANSTON, WYO., CODE art. VIA, § 24–51.1(B) (2007). All large retail stores must comply with fourteen design standards. For example, each building shall have a roof line that incorporates different shapes to conceal a flat roof. *Id.* § 24–51.1(B)(1). Each building façade must include staggered projections and recessed areas that are illuminated. *Id.* § 24–51.1(B)(3). At least thirty percent of the exterior surface must include brick, sandstone, stone, or wood. *Id.* § 24–51.1(B)(4). The building façade shall include light fixtures similar in style to the light fixtures in the downtown historic district. *Id.* § 24–51.1(B)(10). Landscaping around the building must be at least twenty feet times thirty percent of the linear length of the building, and each parking area must have a planting area with a tree per every twelve stalls. *Id.* § 24–51.1(B)(12).

¹⁰⁹ Merriam, *supra* note 4, at 19.

Inside the chain stores, Wal-Mart has standardized floor plans to enable its customers to find products easily, no matter which particular Wal-Mart they are shopping in.¹¹⁰ But breaking up the interior of the retail store would cut down on renovation costs for the new user and thus make reusing Wal-Marts, or other retail stores, more appealing to other businesses. Similarly, exterior architectural variations beyond the typical concrete façade cost money that big box retailers will not voluntarily spend unless it is required to by the local zoning ordinance.¹¹¹

2. Size Cap Zoning Ordinances

The most commonly used zoning regulation is the size cap ordinance, which restricts the size of the discount store by limiting its square footage. For example, Largo, Florida, enacted an ordinance that limits retailers to 125,000 square feet.¹¹² These ordinances may be effective, and more and more towns are enacting them to help control urban sprawl.¹¹³ About half the states currently have cities or towns with such ordinances, indicating the nature of their success.¹¹⁴

Size cap ordinances prevent big box retailers from abandoning stores in two ways. First, the company cannot abandon a smaller store for a larger one because a larger store would violate the ordinance. Instead, the regulation encourages the retailer to maximize profits at one location since it cannot enjoy profits from a larger store with increased shelf space and product selection. Second, size caps promote the reuse of retail space. The number of potential future tenants increases if the store size is smaller, compared to a 250,000 square foot cement building with limited future uses.

However, Wal-Mart has successfully employed other strategies that render size cap ordinances ineffective, enabling the company to push stores into communities where they are unwanted. Perhaps one of the most outlandish examples is from Dunkirk, Maryland, which has a size cap ordinance of 75,000 square feet for retail space.¹¹⁵ Wal-Mart skirted the intent of the regulation by building

¹¹⁰ *Id.* at 18.

¹¹¹ *See id.*

¹¹² *See Tan, supra* note 20.

¹¹³ Denning, *supra* note 19, at 9.

¹¹⁴ *Id.*

¹¹⁵ Amit R. Paley, *Adjacent Wal-Marts May Dodge Size Curbs; Calvert Had Stopped*

two stores right next to each other; one building was 74,998 square feet and the neighboring, attached building was 22,689 square feet.¹¹⁶

Second, Wal-Mart often seeks the support of consumers eager for a large discount store, but who do not consider the full impact of the land use implications on the community as a whole. In Bennington, Vermont, after numerous public meetings and three years of review by the planning board,¹¹⁷ the Town proposed a size cap ordinance that would limit the size of retail stores and would also defeat Wal-Mart's plan to double its store size.¹¹⁸ Wal-Mart and the developer spent \$69,500, or \$32 per vote, to gather enough signatures to put the issue to vote by the small community.¹¹⁹ After heavy advertising through radio and newspapers, mass mailings with promised discounts, and targeting the town planners as rich elitists,¹²⁰ Wal-Mart convinced a majority to vote against the ordinance.¹²¹

A zoning ordinance was also recently defeated in Contra Costa, California.¹²² Here, the City enacted a size cap ordinance of 150,000 square feet for stores that sold groceries in order to protect local grocers and their employees.¹²³ Wal-Mart, planning to build a supercenter in the area, gathered enough signatures to put the issue on the ballot and then spent two million dollars on the ballot measure.¹²⁴ Here, Wal-Mart passed out membership cards, newsletters, and invitations to special events in exchange for ballot signatures.¹²⁵ Not surprisingly, the ordinance was defeated.¹²⁶

While size cap ordinances may be effective, they should be coupled with other zoning and land use regulations to prevent the

Supercenter Plans, WASH. POST, Mar. 7, 2005, at B1.

¹¹⁶ *Id.* The total square footage exceeded the zoning restriction by thirty percent. *Id.*

¹¹⁷ *Wal-Mart Money Trumps Land Use Process in Bennington, Vermont*, THE HOMETOWN ADVANTAGE (New Rules Project, Bennington, V.T.), Apr. 7, 2005, [hereinafter "Wal-Mart Money"], http://www.newrules.org/retail/news_slug.php?slugid=293.

¹¹⁸ Gram, *supra* note 40.

¹¹⁹ See *Wal-Mart Money*, *supra* note 117.

¹²⁰ *Id.*

¹²¹ Gram, *supra* note 40.

¹²² Tim Sullivan, *Wal-Mart's Manifest Destiny: Intent on Western Expansion, the World's Largest Company Turns Democracy Upside-Down—But Now, Communities Are Fighting Back*, HIGH COUNTRY NEWS, June 7, 2004, at 7, available at <http://www.hcn.org/servlets/hcn.PrintableArticle?article-id=14785>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *id.*

big box retailer from skirting a narrowly tailored rule. For example, regional planning would help prevent the retailer from simply choosing a neighboring community with more lax regulations that allowed for a larger store. In addition, the retailer may choose to open several smaller stores in an area if size is limited to a certain square footage. These stores could be encouraged to reuse an existing structure through tax incentives.

C. Regional Planning

Regional planning is yet another highly effective remedy to prevent the abandoned big box. Here, neighboring municipalities agree to one encompassing, comprehensive plan rather than each community having its own separate plan. Normally, the regional planning board consists of members from each municipality in the encompassing area.¹²⁷

Strict ordinances in one community and not in the next can be problematic in the sense that developers prefer land with less restrictions, which is often farther from the inner city core.¹²⁸ Land use and zoning restrictions should not be so strict that retailers go to surrounding communities and add to urban sprawl.¹²⁹ In addition, building outside the larger town in less restrictive, more rural areas can cause increased traffic, pollution, noise, and change the overall rural sense of community as consumers travel farther to the nearest discount big box.¹³⁰

Regional planning facilitates growth control because it prevents uses disallowed in one municipality simply moving locations to a neighboring community.¹³¹ Since land use regulations can impact surrounding communities, regional governments help prevent the big box from moving to a different location where the ordinances are less strict.¹³²

Regional planning deterred Wal-Mart from building a 150,000 square foot supercenter in Upper Hanover Township, Pennsylvania.¹³³ Here, Wal-Mart not only needed approval from

¹²⁷ See, e.g., Jackson, *supra* note 62, at 319.

¹²⁸ See *id.* at 317.

¹²⁹ See *id.* at 310–11.

¹³⁰ See Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL. L. 48, 52–53 (2004–2005).

¹³¹ See Denning & Lary, *supra* note 5, at 912–13.

¹³² See Jackson, *supra* note 62, at 300–01.

¹³³ *Big Box Proposal Tests Regional Planning in Pennsylvania*, THE HOMETOWN ADVANTAGE (New Rules Project, Minneapolis, M.N.), Apr. 1, 2003,

the Township, but also the five surrounding communities, before it could construct the building.¹³⁴ Commissioners urged Wal-Mart to instead consider moving into a vacant department store.¹³⁵ This way, the company was given the option to locate in the area, but more on the terms of the combined communities. If Wal-Mart chooses to try for approval from all six communities, the company wastes time and money that it could spend on opening a store more quickly, and with less opposition, in the vacant department store. Retrofitting a department store into a Wal-Mart would likely be less costly because there are no major construction issues, such as installing windows, which normally come with adaptive reuse.

D. Eminent Domain

Connecticut, tired of the eyesores created by greyfields, enacted a statute that allows the government to take abandoned buildings by eminent domain.¹³⁶ The wording of the statute directly ties the provision to the effects abandoned buildings have on the economic well-being of the community as well as to the health, safety, and welfare of residents,¹³⁷ thus satisfying the requirement that the statute must be related to a legitimate government purpose.

In addition, the Connecticut statute grants municipalities the power to create an urban rehabilitation agency, which the building

http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=169.

¹³⁴ *Id.* The regional plan, adopted in 2001, contained a size cap ordinance of 60,000 square feet for retail space. *Id.*

¹³⁵ *See id.*

¹³⁶ *See* CONN. GEN. STAT. §§ 8-291–96 (2001).

¹³⁷ *Id.* § 8-290. The declaration of policy for the rehabilitation of abandoned industrial and commercial buildings states,

[i]t is hereby found and declared that there exists within the municipalities of this state a large number of real properties containing vacant and abandoned buildings that were once used for industrial or commercial purposes, that many of these vacant and abandoned buildings are located in areas which are blighted or dilapidated and that the existence of such vacant and abandoned buildings contributes to the further decline of such blighted or dilapidated areas. It is further found that the abandonment and forfeiture of real properties with structures thereon is adversely affecting the economic well being of the municipalities and is inimical to the health, safety and welfare of the residents of this state. It is further found that many of the vacant and abandoned buildings can be rehabilitated, reconstructed or reused so as to provide safe and productive industrial or commercial facilities and that such rehabilitation, reconstruction or reuse would eliminate, remedy and prevent the adverse conditions described above. It is further found that private enterprise has not been able to undertake and carry out the rehabilitation, reconstruction or reuse of abandoned and vacant industrial or commercial buildings within the blighted or dilapidated areas of the municipalities of this state and that the provisions of this chapter are necessary and in the public interest.

Id.

official must quarterly provide a list of abandoned buildings.¹³⁸ The agency may then hold a hearing with the property owner in order to determine whether the owner is willing to rehabilitate the building or demolish it.¹³⁹ If the owner does not respond or is unwilling to remedy the problem, the agency may recommend to the legislative body that the land should either be taken by eminent domain or paid for by the government at fair market value.¹⁴⁰ The municipality can then rehabilitate the building itself, demolish it, or transfer it, with or without compensation, to an applicant willing to rehabilitate the building.¹⁴¹ In addition, financial assistance or a tax abatement or deferral may be granted to the applicant willing to reuse the building.¹⁴²

The Connecticut statute provides a retroactive remedy to rehabilitate, reuse, or demolish abandoned buildings left by retailers, in addition to encouraging reuse through financial incentives. However, the effect of the statute only fixes buildings already in a dilapidated state, while failing to prevent abandoned buildings in the first place. For example, retailers may still elect to vacate a building because it may be economically advantageous to receive fair market compensation from the city while also avoiding realtor fees. Therefore, states should couple the retroactive statute with other preventative land use regulations in order to effectively prevent greyfields.

E. Performance and Demolition Bonds

Some municipalities have adopted ordinances that prospectively deter the abandonment of retail stores through performance or demolition bonds.¹⁴³ Performance bonds require the retailer to maintain the exterior of the store until it is re-occupied, while demolition bonds allow the municipality to tear down the building if it is unoccupied for a certain amount of time. The bond money pays for these services in case the retailer abandons the store.¹⁴⁴

For example, Oakdale, California, enacted the Dark Store Ordinance, which requires developers of retail stores larger than

¹³⁸ *Id.* §§ 8-292–93(a).

¹³⁹ *Id.* § 8-293(b).

¹⁴⁰ *Id.* § 8-293(c).

¹⁴¹ *Id.* §§ 8-293(c)–(d), 8-294(a)–(c).

¹⁴² *Id.* § 8-296.

¹⁴³ CHILTON, *supra* note 18, at 6.

¹⁴⁴ *Id.*

40,000 square feet to obtain a performance bond that will cover the City's cost of demolishing or maintaining the structure if it remains dark for more than one year.¹⁴⁵ Buckingham Township, Pennsylvania, has a similar ordinance that requires big box retailers to deposit funds into an escrow account for demolition costs if the store is vacated.¹⁴⁶ Wauwatosa, Wisconsin, went a step further with its demolition bond by also including aesthetic and environmental concerns in the ordinance.¹⁴⁷

F. Other Strategies

1. Taxes

Tax policies coupled with land use regulations is yet another technique to discourage abandonment of stores. Collected taxes or other fees may help the funding for reuse, for example, by transferring the funds to the entity willing to redevelop the property.¹⁴⁸ For instance, a community can proactively require a developer to pay a fee into a trust fund, which can be spent later on renovations if the building is abandoned. These trust funds differ from general tax revenues in the sense that they actually target the specific empty big box rather than using general tax revenue that may alleviate indirect impacts of the big box, such as traffic congestion or pollution.¹⁴⁹ Communities can also act retroactively, encouraging reuse through tax credits for those that move into the empty retail space.¹⁵⁰ Here, the developer willing to reuse the abandoned store enjoys a tax break once the building is occupied.¹⁵¹

¹⁴⁵ OAKDALE, CAL., ZONING ORDINANCE § 36-23.35(R) (2006); *see also* *Dark Store Ordinance—Oakdale, California*, THE HOMETOWN ADVANTAGE (New Rules Project, Oakland, C.A.) <http://www.newrules.org/retail/oakdale.html> (last visited May 1, 2008).

¹⁴⁶ *See* BUCKINGHAM TOWNSHIP, PA., ZONING ORDINANCES § E1 (2001); *see also* Denning, *supra* note 19, at 14.

¹⁴⁷ *See* WAUWATOSA, WIS., ZONING ORDINANCES §§ 24.25, 24.23.090, 24.24.035 (2005). The ordinance requires the retailer to pay \$0.20 for every square foot of retail space to a land conservation fund before a building permit is issued. If the building is abandoned, the City may then use the fund to redevelop the property. Jennifer Evans-Cowley, *Regulatory Strategies for Big Boxes*, ZONING PRAC., Dec. 2005, at 6.

¹⁴⁸ CONN. GEN. STAT. § 8-291-96 (2006); *see* Milne, *supra* note 26, at 6; *see also* Merriam, *supra* note 4, at 26.

¹⁴⁹ *See* Salkin, *supra* note 130, at 57.

¹⁵⁰ *See* Farr, *supra* note 17 (referring to South Carolina's statute that gives tax credits to companies that reuse retail space over 100,000 square feet).

¹⁵¹ *See* Jeff Wilkinson, *Proposal Targets Empty Stores*, COLUM. STATE (SC), Apr. 14, 2005, at B1.

2. Lease Requirements

Oftentimes the big box retailer does not own the store that it abandons and instead rents the building. This makes it difficult to hold the corporate chain responsible for abandoning buildings that it was simply renting. Instead, the building remains empty if the retailer continues to pay the lease or the landowner cannot find a new tenant. However, some municipalities have enacted ordinances that work specifically with rented retail space. For example, Los Angeles, California, requires retailers that plan on building a store with a grocery component to submit a community impact study that requires the company to have a plan to reuse, re-lease, or sell the property if the company decides to abandon the space.¹⁵² This law applies to retail stores larger than 100,000 square feet that have at least ten percent of floor space devoted to food,¹⁵³ targeting the superstores such as Super Wal-Mart.

In Peachtree City, Georgia, contracts between the landlord and a big box tenant must have a provision that the landlord can lease to another tenant if the retailer leaves.¹⁵⁴ This is a condition of site plan approval in any general commercial district. Usually, leases are set for a specific period of time, regardless of whether the building is occupied or not. Hence, a retailer may find that abandoning a location for a larger store and still paying the rent on the vacant property is more profitable than remaining in the old location. The owner does not have any additional expectations besides the rent being paid. Peachtree City's ordinance allows a landlord to seek a new tenant—even if the vacated tenant is still paying rent—which may be more profitable to the owner due to rent inflation.¹⁵⁵

Other ordinances require the retailer to make reasonable efforts to find a new renter. However, problems arise because few businesses can actually use the large amount of square footage left behind,¹⁵⁶ resulting in slow turnover rates.¹⁵⁷ In addition, a

¹⁵² LOS ANGELES, CAL., MUNICIPAL CODE ch. 1, § 12.24(U)(14)(d) (2007). The City Planning Commission decides whether to approve a conditional use permit for the store, with the City Council acting as the appellate body. *Id.* This provision appears in the zoning ordinances because it only applies to stores located in an economic assistance area. *See id.*

¹⁵³ *Id.* § 12.24(U)(14)(a).

¹⁵⁴ PEACHTREE CITY, GA., CODE OF ORDINANCES § 1006.3(a)(6) (1999).

¹⁵⁵ *Id.*

¹⁵⁶ *See* Farr, *supra* note 17.

¹⁵⁷ *See* BOARNET & CRANE, *supra* note 27, at 65.

business that is willing to lease may want a longer lease to substantiate the cost of fixing up or retrofitting the building.¹⁵⁸ However, the owner or landlord usually prefers a shorter lease to protect himself in case the new company is not successful in the location.¹⁵⁹ Costs associated with retrofitting, possible costs of rezoning the property to a new use, excessive square footage, and conflicting goals of lease terms all contribute to businesses avoiding leasing empty big boxes.¹⁶⁰

Despite these limitations, finding new renters has been successful. For example, in the 1980s, when Wal-Mart was beginning to expand to larger stores, traditional grocery operators were simultaneously becoming more successful.¹⁶¹ Due to an increase in demand for grocery retail space, Wal-Mart was able to break a lease because another grocer in the area was willing to take over the lease as a direct tenant.¹⁶² The landlord was agreeable with the arrangement because rents for the grocery store replaced the lost Wal-Mart revenue, especially since the rent increased due to inflation since the transfer.¹⁶³

To its credit, Wal-Mart has a subdivision that focuses on selling, leasing, or sub-leasing empty Wal-Marts and Sam's Clubs.¹⁶⁴ While Wal-Mart Realty claims that the goal of the company is to find tenants for vacant buildings, it still operates in a fashion that is only economically beneficial to the company. The company does not want to continuously pay for the upkeep of the abandoned building for the duration of the lease,¹⁶⁵ and it recently became more concerned about its tarnished environmental image.¹⁶⁶ Instead, Wal-Mart chooses to focus on the "benefits" of abandoning smaller stores for larger accommodations, stating on its website, "Wal-Mart Stores and Sam's Clubs are often so successful that they outgrow

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 66.

¹⁶¹ *See* Hastie, *supra* note 83, at 637.

¹⁶² *See id.* at 638.

¹⁶³ *See id.*

¹⁶⁴ Garris, *supra* note 81.

¹⁶⁵ *See id.*

¹⁶⁶ *See* 2006 ANNUAL REPORT, *supra* note 3, at 44. The U.S. Attorney's Office for the Central District of California is investigating Wal-Mart for criminal violations of the Resource Conservation and Recovery Act, the Clean Water Act, and the Hazardous Materials Transportation Statute. *Id.* Similarly, the Los Angeles County District Attorney and the State of Nevada are also investigating Wal-Mart's hazardous waste disposal and transportation methods. *Id.*

their buildings and relocate to better serve our customers.”¹⁶⁷ Once the company knows that a store is going to be vacated, Wal-Mart does a cost analysis and posts a listing on its website.¹⁶⁸ As of June 1, 2007, Wal-Mart Realty’s website had 253 listings for available properties in thirty-six states.¹⁶⁹ But with the 276 new superstores that opened in 2006 and the 134 traditional stores closing,¹⁷⁰ the numbers do not indicate that Wal-Mart Realty is very successful in actually selling or leasing the abandoned buildings.

V. THE COMMERCE CLAUSE: BIG BOX PRIMARY DEFENSE AGAINST LAND USE REGULATIONS

While land use regulations can be a positive approach to preventing big box retailers from abandoning retail space, care must be taken when drafting these regulations to prevent a valid Commerce Clause claim.¹⁷¹ Under the dormant Commerce Clause, a law cannot discriminate against companies that come from outside the town, city, or state.¹⁷² In addition, the purpose behind the law cannot be to protect local retail merchants from unfair competition, or even to protect the local economy from the pervasive nature of Wal-Mart.¹⁷³

Second, the ordinance cannot be arbitrary or capricious in singling out Wal-Mart as an unwanted retailer in the community. However, the burden to show that a land use regulation is unconstitutional is high,¹⁷⁴ and the courts give deference to the local government. As long as “there [is] nothing improper, irrational, arbitrary or capricious about the [Zoning Board of Appeals] analysis or the conclusion it reached, the determination should not [be] disturbed.”¹⁷⁵

Wal-Mart is certainly aware of the harsh criticisms that the company faces, not just in land use planning, but also with lack of

¹⁶⁷ Wal-Mart Realty, Economic Development, *supra* note 14.

¹⁶⁸ See Garris, *supra* note 81.

¹⁶⁹ See Wal-Mart Realty, Advanced Building List, *supra* note 50.

¹⁷⁰ 2007 ANNUAL REPORT, *supra* note 3, at 26.

¹⁷¹ U.S. CONST. art. I, § 8, cl. 3.

¹⁷² See, e.g., Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

¹⁷³ See Denning, *supra* note 19, at 10.

¹⁷⁴ “Zoning ordinances . . . are presumed constitutional and the burden is on the party challenging the ordinance to prove its unconstitutionality beyond a reasonable doubt.” McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1242 (N.Y. 1985) (citations omitted).

¹⁷⁵ Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Moreau, 838 N.E.2d 624, 628–29 (N.Y. 2005).

health care for employees,¹⁷⁶ poor hourly wages,¹⁷⁷ unfair competition with grocery and “mom and pop” stores,¹⁷⁸ and negative environmental impacts,¹⁷⁹ just to name a few. As a result, many community members may speak at public hearings regarding a proposed Wal-Mart site. Wal-Mart may then use these comments later in a court action to argue that the underlying purpose of any land use regulation is to discriminate against their company rather than being tied to the goals of the community.

Instead, the purpose behind any land use decision must be linked to the public health, safety, and welfare of the general public, as well as to the comprehensive plan, if any, of the community.¹⁸⁰ Legitimate purposes may also include environmental or infrastructural reasons,¹⁸¹ such as increased traffic in residential neighborhoods. In addition, the drafters should consider the needs of the municipality and identify ways to reuse abandoned Wal-Marts before writing any land use regulation dealing with big box retail space.¹⁸² This way, the regulation is tied directly to the benefits of the community as a whole and lessens the possibility of a successful Article 78 action.

The drafters of the land use regulation must refrain from using explicit language in the ordinance that links the regulation specifically to Wal-Mart or to a particular proposed project.¹⁸³ In addition, the regulation should not include exempt classes for the abandonment of stores. If the ordinance is challenged by Wal-Mart, the court may look at an ordinance with exceptions with stricter scrutiny than if the regulation treated all businesses the same.¹⁸⁴

As a preventative measure, the drafters should use language that directly ties the regulation to the public welfare of the community. Towns have successfully justified their zoning ordinances to “maintain property values, . . . provide neighborhood social and economic stability, arrest blight and decay, . . . and encourage

¹⁷⁶ See Wakeup Wal-Mart, Why Wal-Mart Must Change, *supra* note 8.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Wakeup Wal-Mart, The Real Facts About Wal-Mart, *supra* note 10.

¹⁸⁰ See Denning, *supra* note 19, at 10–11.

¹⁸¹ *Id.* at 14.

¹⁸² See Farr, *supra* note 17.

¹⁸³ See Denning, *supra* note 19, at 10–11. By singling out a proposed Wal-Mart plan, the zoning or planning board would be engaging in illegal spot zoning, and a court would not uphold the ordinance. Instead, local governments should foresee the problem of abandoned retail space before Wal-Mart proposes a store and not act retroactively.

¹⁸⁴ See *id.* at 15.

conditions that make a community a pleasant place to live and work.”¹⁸⁵ Specific language would help prevent Wal-Mart from arguing that the purpose of the regulation is discriminatory since the real reason behind the ordinance can be deduced from the public meetings leading up to the enactment of the law.

VI. NEW YORK

A. Courts Uphold Local Land Use Regulations

Despite the legal muscle that Wal-Mart exerts on local government officials, such as city council members and town board members, who give the retailer a difficult time, zoning ordinances enacted to limit the impact the retailer has on a community have been upheld in New York. Courts tend to give deference to the local legislative body and uphold zoning restrictions as long as they are tied to the police power or general welfare of the community. While there has not been much land use litigation concerning Wal-Mart in New York, the cases offer encouragement to local communities that want to limit the number and size of greyfields.

For example, in 1989, Wal-Mart planned to build a new supercenter in the Town of Hyde Park in a zoning area that prohibited retail commercial use.¹⁸⁶ The land purchase was conditioned on the rezoning of the parcel, which was subsequently rezoned with the provision that the Zoning Board of Appeals must issue a special use permit for a shopping center.¹⁸⁷ After several ethical violations, such as private meetings between Wal-Mart and the Town Supervisor, a planning board member refusing to recuse herself from the board after her husband criticized Wal-Mart in front of the media, and an illegal town meeting, the Town approved a second zoning ordinance that repealed the first ordinance, thereby effectively barring the supercenter.¹⁸⁸ The Town also acted in bad faith when it hid zoning maps and other records that were harmful to its case during the jury trial that ensued thereafter.¹⁸⁹ Despite the Town’s inappropriate behavior and lack of ethics, the Court of Appeals for the Second Circuit held that the second rezoning did not

¹⁸⁵ Lefcoe, *supra* note 7, at 862.

¹⁸⁶ DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 127 (2d Cir. 1998).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 127–28.

¹⁸⁹ *Id.* at 134–35.

deprive the developer's rights in the property because the rights were not vested, stating, "[i]n order for a right in a particular zoning status to vest, a property owner must have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance."¹⁹⁰ In addition, the court stated that the Zoning Board of Appeals had "wide discretion" to deny special use permits¹⁹¹ as long as there was a legitimate reason behind the denial.¹⁹²

New York State courts rule similarly in favor of local legislation at both the supreme court level and the appellate level. For example, the Tompkins County Supreme Court upheld the City of Ithaca's Planning Board decision to deny a proposal to build a Wal-Mart in a commercial zone for aesthetic reasons, but not for social, cultural, or economic reasons.¹⁹³ Wal-Mart brought suit, arguing that the zoning ordinance prevented competition and discouraged new enterprise.¹⁹⁴ The City's defense was that the building would adversely affect the community and, therefore, the decision to deny the proposal was protected by the State Environmental Quality Review Act (SEQRA).¹⁹⁵ The City of Ithaca argued that the definition of "environment" under SEQRA included community or neighborhood character.¹⁹⁶ The court held that the Planning Board could not deny the request based on SEQRA for economic reasons, but the aesthetic impact on the community could be considered under SEQRA as long as the visual impact was significant.¹⁹⁷ Since the Board properly examined the aesthetic impacts a new Wal-Mart would bring to the town,¹⁹⁸ the decision to deny the proposal was valid, stating "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively."¹⁹⁹

The New York Appellate Division for the Third Department

¹⁹⁰ *Id.* at 130 (citing *In the Matter of Ellington Constr. Corp. v. Zoning Bd. of Appeals of the Inc. Vill. of New Hempstead*, 566 N.E.2d 128, 132 (N.Y. 1990)). The district court ordered the town to pay \$39,905 in discovery sanctions. *Id.* at 134.

¹⁹¹ *Id.* at 132.

¹⁹² *Id.* at 133.

¹⁹³ *E. Coast Dev. Co. v. Kay*, 667 N.Y.S.2d 182, 186–87 (App. Div. 1996).

¹⁹⁴ *Id.* at 183.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 184.

¹⁹⁷ *Id.* at 186.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citation omitted).

similarly upheld a decision of the Town of North Elba Planning Board to deny a conditional use permit to Wal-Mart.²⁰⁰ Here, Wal-Mart wanted to build a store in a Lake Placid tourist community²⁰¹ that was known for its “rustic nature and striking scenery.”²⁰² The court stated that SEQRA was not the only consideration that the Board could use when determining whether to issue the permit,²⁰³ but could also consider the visual impact of the large concrete store.²⁰⁴

Furthermore, and perhaps most important to the prevention of abandoned greyfields, the appellate division in this case stated, while the [Planning Board’s] decision refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the overall character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area—an entirely proper avenue of inquiry, even within SEQRA.²⁰⁵

Therefore, the third department would likely uphold a zoning ordinance that is specifically geared toward preventing the abandonment of buildings, without the ordinance being tied to SEQRA or aesthetics.

While New York courts will likely uphold planning board decisions so long as they have a rational basis and are supported by substantial evidence, individual homeowners that try to prevent a Wal-Mart from being built face several challenges. First, a court may hold that a homeowner does not meet standing prerequisites because there is no injury before the Wal-Mart is built.²⁰⁶ For example, the third department in *Oates v. Village of Watkins Glen* ruled that nearby neighbors as well as a not-for-profit group organized to protect the county’s environment lacked standing because neither group would suffer direct harm or have injury any different than the general public.²⁰⁷ In addition, there was no

²⁰⁰ Wal-Mart Stores, Inc. v. Planning Bd. of N. Elba, 668 N.Y.S.2d 774, 778 (App. Div. 1998).

²⁰¹ *Id.* at 777–78.

²⁰² *Id.* at 777.

²⁰³ *Id.* at 776.

²⁰⁴ *Id.* at 777.

²⁰⁵ *Id.*

²⁰⁶ Al Norman, *Sprawl and the Coercive Force of Zoning Law: Fear & Loathing*, 6 VT. J. ENVTL. L. 90, 92–94 (2004–2005).

²⁰⁷ 736 N.Y.S.2d 478, 481–82 (App. Div. 2002).

standing based on increased traffic, noise, air quality, or aesthetics.²⁰⁸

Second, the cost of litigation may deter local governments from fighting Wal-Mart in court.²⁰⁹ A local legislative body may not be willing to spend taxpayer money on litigation, especially when it would likely receive criticism from citizens that do not oppose the store. In addition, local city officials may fear political ramifications if they oppose Wal-Mart. The expert witnesses that are necessary to proceed through court are also costly.²¹⁰ Experts may include, for example, civil engineers, traffic engineers, and environmental specialists.²¹¹ On the other hand, Wal-Mart is willing to expend large amounts of money on expert witnesses for litigation, as well as advertisements to gain the support of local consumers that would likely frequent the store.

B. New York and the Police Power

New York State grants the power to the local counties, cities, towns, and villages to protect and enhance their physical and visual environment,²¹² and it empowers localities to regulate “[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein.”²¹³ In addition, the General City Law,²¹⁴ Town Law,²¹⁵ and Village Law²¹⁶ all reiterate the scope

²⁰⁸ *Id.* at 481.

²⁰⁹ Norman, *supra* note 206, at 90–91. For example, the Mayor of Atascadero, California, recently stated that he no longer supported a zoning ordinance that would shut out Wal-Mart from building a new 207,000 square foot super center. Stephen Curran, *Mayor Rolls Back Support for Wal-Mart Ordinance*, THE (SAN LUIS OBISPO, C.A.) TRIB., Jan. 26, 2007, at A1. For months, the Mayor pressured City Council members to enact the ordinance. *Id.* However, he had a sudden change of heart once he realized how costly a defensive fight with Wal-Mart could get if the company challenged the ordinance in court. *Id.* Without the Mayor’s support, the ordinance was not likely to get the requisite number of votes to pass. *Id.* A spokesperson for Wal-Mart said that the company was considering “a host of strategies, including a possible lawsuit” to fight the ordinance. *Id.*

²¹⁰ Norman, *supra* note 206, at 91–92.

²¹¹ *Id.* at 91.

²¹² N.Y. MUN. HOME RULE LAW § 10(1)(a)(11) (McKinney Supp. 2007).

²¹³ *Id.* § 10(1)(a)(12).

²¹⁴ N.Y. GEN. CITY LAW § 20(24)–(25) (McKinney 2003) (“Subject to the constitution and general laws of this state, every city is empowered . . . To regulate and limit the height, bulk and location of buildings . . . and other open spaces . . . Such regulations shall be designed to . . . promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.”).

²¹⁵ N.Y. TOWN LAW § 261 (McKinney 2004) (“For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict . . . buildings and . . . open spaces.”).

of the police power, as long as the regulations are made to promote the public health, safety, morals, and general welfare of the community. In general, the local legislative body has the power to enact zoning laws or ordinances that regulate the size and type of buildings and regulate the locations of particular uses.²¹⁷ Furthermore, New York State gives municipalities' broad statutory authority so that communities can work together in regional planning and zoning.²¹⁸

Despite authority to do so, few communities in New York have enacted zoning ordinances or land use regulations containing provisions that would specifically prevent the abandonment of big boxes and the creation of greyfields.²¹⁹ However, some municipalities have adopted land use controls that can serve as models for other communities to follow. Perhaps the reason that more communities do not have laws in place to protect against empty big boxes is an indication that Wal-Mart has not infiltrated New York State like it has areas of the mid-West.²²⁰ However, this is even more reason for communities to act proactively and enact land use regulations, before the problem of abandoned Wal-Marts becomes real.

C. Examples of Existing New York Land Use Regulations and the Big Box

The Town of Hamburg, New York, has a zoning district specifically for retail business that targets the size of retail stores,

²¹⁶ N.Y. VILLAGE LAW § 7-700 (McKinney 1996) ("For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict . . . buildings . . . and . . . open spaces.").

²¹⁷ See N.Y. GEN. CITY LAW § 20(24)–(25) (McKinney 2003); N.Y. TOWN LAW § 261 (McKinney 2004); N.Y. VILLAGE LAW § 7-700 (McKinney 1996).

²¹⁸ See Salkin, *supra* note 130, at 56 (pointing out that local statutes were enacted specifically to encourage neighboring municipalities to work together for regional zoning and planning); see also N.Y. GEN. MUN. LAW § 119-u(2) (McKinney 2007); N.Y. TOWN LAW § 284(2) (McKinney 2004); N.Y. VILLAGE LAW § 7-741(2) (McKinney 1996).

²¹⁹ See, e.g., E-Codes: Municipal Codes on the Internet, <http://www.generalcode.com/webcode2.html> (last visited May 1, 2008). While the website does not include a comprehensive list of all the municipal codes in New York State, it provides a current list of over 250 county, city, town, and village codes.

²²⁰ As of October 15, 2007, New York has forty-five Super Wal-Marts and forty-five discount stores statewide. Wal-Mart Facts, New York Community Impact, <http://www.walmartfacts.com/StateByState/?id=34> (last visited May 1, 2008). Wal-Mart Realty currently advertises one empty building. Wal-Mart Realty, Basic List of Available Buildings, <http://walmartrealty.com/Buildings/PrintableBuilding/BasicBldgListOnly.html> (last visited May 1, 2008).

as well as restricts uses that help preserve the image of the town.²²¹ The zoning ordinance lays out the purpose of the restrictions as to “serve the local needs of the [t]own. . . . [while ensuring that commercial uses do not] become a regional attraction.”²²² The regulations must consider the “surrounding aesthetics” and “adaptive reuse” to enhance the overall image of the town.²²³ The ordinance further ties the goals of the town image to limiting retail structures to 15,000 square feet and restricting hours of operation from 8:00 a.m. to 9:00 p.m.²²⁴ Hamburg then provides a separate commercial zoning district that includes a permitted use of retail space with a maximum of 100,000 square feet.²²⁵ The ordinance incorporates a design regulation that requires the retailer to consider “aesthetics, landscaping, [and] adaptive reuse” to enhance the overall image of the town.²²⁶

The Town of Brighton, New York, also restricts retail use to a zoning district.²²⁷ Retail stores are a permitted use, but the ordinance retains the right of the Town to restrict structure size in order to limit intensity, though it does not provide a maximum square footage.²²⁸ In addition, the ordinance promotes reuse of existing structures²²⁹ and limits hours of operation and sign illumination.²³⁰

The Town of Hyde Park, New York, ties the purpose of its zoning ordinance to developing intensity of use in its community center while reserving outlying areas for a lower intensity of use.²³¹ This provision may promote a big box retailer to reuse existing space if the Town denies a proposal for a store on the outskirts of the community. Hyde Park further encourages adaptive reuse by allowing a fifty percent increase in scale and density for allowable uses, provided that the Planning Board makes a determination that the use is in character with the district as set forth in the

²²¹ TOWN OF HAMBURG, N.Y., MUN. CODE art. XIII, § 280-1 (1998).

²²² *Id.* § 280-69.

²²³ *Id.* The ordinance also lists intrusive characteristics that are not allowed in the district, such as high noise levels, obtrusive lighting, and unlimited signage. *Id.*

²²⁴ *Id.*

²²⁵ *Id.* §§ 280-80–81.

²²⁶ *Id.* § 280-80.

²²⁷ TOWN OF BRIGHTON, N.Y., MUN. CODE ch. 203, art. VIII A (1998).

²²⁸ *Id.* §§ 203-62.2–62.3. By not specifying a size cap, the zoning ordinance allows some flexibility to the Town when determining whether a big box size is appropriate or not.

²²⁹ *Id.* § 203-62.2.

²³⁰ *Id.* § 203-62.3(G)(3), (5).

²³¹ TOWN OF HYDE PARK, N.Y., MUN. CODE § 108-4 (2005).

Comprehensive Plan.²³²

Similarly, the City of Auburn, New York, also promotes creative reuse in “neighborhoods located between industrial and residential sections of the City and older industrial buildings which fail to meet the needs of modern industry.”²³³ Auburn further reserves the right to require a site plan approval for retail shopping establishments.²³⁴

Instead of focusing on adaptive reuse or size cap limitations, the Town of Crawford prospectively guards against abandoned greyfields through aesthetic limitations in the town zoning regulations.²³⁵ Businesses are subject to Planning Board approval, which takes into consideration the aesthetic appearance of the building, the landscaping, the materials used in construction, and the number of windows.²³⁶ Crawford does not prevent, or even insinuate, that a large retail discount store is not wanted in the community. Instead, the zoning ordinance expressly provides the terms and conditions for which the community would be willing to assume the burden of a big box store. By allowing the Planning Board to have a voice in the appearance of buildings, the Board can consider the potential reuses of the building if the original developer eventually abandons the site. This way, the zoning ordinance not only protects the town from an initial big box eyesore that is made solely of concrete, but also encourages adaptive reuse. Of special note is the requirement of windows, since this seems to be the main complaint for the reuse of big box stores. In addition, the ordinance provides for a big box retailer, such as Wal-Mart, to foot the bill for increased aesthetic value, which makes retrofitting easier and more economical for future uses.

²³² *Id.* § 108-16(A)(4). Hyde Park defines an “adaptive reuse” as a “[c]ontemporary use of an existing building or structure for a use other than that for which it was originally designed, intended or occupied.” *Id.* § 108-2.2.

²³³ CITY OF AUBURN, N.Y., MUN. CODE § 305-44(A) (2005).

²³⁴ *Id.* § 305-44(B)(4).

²³⁵ TOWN OF CRAWFORD, N.Y., MUN. CODE § 137-11 (2006).

²³⁶ *Id.* § 137-11(3) (“Strong consideration shall be given to aesthetic, screening, landscaping, and lighting in order to convey an attractive business appearance that is consistent with the rural community character and to avoid adverse or inconsistent effect on the public and on private properties where businesses will be visible from public streets, parks or adjoining residential properties or districts. The design and appearance of nonagricultural uses, whether discrete or located within a business park, shall be harmonious with adjoining uses where visible from the adjoining use. The appearance, color, material, texture, and design of structures, including roof pitch and building mass, and the size, shape, location and number of window and door openings, shall be reviewed by the Planning Board as to their compatibility with community character and to avoid unnecessary or abrupt contrast with surrounding structures. . . . [T]he renovation and reuse of existing buildings is expressly encouraged as a preferred option to demolition and removal.”).

Finally, some municipalities provide a remedy for once a big box store abandons the property, such as the City of Oneida, New York. In Oneida, when a nonresidential building is not in use or is not occupied, the City Engineer can recommend to the Common Council that the building should be demolished if it “in any way endangers the health, safety or welfare of the public.”²³⁷ Of course, the owner is given the opportunity to remedy the problem of the vacant building.²³⁸ If the abandoned building is neither repaired nor removed, the City can remove the building at the expense of the owner, and the cost becomes a lien against the property, collectable by taxes or civil action.²³⁹ The demolition provision may encourage building owners to reconsider before leasing property to a retailer like Wal-Mart; if the use is likely to be abandoned, the building owner, not the retailer, is financially responsible.

All in all, some New York municipalities have creative zoning and land use provisions to prevent abandoned big box stores left in the path of Wal-Mart or another big box retailer. Other communities should take note of the above zoning regulations and devise preventative measures of their own.

D. Current New York Challenges

The police power proved to be a strong tool for Brunswick, New York, which recently faced Wal-Mart’s plans to open a new supercenter.²⁴⁰ The plans spurred the creation of Brunswick Smart Growth, a community group devoted to preserving the community and quality of life in the town.²⁴¹ The group’s webpage highlights the need to regulate growth in a manner that prevents urban sprawl²⁴² and does not “overburden the existing resources.”²⁴³

²³⁷ CITY OF ONEIDA, N.Y., CODE §§ 34-20–26 (2002). The City’s zoning ordinance defines “abandoned building” as

[a] nonresidential or residential structure which has remained unoccupied or unused for more than one year or for a six-month period as measured below, whichever is sooner. Said six-month period shall be measured from the date of service, as provided herein, of notice of such non-use or non-occupancy to the owner.

Id. § 34-19.

²³⁸ *Id.* § 34-21.

²³⁹ *Id.* §§ 34-25–29.

²⁴⁰ See Tim O’Brien, *Big Plans Split Small Town: Brunswick’s Rural Charm Lures Developers as Residents Fear the Loss of Open Space*, ALB. TIMES UNION, Oct. 29, 2006, at C1.

²⁴¹ Brunswick Smart Growth, FAQ, <http://www.brunswicksmartgrowth.org/faqs.htm> (last visited May 1, 2008).

²⁴² *Id.*

²⁴³ *Id.*

Brunswick Smart Growth is careful to tie its mission to the police power by stating, “We aim to generate respect, openness and awareness so that the residents of Brunswick are informed decision makers inspired to preserve and protect the quality of life in our community while encouraging growth that will enhance the unique and essential character of our community.”²⁴⁴ In addition, the group specifically states that their goal is not to prevent Wal-Mart from building a new store, but rather to raise community awareness to Town Board decisions.²⁴⁵ The community rally worked. Wal-Mart since withdrew its supercenter application,²⁴⁶ despite completion of the Draft Environmental Impact Statement issued by SEQRA.²⁴⁷

The Town Board in Ballston Spa, New York, is currently in litigation regarding its decision to deny an application for a proposed Wal-Mart supercenter.²⁴⁸ A landowner alleges that the Town Board illegally held secret meetings and violated the commerce clause by discriminating against Wal-Mart when it denied his development application for the store.²⁴⁹ On February 2, 2007, oral arguments were heard in state supreme court to determine whether the landowner could get depositions from the Town Council, thereby gaining insight into the rationale behind the denial.²⁵⁰ The judge reserved judgment for a later date.²⁵¹ As previously discussed, the judge will likely give deference to the Town Board’s decision and eventually dismiss the case.²⁵²

VII. CONCLUSION

Thoughtful land use planning can significantly reduce greyfields in local municipalities. Planning and zoning boards should anticipate the abandonment of big boxes and take a pro-active

²⁴⁴ Brunswick Smart Growth, <http://www.brunswicksmartgrowth.org> (last visited May 1, 2008).

²⁴⁵ See Brunswick Smart Growth, FAQ, *supra* note 241.

²⁴⁶ Brunswick Smart Growth, *supra* note 244.

²⁴⁷ See STATE ENVTL. QUALITY REVIEW ACT, FINAL SCOPING DOCUMENT FOR DRAFT ENVIRONMENTAL IMPACT STATEMENT, PROJECT NAME: WAL-MART SUPERCENTER STORE NO. 2370-02 (June 9, 2005), available at http://www.brunswicksmartgrowth.org/documents/walmart_draft_deis_OCR_scan.pdf.

²⁴⁸ Christen Deming, *Rejected Land Plan Gets Day in Court: Owners Suing Ballston Board Over Rejection of Wal-Mart Proposal*, ALB. TIMES UNION, Feb. 3, 2007, at B4.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See *supra* Part VI.A.

approach to land use controls, rather than reacting to eyesores after they are built.²⁵³ By enacting land use regulations, communities can prevent unusable greyfields, encourage the adaptive reuse of buildings, or curb the negative effects resulting from an empty big box. Furthermore, while focusing on the comprehensive plan of the municipality and tying regulations to the general health, safety, and welfare of the public, municipalities can incorporate laws that will effectively stand up to any legal challenges brought by the retailer.

²⁵³ See Staley, *supra* note 35.