

2008

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Recommended Citation

58 Case W. Res. L. Rev. 1251 (2008)

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MUNICIPAL REGULATION OF FORMULA BUSINESSES: CREATING AND PROTECTING COMMUNITIES

Patricia E. Salkin[†]

INTRODUCTION

People have been trying to exclude chain stores from their communities for decades.¹ This includes “big-box” chains—the behemoth retailers that prefer an architecture of rectangular, single-story unadorned structures reaching 200,000 square feet or more²—as well as national and international businesses including well-recognized fast food restaurants, drug stores and clothing retailers.³ The reasons for restricting these large corporate

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¹ See generally Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011 (2005).

² See Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L. 7 (2004–2005). The State of Maryland describes four categories of formats for big box retail: discount department stores (“ranging from 80,000 square feet to 130,000 square feet, offer[ing] a wide variety of merchandise including automotive parts and services, housewares, home furnishings, apparel and beauty aids”); category killers (“ranging from 20,000 square feet to 120,000 square feet, offer[ing] a large selection of merchandise and low prices in a particular type of product category”); outlet stores (“ranging from 20,000 square feet to 80,000 square feet, are typically the discount arms of major department stores”); and warehouse clubs (“ranging from 104,000 square feet to 170,000 square feet, offer[ing] a variety of goods, in bulk, at wholesale prices . . . warehouse clubs provide a limited number of product items (5,000 or less)”). MD. DEP’T OF PLANNING, *MANAGING MARYLAND’S GROWTH: MODELS AND GUIDELINES, “BIG-BOX” RETAIL DEVELOPMENT 4* (2001), available at http://www.mdp.state.md.us/planningact/download/bigbox_v3.pdf.

³ The New Rules Project, *Retail: Formula Business Restrictions*, <http://www.newrules.org/retail/formula.html> (last visited Mar. 27, 2008).

businesses include concerns over community character and aesthetics, local economics and self-reliance, and corporate ideologies. Over time, many municipalities have been forced to accept that “formula retail”⁴ and “franchise architecture”⁵ are simply part of the American economy.⁶ In many communities, the emphasis has shifted from efforts aimed at prohibiting these retailers to strategies aimed at implementing land use controls and other programs designed to regulate these businesses so as to minimize potential negative community impacts.

Part I of this Article focuses on the reasons why communities attempt to regulate formula based businesses, including concerns over community character, economic and environmental impacts, and social equity issues. Part II explores legal strategies to minimize the negative effects that often result from the location of formula based businesses through a host of local land use controls including comprehensive plans, zoning ordinances, special use permits, size caps, historic district regulations, design guidelines and site plan review, formula business restrictions, town-serving zones, and vacant store ordinances. Part III examines locally initiated or implemented economic and social regulations and programs to counter impacts from formula based businesses. These strategies include economic impact review initiated by the local government, as well as nongovernmental, community-based strategies that complement municipal efforts to regulate formula businesses, including the use of community benefits agreements and the impact of independent business associations and the local currency movements. The Article concludes with the thought that careful, strategic, community planning, along with a combination of municipal regulatory programs and grass-roots initiatives, can yield thriving communities both with and without certain formula retail establishments.

⁴ *Id.* (“Formula businesses include retail stores, restaurants, hotels and other establishments that are required by contract to adopt standardized services, methods of operation, décor, uniforms, architecture or other features virtually identical to businesses located in other communities.”).

⁵ See Daniel A. Spitzer & Jill L. Yonkers, *A Guide to Regulating Big Box Stores, Franchise Architecture, and Formula Businesses*, 7 N.Y. ZONING L. & PRAC. REP. 1 (2007) (explaining concerns over franchise architecture including: aesthetic impact of featureless big boxes; garish colors and designs national and regional chains use to brand their products; large logos and/or colors used over large expanses of a building; the difficulty in reusing branded buildings when vacated by the primary business; lack of architectural elements and design consistent with local community character and historical context).

⁶ Trends indicate growth in drive-thru pharmacies and coffee shops, value malls and de-value malls as examples of growing formula (and big box) retail. See MD. DEP’T OF PLANNING, *supra* note 2, at 11.

I. WHY COMMUNITIES AND FORMULA BASED BUSINESSES CONFLICT

A. Community Character, Aesthetics, and Historic Interests

Part of defining a community is identifying what distinguishes it from every other community in the region or in the country. Unique identifiers, referred to as “community character,” may include significant cultural, historic or environmental features not typically found elsewhere. Community walkability, street connectivity, and public spaces are examples of traditional distinguishing characteristics. Geography, physical size, housing style and architecture, and population density also factor into community character.⁷

Many people believe that corporate retail and community character inherently conflict. In the business world, marketing gurus preach corporate “branding” to ensure name recognition and visual association with businesses.⁸ This translates into a goal of uniformity in physical appearance of buildings, physical layout of the inside retail floor, color and size of logos, and consistency in services and/or products available. In addition to achieving recognition through branding, corporations benefit from uniformity because it is cheaper to develop one set of blueprints and one set of protocols that can be used for hundreds or thousands of retail or service outlets than it is to customize each individual establishment.⁹ Corporate “sameness” poses the threat that chain stores will detract from community character.¹⁰ However, while the cookie-cutter versions of chain stores

⁷ See Edward T. McMahon, *Good Design Matters*, 82 GREEN TEACHER 5, 5 (2007) (explaining that “community character is what makes your town different from every other town. No two towns are exactly alike. Each has a particular street layout and arrangement of buildings, shaped over time in a particular geography by a particular population.”).

⁸ See Lawrence Cheek, *Coffee with a Twist: Starbucks Puts a Double Shot of Hometown Flavor Into Every Store*, SEATTLE POST-INTELLIGENCER, Apr. 26, 2005, at E1 (discussing Starbucks’ branding design strategies); Janet Moore, *Brand-Building Hits the Spot for Target Corp., Exec Says*, MINNEAPOLIS STAR-TRIB., Jan. 31, 2001, at 1D (explaining that Target has built its brand in part through its physical locations and store layouts); Martin Roll, *Understanding the Purpose of a Corporate Branding Strategy*, BRAND CHANNEL, Apr. 12, 2004, http://www.brandchannel.com/brand_speak.asp?bs_id=81 (discussing corporate branding generally) (last visited Mar. 27, 2008).

⁹ See Merriam, *supra* note 2, at 18.

¹⁰ See Ross Atkin, *Conserving American Character, Town by Town*, CHRISTIAN SCI. MONITOR, Oct. 2, 2002, at 11 (noting that “[c]hain stores, with their cookie-cutter visual sameness, are a major contributing factor to the homogenization of towns”); Christina Prochillo, *Chain Drugstores on Main Street: Some Positive Trends*, FORUM NEWS (National Trust for Historic Preservation, Washington, D.C.), Mar. 2002, at 1, available at http://www.preservationnation.org/issues/chain-drugstores/additional-resources/drugstore_forum.pdf (noting that “[c]hains have frequently demolished significant structures, replacing them with freestanding suburban-style stores whose design—seas of parking, drive-

may seem ubiquitous, many chains have been known to customize individual establishments to conform to community design standards.¹¹

Proponents of locally grown businesses also claim that local businesses encourage the growth of strong community character by “provid[ing] a foundation for the web of connections and trust that . . . [are] essential to a healthy neighborhood.”¹² These establishments are, by their nature, unique in that they are not found in numerous other locations. Their products (whether retail goods, food or other services) are typically tailored to, and unique to, the host community or region, often contributing to the community’s identity. These considerations are even more important for communities that depend upon tourism as a major economic driver.

B. Other Community and Environmental Concerns

Formula retail, particularly big boxes, also present myriad environmental concerns for host communities by virtue of their size and development patterns.¹³ For example, traffic impacts including safety, congestion, noise (from trucks and from quantity of vehicles), and air quality that result from “destination” big boxes are typically experienced by the residents of the host community.¹⁴ Impacts from

through windows, blank exteriors, and one-story scale—disrupt the traditional main street”).

¹¹ See *infra* Part II.A.5 (historic districts).

¹² Stacy Mitchell, Researcher, Institute for Local Self-Reliance, Speech at the Annual Conference of the American Planning Association: The Impact of Chain Stores on Community (April 2000), in *The New Rules Project, Resources: The Impact of Chain Stores on Community*, <http://www.newrules.org/resources/smapaspeech.html> (last visited Sept. 19, 2008).

¹³ See MD. DEP’T OF PLANNING, *supra* note 2, at 35. The Maryland Department of Planning points out the following environmental concerns:

Increased traffic due to big-box development can potentially increase pollution in the area or affect nearby, environmentally sensitive zones. Oil run-off from the surface parking lot of a big-box development, or chemicals that are not handled properly in a big-box development that sells garden supplies can potentially contaminate the water supply of a local community. Increased traffic and noise pollution due to big-box development may potentially lower the value of nearby homes purchased by people who reasonably assumed that the area would remain peaceful and attractive.

Id.

¹⁴ See, e.g., Andrea M. Hricko, *Ships, Trucks, and Trains: Effects of Goods Movement on Env’tl. Health*, 114 ENVTL. HEALTH PERSP. A204, A204 (2006). Hricko notes some of the environmental health effects of big boxes, including:

Residents in communities adjacent to truck-congested freeways, where elevated levels of carbon monoxide, diesel constituents, and ultrafine particles have been documented. Residents living near ports, in whom there are elevated rates of oropharyngeal cancer and certain lung cancers. Residents who breathe ambient air pollution full of traffic-related pollutants, in whom there are higher rates of

stormwater run-off due to large impervious surfaces can be exacerbated by the potential for greater mixing of oil, gas and other products that may leak from large numbers of automobiles and commercial vehicles parked on these surfaces.¹⁵ Lighting from

cardiovascular disease and death . . . and reduced lung function. Residents who live near rail yards, ports, and other goods movement facilities, who endure high noise levels, traffic congestion, visual blight, and other community impacts.

Id. (citation omitted); *see also* Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 1023, 1032 (E.D. Cal. 2007) (mentioning that “Wal-Mart does not argue that its Supercenters do not have significant environmental effects, or even that they do not produce the results City fears—to wit, urban/suburban decay, increased traffic, and reduced air quality” (quoting Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420 (Ct. App. 1006))). However, with calls to reduce carbon footprints that can be accomplished, in part, with reduced car trips, the ability to accomplish one-stop shopping in a big box may assist in moving towards this goal. This argument is limited to the retail strategy of the big box, and not other formula retail outlets. *See* Hricko, *supra* note 14; *see also* Daniel Akst, *The Wrong Target: Could Chain Stores Actually Be Good for the Environment?*, GRIST: ENVTL. NEWS & COMMENT., Nov. 3, 2005, <http://www.grist.org/comments/soapbox/2005/11/03/akst/>. The “footprint” of a big-box store can be divided into four categories:

1) The building footprint, which reflects the environmental impacts associated with constructing the store and any associated buildings, parking lots and sidewalks as well as the energy required to produce all the materials used in construction. 2) The transportation footprint, which reflects the environmental impact of delivery vehicles as well as consumer and employee travel to and from the store. 3) The operation footprint, which reflects the environmental impacts of computers, cash registers, and other durable equipment required to run the store, cleaning products needed to maintain the store, and the store’s ongoing use of energy and water. 4) The waste footprint, which reflects the environmental impacts of the store’s stream of glass, metal, paper, packaging, wood, and plastic waste.

DAHLIA CHAZAN ET AL., THE BIG BOX CALCULATOR: A GUIDE TO REDUCING THE ECOLOGICAL FOOTPRINT OF LARGE RETAIL STORES 3 (Sept. 2005), http://www.rprogress.org/publications/2005/Big_Box_Calculator.pdf.

¹⁵ *See, e.g.*, U.S. ENVTL. PROT. AGENCY, ECONOMIC BENEFITS OF RUNOFF CONTROLS (2005), <http://www.epa.gov/owow/nps/runoff.html#2>. The EPA report explains that

[d]evelopment leads to an increase in the amount of pollutants in an area. Sediment from construction sites can end up in streams and rivers, choking plant and animal life. Oil and gas from vehicles can leak onto roads and parking lots. . . . All of these pollutants can wash away when it rains and end up in streams, rivers, lakes, estuaries, or ground water. Many pollutants also bind to the sediment, so when sediment washes away it takes the pollutants with it. Urbanization also leads to loss of pervious areas (porous surfaces) that allow rainwater to soak into the ground. This can increase the amount and velocity of rainwater flowing to streams and rivers. This increased speed and volume of water can have many impacts, including eroded stream banks, increased turbidity and pollution, increased stream water temperature, and increased water flow. All of these can have an adverse effect on the fish and other organisms living in the stream and the receiving waters. When rainwater cannot soak into the ground, the result can be a loss of drinking water because many areas of the country rely on rainwater soaking into the ground to replenish underground drinking water supplies. Loss of trees due to urbanization can have negative impacts.

Id.; *see also* Press Release, U.S. Env’tl. Prot. Agency, U.S. Announces Major Clean Water Act

parking lots, needed for security reasons, contributes to light pollution.¹⁶ In addition, since it is more cost-effective on a cash basis to build a new store on undeveloped green space, rather than to retrofit an existing building or to redevelop a brownfield, large formula-retail outlets have been blamed for contributing to sprawl, resulting in destruction of aesthetic viewsheds and unnecessary degradation of the natural environment.¹⁷ Big-box retail centers have also been blamed for the rise of a “pavement camping” movement among RV and truck drivers. Rather than renting a pad at a licensed RV park and staying overnight, drivers have taken to spending their nights in the far reaches of large retail parking lots. Many stores permit this practice, and drivers can camp there for free. However, the practice often violates local overnight parking ordinances and may cause problems because parking lots are not equipped to handle waste from commercial and recreational vehicles.¹⁸ Environmental concerns such as these have underlined the decisions in many areas concerning the siting of new formula businesses.¹⁹

Settlement with Retail Giant Wal-Mart (May 12, 2004), available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/5702a09ae47131c085256e920060d460?OpenDocument> (involving complaints against Wal-Mart for failing to obtain pre-construction permits, failing to develop plans to adequately control polluted runoff from construction sites, failing to adequately control erosion and failure to prevent discharge of sediments into sensitive ecosystems).

¹⁶ See New England Light Pollution Advisory Group, Key Light-Pollution Issues, <http://www.cfa.harvard.edu/nelpag/nelpagphilos.html> (last visited Mar. 27, 2008) (explaining that “[f]ar fewer outdoor lights are needed than are now lit every night, particularly over streets, highways, and parking lots”).

¹⁷ See The Sierra Club, Big Box Sprawl: How Big Box Stores like Wal-Mart Effect the Environment and Communities, http://www.sierraclub.org/sprawl/reports/big_box.asp (last visited Mar. 28, 2008) (noting that “Wal-Mart and other Big Box retailers typically develop stores at the fringes of towns, which are accessible mainly by driving and often result in increased traffic”); Vt. Dep’t of Housing & Cmty. Aff., Facing Sprawl: Proactive Planning and Engagement Along Vermont’s Interstate Corridors, <http://www.dhca.state.vt.us/Planning/EPAGrantDescription.htm> (explaining that “[t]he pattern [of sprawl] is familiar: what begins as a small gas station quickly expands into a convenience store, paving the way for additional service stations and accessory retail stores and in some cases, big box retail power centers. These developments often impact natural resources, scenic viewsheds, local economies, and compact village settlements”).

¹⁸ Venita Jenkins, *Camp Wal-Mart*, FAYETTE OBSERVER (N.C.), Apr. 14, 2007, at 1D; Joanne Kimberlin, *Travelers See America’s Beauty by Day, Parking Lots at Wal-Mart by Night*, VIRGINIAN-PILOT, Sep. 3, 2007, at A1; Marcia Nelesen, *Overnight Parking at Wal-Mart Banned*, JANESVILLE GAZETTE (Wis.), Dec. 18, 2007; Otto Pohl, *R.V. Owners Skip Camp and Park at Wal-Mart*, N.Y. TIMES, Sept. 11, 2005, at A18.

¹⁹ See, e.g., Moscow, Idaho, Ordinance 2006-03 (Feb. 7, 2006) (listing one of the reasons for enacting big box site design standards as the prevention of sprawl); Mike Kalil, *Panel Weighs Size of Stores*, BRATTLEBORO REFORMER (Vt.), Apr. 8, 2005, at 1 (stating that “[c]ommittee members say they want Brattleboro to remain unique and not imitate the sprawl of nearby Keene, N.H.”); Karyn Saemann, *Wall-to-Wall Wal-Marts: 14 Supercenters in Place, in Works in the Region*, CAPITAL TIMES (Madison, Wis.), Nov. 29, 2006, at C1 (noting that a city

More recently, a debate has developed over whether formula businesses or local businesses have a greater impact on climate change.²⁰ The environmental health effects of national chains and their shipping and supply systems have also been a subject of debate, with critics arguing that the international trade and goods movements has adverse effects on: climate change (through emissions); overseas workers who produce goods and who are subject to lax occupational health and safety regulations; ports workers and truck drivers; and residents in communities near trucking routes and ports.²¹

Some communities have also sought to restrict commercial development due to the problems created by overbuilding. These problems may be serious: “[p]roperty values fall, disinvestment follows, and deterioration results.”²² Empty big boxes and freestanding chain stores may be particularly troublesome, as they can constitute fire hazards and targets for vandalism.²³ Furthermore, large retail centers could also prove to be a potential target for terrorist activities due to the large number of people congregating at any one time in a contained space.²⁴

council member opposed a new big box due to concerns about car emissions, light pollution, and sprawl).

²⁰ Compare Stacy Mitchell, *Keep Your Eyes on the Size: The Impossibility of a Green Wal-Mart*, GRIST: ENVTL. NEWS & COMMENT., Mar. 28, 2007, <http://www.grist.org/comments/soapbox/2007/03/28/mitchell/>, with Akst, *supra* note 14. Recently, big box retailers have taken advantage of the marketing opportunity to “go green.” For example, Wal-Mart and Home Depot have announced plans to improve in-house systems aimed at reducing energy consumption, they are advertising and selling targeted energy efficient products to consumers, and they have advocated for legislative change in support of enacting mandatory greenhouse gas regulations. See Stuart Price, *Implementing Bus. & Finance Recommendation*, Yale School of Forestry & Environmental Studies, <http://environment.yale.edu/climate/2006/10/05/implementing-bus-finance-recommendation>. In addition, some corporations, such as Wal-Mart, have joined forces with conservation organizations like the National Fish and Wildlife Foundation, where in 2005 Wal-Mart committed \$35 million over ten years to permanently conserve at least one acre of priority habitat for every acre developed by the company. Nat’l Fish & Wildlife Found., Wal-Mart Introduction, <http://www.nfwf.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=5624>.

²¹ See Hricko, *supra* note 14.

²² Kirk McClure, *Managing Growth of Retail Commercial Space: Retail Market Dynamics in Lawrence, Kansas*, in DOWNTOWNS: REVITALIZING THE CENTERS OF SMALL URBAN COMMUNITIES 230 (Michael A. Burayidi ed., 2001).

²³ See Paul Alongi, *Communities Struggle With Empty ‘Big Box’ Stores*, GREENVILLE NEWS (S.C.), Apr. 5, 2005, at 15B.

²⁴ Rufus Calhoun Young, Jr. & Dwight H. Merriam, *Homeland Security Begins at Home: Local Planning and Regulatory Review to Improve Security*, in A LEGAL GUIDE TO HOMELAND SECURITY AND EMERGENCY MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS 79–101 (Ernest B. Abbott & Otto J. Hetzel eds., 2005) (discussing prudent threat reducing measures for building owners and the interplay between land use planning and building design with risk reduction).

C. Economics

In addition to aesthetic concerns, formula based businesses have long been criticized for their negative impacts on local economies. Chain stores began to gain prominence in the 1920s, and as they grew, opposition did too. By 1929, more than 400 organizations had formed to fight chains, and by 1937 twenty-six states had enacted chain store tax laws.²⁵ Early critics of chain stores focused on the economic effects of centralization and “articulated an account of local economic self-sufficiency in the service of political liberty, economic independence, and local community.”²⁶ These concerns about local economic self-sufficiency continue to figure into the present controversy over formula businesses.²⁷

Perhaps the most commonly cited economic impact of chain stores is their ability to displace existing local businesses through competitive pricing.²⁸ While consumers may benefit in the short-run from lower priced goods and services that formula based businesses can offer, critics of chain stores claim that the loss of locally grown “mom-and-pop” outlets may have a ripple effect in local economies. This is because independent businesses tend to contribute more to local economies than nationalized chains by recirculating wealth within the community.²⁹ Further, by some accounts, local businesses

²⁵ Schragger, *supra* note 1, at 1013–14.

²⁶ *Id.* at 1014.

²⁷ See Spitzer & Yonkers, *supra* note 5, at 2 (stating that “local economic pressures form the core values of significant opposition to Wal-Mart and other national chains”). According to the Maryland Department of Planning, “Communities often experience a reduction in the number of small-scale, locally-owned retailers that are in direct competition with big-box retailers. A reduction in locally-owned businesses, in some instances, can increase unemployment rates and the number of vacant buildings, which can potentially affect the economy of an area.” MD. DEP’T OF PLANNING, *supra* note 2, at 35–36.

²⁸ See Stacy Mitchell, Researcher, Inst. for Local Self-Reliance, A Speech Delivered at the Annual Conference of American Planning Association (April 2000), <http://www.newrules.org/resources/smapaspeech.html> (stating that “very little of the sales generated by a new retail store represent new retail spending. Instead these developments simply shift economic activity from one part of town to another. The end result is not economic development, but rather economic displacement.”).

²⁹ Independent businesses, for example, tend to hire local attorneys, accountants, printers and other service providers. Chain stores, on the other hand, usually have access to these support services through centralized corporate structures located far away from many of their outlets. Studies suggest that this recirculation creates significantly more local economic activity than do their national counterparts. See INST. FOR LOCAL SELF-RELIANCE, BIGBOX TOOLKIT: KEY STUDIES ON BIG-BOX RETAIL 5–6 (2006), <http://www.bigboxtoolkit.com/images/pdf/keystudies.pdf> (describing several studies); see also CIVIL ECONOMICS, THE ANDERSONVILLE STUDY OF RETAIL ECONOMICS 1 (2004), <http://www.civiceconomics.com/Andersonville/AndersonvilleStudy.pdf> (finding that for every \$100 spent in Chicago at a local business, \$68 remains in the local economy, while, for chain businesses, only \$43 remains in the local economy); S.F. LOCALLY OWNED MERCHS. ALLIANCE, THE S.F. RETAIL DIVERSITY STUDY 27 (2007), http://www.civiceconomics.com/SF/SFRDS_May07.pdf (finding that

spend a greater proportion of their revenues on wages and labor than formula businesses.³⁰

Chain stores and their deleterious effect on local character are also commonly believed to have negative effects on tourism-based economies. One advocacy group asserts that “in a time when so many cities are ringed by identical sprawling boxes or overrun by ubiquitous chains . . . uniqueness has become a rare and valuable economic asset. Those communities that have protected their distinctive character and maintained many one-of-a-kind businesses are more interesting places to live and visit.”³¹ Small resort communities, such as Ogunquit, Maine, a popular seaside destination,³² and Solvang, California, the “Danish Capital of America,”³³ are among the growing list of municipalities that have enacted regulations addressing formula-based retail in order to enhance their ability to attract tourists.

While attracting formula businesses may appear, at first blush, to be a method of increasing the tax base, creating jobs, and attracting economic growth, some argue that this may not be the case because the cost of providing municipal services may exceed the amount of local taxes generated by formula businesses, especially big boxes.³⁴ Moreover, studies have found that formula businesses do not always create new economic activity; rather, they may simply attract sales away from existing locally grown businesses. Therefore, new formula businesses may not always “create” new jobs, but rather may create an environment in which jobs are transferred from previously existing businesses that may be forced to down-size or close as a result of the opening of a “new” formula business.³⁵

“increasing independent market share by 10% would yield nearly \$200 Million in economic activity and nearly 1,300 new jobs”).

³⁰ INST. FOR LOCAL SELF-RELIANCE, LOCALLY OWNED VS. CHAIN: THE LOCAL PREMIUM 1, <http://www.bigboxtoolkit.com/images/pdf/Premium.pdf>.

³¹ Stacy Mitchell, *Protecting Locally Owned Retail: Planning Tools for Curbing Chains and Nurturing Homegrown Businesses*, MAIN STREET NEWS (The National Trust), Feb. 2004, at 3.

³² See Ogunquit.org, <http://www.ogunquit.org> (last visited Mar. 27, 2008).

³³ Solvang, <http://www.solvangusa.com/static/index.cfm?contentID=5> (last visited Mar. 27, 2008).

³⁴ See INST. FOR SELF-RELIANCE, WAL-MART’S IMPACT ON LOCAL POLICE COSTS (2005), <http://www.newrules.org/retail/policefactsheet.pdf> (last visited Apr. 13, 2008) (explaining that “cities and towns across the country are reporting that big-box retailers are generating large numbers of police calls Studies have found that big-box stores can also increase other municipal costs, particularly road maintenance, and eliminate tax revenue from small businesses that are forced to close or downsize. Altogether, these costs may even *exceed* the tax revenue a big-box store generates.”).

³⁵ Mitchell, *supra* note 28 (reporting that one study determined that a Wal-Mart projected to create 177 jobs would actually result in the loss of 148 jobs at other businesses).

D. Social Equity Agenda

For some, patronizing formula businesses operated by large corporations may be distasteful due to documented corporate policies. For example, some formula businesses, notably big boxes, are known to pay lower wages, offer fewer benefits, and oppose union organizing.³⁶ Community activists often advocate that restricting these businesses is an effective method of countering harmful labor policies, as well as preventing the creation of poorly paid, dead-end positions with inadequate benefits.³⁷ Emblematic of this struggle between labor and big boxes is Inglewood, California (a Los Angeles suburb), where a community coalition won an initiative preventing the building of a Wal-Mart, primarily because of concerns that Wal-Mart would displace unionized grocery stores and/or lead to cuts in benefits to unionized workers in an effort to compete.³⁸ The situation eventually led to Los Angeles enacting its superstore law.³⁹ Similarly, in Chicago, the debate over permitting Wal-Marts in two economically depressed and predominantly black neighborhoods led to the enactment of an ordinance requiring big-box stores to pay living wages,⁴⁰ although the law was later vetoed by the mayor.⁴¹

³⁶ See Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1935–42 (2007) (describing Wal-Mart's poor labor policies and the legal and cultural factors that have permitted the retailer to continue them).

³⁷ See, e.g., Nancy Cleeland & Abigail Goldman, *Grocery Unions Battle to Stop Invasion of the Giant Stores*, L.A. TIMES, Nov. 25, 2003, at A1 (detailing the battle between labor unions, local residents and Wal-Mart in Inglewood, California); Cummings, *supra* note 36.

³⁸ See Cleeland & Goldman, *supra* note 37. Cleeland and Goldman explain that

[f]or decades, the unions have been a major force in the state grocery industry and have negotiated generous labor contracts. Wal-Mart pays its grocery workers an estimated \$10 less per hour in wages and benefits than do the big supermarkets nationwide — \$19 versus \$9. As California grocery chains brace for the competition, their workers face severe cutbacks in compensation. . . . The push for concessions has already started. . . . About 70,000 grocery workers employed by Albertsons Inc., Kroger Co.'s Ralphs and Safeway Inc.'s Vons and Pavilions have been walking the picket lines since Oct. 11, largely to protest proposed reductions in health benefits. The supermarkets say they need these cuts to hold their own against Wal-Mart, already the nation's largest grocer.

Id.; see also Cummings, *supra* note 36, at 1951–1970.

³⁹ See Cummings, *supra* note 36, at 1970–74 (explaining that the Los Angeles ordinance requires “superstores,” defined as retail facilities over 100,000 square feet devoting 10% or more of their space to non-taxable items (i.e., food), to undergo economic impact reviews). Impact review regulations are discussed in further detail, *infra* Part III.A.

⁴⁰ Cummings, *supra* note 36; Erik Eckholm, *Chicago Orders 'Big Box' Stores to Raise Wage*, N.Y. TIMES, July 27, 2006, at A1. The living wage requirement was later struck down.

⁴¹ See *Mayor Vetoes Chicago's 'Living Wage' Ordinance Aimed at Big Retailers*, USA TODAY, Sep. 11, 2006, available at http://www.usatoday.com/money/economy/employment/2006-09-11-chicago-wage_x.htm.

However, many chains have more progressive (or at least less offensive) labor policies, and supporters of chains argue that formula businesses in fact advance social equity goals by offering lower prices. Chain businesses, in this regard, may be a boon to underserved portions of the population by providing goods and services that they might not otherwise have access to.⁴² This benefit, accordingly, should be factored into any public policy analysis dealing with chains and local businesses.

These concerns are admittedly generalized; not all independent businesses pay decent wages and not all chain businesses are built in sprawling developments. In some cases, the opposite may be true. Nevertheless, these issues necessarily enter into the dialogue in land use controversies relating to chain businesses. They are also important to understand, because the underlying purposes of municipal land use decisions and ordinances concerning formula businesses may be subject to scrutiny under the dormant Commerce Clause.⁴³

II. LAND USE STRATEGIES TO MINIMIZE IMPACTS

Some municipalities have chosen to impose strict regulations on formula businesses, and others have simply prohibited formula businesses outright.⁴⁴ Land use planning and zoning tools present effective options for municipalities that desire to combat the loss of community character that results from formula based businesses. Zoning and planning techniques are generally authorized by the broad state statutory authority for local governments to regulate the use of land within municipal borders, and local regulations will be valid so long as they are grounded in police power purposes and not used purely for economic protection.⁴⁵ From comprehensive land use plans

⁴² See Robert McNatt, *Who Says Wal-Mart Is Bad for Cities? Underserved Neighborhoods Welcome its Jobs, Low Prices, and Tax Revenue*, BUS. WK., May 10, 2004, at 77.

⁴³ See Brannon P. Denning, *Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update*, 58 CASE W. L. REV. 1233 (2008).

⁴⁴ See, e.g., NANTUCKET, MASS., CODE pt. 2, ch. 139, § 139-12(H)(2) (2007) (the zoning ordinance provides that it is intended “to address the adverse impact of nationwide, standardized businesses on Nantucket’s historic downtown area. The proliferation of formula businesses will have a negative impact on the island’s economy, historical relevance, and unique character and economic vitality. These uses are therefore prohibited in order to maintain a unique retail and dining experience. Formula Businesses frustrate this goal by detracting from the overall historic island experience and threatening its tourist economy.”).

⁴⁵ See George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging From Skirmishes Between Wal-Mart and United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 859–60 (2006) (stating that “states broadly empower local governments to regulate land use under their general police powers, [but] appellate courts will strike down land use controls as indefensible except to protect local merchants from economic

to zoning ordinances and other types of land use controls, this section outlines some of the municipal land use regulations that can be employed to regulate these uses. Although not the subject of this discussion, a number of municipalities have also adopted moratoria to prevent permits from being issued for formula retail projects pending the outcome of studies, plans, and any new laws or regulations that might flow from those processes.⁴⁶ In addition, a number of states require local governments to conduct environmental assessments of proposed land use projects/decisions that may have a significant impact on the environment.⁴⁷ Although this local environmental review may be viewed as part of the land use process, this type of environmental impact review is beyond the scope of this section.

A. Comprehensive Plans

The development and adoption of a comprehensive land use plan is the first step in municipal regulation of formula retail since this document allows a municipality to set forth development goals and policies that may provide justification for land use regulations that restrict formula businesses.⁴⁸ This is important because it offers the

competition”); *see also* *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (explaining that “[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”). For the leading Supreme Court cases on economic protectionism, *see also* *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁴⁶ A moratorium, when exercised properly, is a constitutionally protected planning tool. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *see also* Merriam, *supra* note 2, at 25–26.

⁴⁷ *See generally* Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211 (2002); Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109 (2002).

⁴⁸ *See generally* 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 (2004); COLUMBIA UNIVERSITY GRADUATE SCHOOL OF ARCHITECTURE, A VISION FOR NEW ROCHELLE: PLAN FOR REVITALIZING THE CITY PARK NEIGHBORHOOD 46 (May 2001), http://www.columbia.edu/itc/architecture/bass/newrochelle/report/Citypark_complete.pdf. The Columbia University report states that

[t]he exterior designs of the [big box] buildings are standardized so that every location looks the same and is easily recognizable, and acres of parking surround the entire structure. The above features lend to “big box” retail stores an anti-community feel. They cater to the auto-borne shopper and are usually located just off highway exits or along major traffic corridors. They do not support pedestrian amenities nor do they attempt to make any connections with the neighboring community—they are large, isolated boxes in seas of parking lots.

Id.

community an opportunity to initiate dialogue about whether it wants to encourage or restrain the growth of certain formula retail.⁴⁹ Often, the comprehensive plan is described as “the adopted official statement of a legislative body of a local government that sets forth . . . goals, policies, and guidelines intended to direct the present and future physical, social, and economic development that occurs within its planning jurisdiction.”⁵⁰ State enabling statutes provide broad flexibility for local governments to address unique community goals in their comprehensive plans, and typical plan elements address issues including: patterns of growth; performance measures for transportation and community facilities (including supporting development that supports multimodal transportation); the provision of adequate employment opportunities and the economic health of the locality (and region); conserving natural resources (including green space, viewsheds and other significant natural features of the land); promoting good civic design; and the protection of life and property from the effects of natural hazards that may include flooding, wind, wildfires and unstable land.⁵¹ Since zoning and other land use controls generally must be consistent with the comprehensive plan, these policies must be adhered to when reviewing proposals for new formula business developments and when proposing changes to local zoning ordinances.⁵²

In a number of cases, comprehensive plan language has served as a basis for the rejection of proposed formula businesses. For example, in Delaware, residents opposed a rezoning that would have allowed the construction of a Wal-Mart on the basis that the rezoning did not conform to the plan’s designation of the area as destined for office and industrial development. The court agreed and held that the

⁴⁹ See Janet E. Milne, *Forward: The Big Box Challenge*, 6 VT. J. ENVTL. L. 2 (2005). Professor Milne provides an example from Bennington, VT, where the legislative body voted to restrict the size of big boxes to prevent expansion, only to be overturned by voters following a petition—this can be viewed as an example of the need for a community to have an articulated shared vision. *Id.* The New York Times recently reported how one community in Monsey, NY, came together to articulate a vision of their neighborhood that did not include a Wal-Mart. See Fernanda Santos, *A Stand Against Wal-Mart and, for Now, a Victory*, N.Y. TIMES, Mar. 12, 2008, at B3.

⁵⁰ See AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 7-19 (Stuart Meck ed., 2002), available at www.planning.org/GrowingSmart [hereinafter GUIDEBOOK].

⁵¹ *Id.* at 7-69 to 7-70.

⁵² See Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, SN005 ALI-ABA 1571 (2007) (describing the states that require consistency with the comprehensive plan and noting that “the comprehensive plan is gradually gaining more credence, through state legislation and court decisions, as the standard by which land use regulations and actions are judged The trend is definitely towards the requirements of a planning process that results in discrete, enforceable policies . . .”).

rezoning was invalid.⁵³ In the early 1990s, proposed plans for a Wal-Mart in Chestertown, Maryland, were rejected based on provisions in the Kent County comprehensive plan. The Maryland Court of Special Appeals later upheld this decision.⁵⁴ The county's current comprehensive plan states that one of its strategies is to "[p]romote development of small locally owned businesses."⁵⁵ The Corvallis, Oregon, comprehensive plan contains a provision that more specifically favors small, locally owned businesses. It states that it is the city's policy is to "support existing businesses and industries and the establishment of locally-owned, managed, or controlled small businesses."⁵⁶ Other comprehensive plans from municipalities across the country include language supportive of small and locally owned businesses.⁵⁷

B. General Zoning Restrictions

Local governments are granted authority by states to engage in zoning. Zoning is a type of land use regulation that divides the land in a municipality into various districts. The zoning law articulates, among other things, the allowable uses in each designated district, as well as various dimensional requirements (e.g., size and height). Initially developed as a method of separating incompatible land uses

⁵³ O'Neill v. Town of Middletown, No. 1069-N, 2006 Del. Ch. LEXIS 10, at *185-86 (Jan. 18, 2006), *aff'd*, No. 2197-N, 2006 Del. Ch. LEXIS 131 (Jul. 5, 2006) (In the subsequent litigation, the rezoning was denied a second time on the basis that the council members gave insufficient reasons for the rezoning.).

⁵⁴ Elizabeth Leis, *Battling Wal-Mart a Maryland Tradition*, MD. GAZETTE, Jun. 10, 2006, at A6. The decision of the Court of Special Appeals was not reported.

⁵⁵ KENT COUNTY, COMPREHENSIVE PLAN 10 (May 2006), <http://www.kentcounty.com/gov/planzone/Draft%20CP/CompPlan.pdf>.

⁵⁶ CITY OF CORVALLIS, COMPREHENSIVE PLAN art. 8, § 8.2.3, at 93 (1998), <http://www.ci.corvallis.or.us/downloads/cd/compplan/Article%2008--Economy.pdf>.

⁵⁷ See, e.g., CITY OF PIKEVILLE, COMPREHENSIVE PLAN 59, http://www.egovlink.com/pulic_documents300/pikeville/published_documents/Comprehensive%20Plan/Chapter%204%20Economy%20Business%20Activity%20and%20Economic%20Development.pdf ("Support opportunities for expansion and creation of locally owned businesses and industry and give them the same level of attention as recruitment of outside industry."); 1 CITY OF SPOKANE, DRAFT COMPREHENSIVE PLAN & ENVTL. IMPACT STATEMENT 15 (2000), http://www.spokaneplanning.org/Documents/DRAFT_PL/text/c8_econ.pdf ("Support opportunities to increase the number of locally-owned businesses in Spokane."); EAST LANSING PLANNING COMM'N 8, THE EAST VILLAGE MASTER PLAN (2006), <http://www.cityofeastlansing.com/citygov/pcd/pdf/CompPlan/EVMasterPlan.pdf> ("Encourage small, unique and locally owned business growth . . ."); TOWN OF CAROLINE, COMPREHENSIVE PLAN 15 (2006), <http://www.townofcaroline.org/announcements/Comprehensive%20Plan%202006.pdf> (including the goal of "[e]ncouraging locally-owned businesses that integrate with the rural residential and agricultural nature of the town, and discouraging commercial development that would negatively affect local agricultural, business, and residential communities").

and recognized as a valid exercise of the police power,⁵⁸ zoning may also be used to regulate aesthetics.⁵⁹

Through zoning, municipalities regulate where commercial uses may be located.⁶⁰ Some localities have further limited their commercial zoning designations in order to restrict chain stores and big boxes. For example, large-scale retail may be permitted only in a more intense zoning classification. For example, in Albuquerque, New Mexico, the locations of large retail stores are restricted based on their size. The zoning designations correspond to locations where the existing roads are large enough to support these developments.⁶¹

In addition to indicating uses that are permitted as of right in individual zoning districts, zoning ordinances typically provide regulations that allow for certain uses subject to special use permits (also known as conditional use permits, or CUPs).⁶² This process allows municipalities to consider certain criteria when evaluating the impact of a proposed use for the purpose of ensuring that it is in keeping with the character of the community. However, special use permitting, standing alone, may not be the ideal method of regulating chains. This is because

special uses are allowed uses—their inclusion in a zoning code is equivalent to a legislative determination that they are proper for the zone. Thus, generally speaking, a town cannot deny the application on the ground that it is not in harmony with the purpose and intent of its zoning.⁶³

Municipalities may also attach conditions to permits granted for commercial uses.⁶⁴ Reasonable conditions will be upheld if they are directly related to the proposed use of the property and are intended to ameliorate its negative effects.⁶⁵ Many of the other land use controls

⁵⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁵⁹ *See Berman v. Parker*, 348 U.S. 26, 33 (1954) (explaining that “[t]he 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.”) (citation omitted).

⁶⁰ 2 ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* § 9:41 (4th ed. 1996).

⁶¹ ALBUQUERQUE, N.M., CODE § 14-16-3-2(D)(1)-(2) (2008).

⁶² *See* ANDERSON, *supra* note 60, § 21:1 (explaining that “[n]early all zoning ordinances make some use of special-permit procedures [and that [m]ost ordinances impose a broad division of land uses and, in addition, provide that specified uses may be established or maintained in named districts, only pursuant to a special permit issued with the approval of the board of adjustment”).

⁶³ *Spitzer & Yonkers*, *supra* note 5, at 7.

⁶⁴ ANDERSON, *supra* note 60, at § 21:30.

⁶⁵ *Id.* at § 21:31.

described in this Article incorporate special use permit requirements.⁶⁶

C. Town-Serving Restrictions

Certain districts in the City of Palm Beach, Florida, are subject to a requirement that commercial uses of more than 2,000 square feet be “town-serving.” In effect, the ordinance requires businesses seeking special exceptions from the size cap to “satisfy the council that not less than 50% of the anticipated customers will be ‘town persons.’”⁶⁷ When the ordinance was challenged, the court held that it was constitutional, noting that it was rationally related to valid planning interests.⁶⁸ Strict local-serving requirements have not become particularly common, but planning policies supportive of town- and resident-serving uses have been promulgated in a number of cities and towns.⁶⁹ Town-serving zones may prevent the displacement of local stores when an area becomes a regional shopping draw or a destination for tourists.⁷⁰ However, they may not be effective bars to new chain stores that do provide services to local residents, such as pharmacies, hardware stores, and banks, even though such chain outlets may displace similar locally owned businesses.

D. Size Caps on Retail Space

Size caps on retail developments have also become common with the increasing number of big-box stores.⁷¹ Ordinances limiting the size of large-scale retail facilities generally either prohibit stores over a certain square footage or require the footprint of stores to be within

⁶⁶ See Economic Impact Review discussion *infra* Part III.A; see also site design discussion *infra* Part II.A.6.

⁶⁷ *Handelsman v. Town of Palm Beach*, 585 So. 2d 1047 (Fla. Dist. Ct. App. 1991).

⁶⁸ *Id.*

⁶⁹ See CALISTOGA, CAL. MUN. CODE §§ 17.04.597 and 17.40.010–17.40.100 (current through June 17, 2008) (encouraging use permits for businesses “which provide products and services which satisfy Calistoga residents’ day-to-day needs”), available at http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=356207276&depth=2&infobase=calistoga.nfo&record={3B58}&softpage=PL_frame; Sausalito, Cal., Policy LU-2.10 (Jun. 18, 2007) (To “[e]nhance Caledonia Street’s role as a mixed residential and commercial area by encouraging local resident serving commercial uses . . .”), available at <http://www.ci.sausalito.ca.us/Index.aspx?page=283>; CITY OF DANA POINT, THE LAND USE ELEMENT 8 (Aug. 26, 1997), <http://www.danapoint.org/GP/LAND-USE.pdf> (“[p]rotecting resident-serving land uses”) <http://www.danapoint.org/GP/LAND-USE.pdf>; FONTANA, CAL. ZONING & DEV. CODE ch. 30, arts. VI, IX (current through Jan. 8, 2008) (encouraging community-serving development through zoning), available at <http://www.municode.com/Resources/gateway.asp?pid=12998&sid=5>.

⁷⁰ The New Rules Project, Neighborhood Serving Zones, <http://www.newrules.org/retail/neighbor.html> (last visited Apr. 6, 2008).

⁷¹ See Merriam, *supra* note 2, at 24–25.

certain limits. Some municipalities may allow larger stores, but only with approval of a special use permit. A number of courts have upheld retail size limits, but still, “planners need to do a ‘reality check’ of such limitations to determine whether they truly are intended to ensure compatibility with the scale of their communities, or whether such limitations are designed to keep out retailers for reasons unrelated to good planning.”⁷² Where size caps are motivated by economic protectionism rather than legitimate planning concerns, they may run afoul of the dormant Commerce Clause, which bars regulations that interfere with interstate commerce.⁷³ Furthermore, depending upon the drafting of the ordinances, size-cap ordinances are not always successful in preventing certain corporations from building in a particular jurisdiction. Corporations have found ways to circumvent size caps by dividing footprints and separating various uses, and some have even sited multiple buildings in the same general geographic area.

E. Historic District Regulations

Properties located in landmark or historic districts may be subject to strict architectural and exterior design regulations.⁷⁴ While they do not restrict commercial uses per se, they require the historic architectural details on buildings to be preserved. Chain stores, which often rely on their distinctive appearances to attract customers, may be required to comply with these regulations. In some cases, chain stores have indeed modified their exterior design features to be consistent with the historic character of surrounding areas. For example, McDonald’s operates a restaurant out of a historic house in Freeport, Maine (complete with upholstered chairs, mahogany tables and antique paintings),⁷⁵ and in a Tudor-style building located near the historic Biltmore Estate in Asheville, North Carolina.⁷⁶ Dunkin Donuts has also been willing to alter the appearance of stores located in historic areas. A store located in the colonial town of Bristol, Rhode Island, abandoned its customary pink and orange motif and opted for gold leaf signs, cherry cabinetry, wainscoting and architectural lighting.⁷⁷

⁷² *Id.* at 25.

⁷³ See Denning, *supra* note 43.

⁷⁴ See generally ANDERSON, *supra* note 60, § 9:73.

⁷⁵ See Tom Bell, *Embracing the Giant from Away*, PORTLAND PRESS HERALD (Me.), May 16, 2001, at 1A.

⁷⁶ See Melissa Williams, *Communities Try to Balance Local Business and Big Retail*, ASHEVILLE CITIZEN-TIMES (N.C.), Mar. 16, 2003, at S11.

⁷⁷ See Haya El Nasser, *Cities Put Shackles on Chain Stores*, USA TODAY, July 20, 2004,

Individual historic properties not located within designated historic areas are more susceptible to alteration or demolition by corporate owners. Even properties listed on the National Register of Historic Places receive only limited protection. Although inclusion in the list makes these properties eligible for protection from federal actions, it does not prevent owners of historic properties from modifying or demolishing them.⁷⁸ For this reason, local historic protection laws may be particularly important in determining whether or not chains may take actions impacting the historic nature of their properties. The National Trust for Historic Preservation has recognized the threat to these historic sites by large national chains, and it has sought to ameliorate the problem by working cooperatively with the major drug store companies. It has succeeded in obtaining agreements from CVS, Eckerd, Rite Aid, and Walgreens not to demolish properties listed on the National Register.⁷⁹

F. Design Regulations and Site Plan Review

Many municipalities have created “downtown commercial districts” or similarly titled zones in which commercial uses may be subject to increased regulation in order to emphasize traditional downtown features such as mixed uses, compact development, and walkability.⁸⁰ These areas may also be subject to historic district regulations, with the result that businesses may be subject to stricter architectural, design and area regulations than they would be in other districts. However, “effective design review can be more difficult to achieve in places that lack a discernible, cohesive architectural character or a distinctive natural setting.”⁸¹

Some municipalities have also enacted site plan review procedures for large retail facilities to address the particular aesthetic problems associated with big boxes. At their worst, big boxes have been described as “plain vanilla rectangular boxes of industrial quality

at 3A, available at http://www.usatoday.com/news/nation/2004-07-20-chain-stores_x.htm.

⁷⁸ See National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2000); National Park Service, National Register of Historic Places, What Are the Results of Listing?, <http://www.nps.gov/nr/results.htm>.

⁷⁹ National Trust for Historic Preservation, Chain Drugstores, <http://www.preservationnation.org/issues/chain-drugstores/> (last visited Apr. 6, 2008).

⁸⁰ See, e.g., MINNEAPOLIS, MINN., CODE tit. 20, ch. 549 (downtown districts); GUIDEBOOK, *supra* note 50, at 8-54 to 8-55.

⁸¹ TERRY SCHWARZ, URBAN DESIGN CENTER OF NORTHEAST OHIO, DEFENDING REGIONAL IDENTITY: STRATEGIES FOR RESHAPING FRANCHISE ARCHITECTURE 11 (2004), http://www.uic.edu/cuppa/cityfutures/papers/webpapers/cityfuturespapers/session5_1/5_1defendingregional.pdf.

construction coated with corporate color schemes and surrounded by acres of asphalt with nary a bush or tree in sight.”⁸² Site design regulations attempt to ameliorate these problems without necessarily prohibiting big boxes. The primary targets of these regulations are to minimize the massive appearance of big boxes and their seas of parking, to include landscaping and screening to hide machinery and other unsightly equipment, to require quality building materials, and to promote pedestrian and bicycle access and safety.

The City of Fort Collins, Colorado, has been a pioneer in site design restrictions for large scale retail. In early 1995, the city adopted its Design Standards and Guidelines for Large Retail Establishments to supplement its already detailed signage and landscaping requirements.⁸³ The regulations included a number of provisions that have now become standard in site design requirements for big boxes:

- Uninterrupted facades of more than 100 feet are prohibited. Facades may be broken up by recesses and projections, windows, awnings or other architectural details.
- Facades must include repeating patterns of color, texture or materials to increase architectural interest in buildings.
- Roof lines must include variations such as parapets (to conceal flat roofs and rooftop equipment), overhanging eaves and sloping planes.
- Customer entrances must have features such as canopies or porticos, arcades, arches or planters.
- Exterior building materials must be high quality. Smooth-faced concrete, tilt-up concrete panels and steel panels are not permitted.
- Facade colors must be neutral. Trim may have brighter colors, but neon lighting is not permitted.
- Any facade adjacent to a public street must have a customer entrance. Facades adjacent to residential areas must

⁸² Chris Duerksen & Robert Blanchard, *Belling the Box: Planning for Large-Scale Retail Stores* (1998 Nat'l Planning Conference), available at <http://design.asu.edu/apal/proceedings98/Duerk/duerk.html>.

⁸³ Fort Collins, Colo., Design Standards and Guidelines for Large Retail Establishments (Jan. 17, 1995), available at <http://fcgov.com/cityplanning/pdf/large-retail-doc.pdf> [hereinafter Fort Collins, Design Standards]; Duerksen & Blanchard, *supra* note 82.

be setback 35 feet and must be visually concealed by vegetation.

- Loading docks, trash collection areas and outdoor storage must be screened.
- Sidewalks must be included along all sides of a lot that abuts a public street and along the length of any side of the building that has a customer entrance. Sidewalks connecting to the principal customer entrance must feature landscaping or benches.
- No more than 50% of a store's parking may be located between the front facade and the primary abutting street.⁸⁴

Site design regulations for large scale retail have been enacted in cities and towns across the country.⁸⁵ The trigger for these regulations is usually based on the size of a proposed store. Thresholds vary, however, ranging from 15,000 square feet in Homer, Alaska, to 75,000 square feet in Albuquerque, New Mexico.⁸⁶ Other common aspects of site design ordinances are requirements that big boxes be flanked by small liner stores⁸⁷ and that they provide pedestrian and bicycle access from offsite.⁸⁸

⁸⁴ FORT COLLINS, COLO., LAND USE CODE § 3.5.4 (2007) (current version), *available at* <http://www.colocode.com/ftcollins/landuse/article3.htm#sec3d5d4>; Fort Collins, Design Standards, *supra* note 83; *see also* Duerksen & Blanchard, *supra* note 82.

⁸⁵ *See, e.g.*, HOMER, ALASKA, CODE § 21.61.105 (2004); GUNNISON, COLO., CODE § 15.190 (2006); ALBUQUERQUE, N.M., CODE § 14-16-3-2(D)(1)-(2) (2008); SANTA FE, N. M. CODE § 14-8.8 (2007); Moscow, Idaho, Ordinance 2006-03 (Feb. 7, 2006); Sequim, Washington, Design Standards & Guidelines for Large Retail Establishments (Oct. 16, 2003).

⁸⁶ Several cities have different site design requirements for different sizes of large retail developments. *See, e.g.*, HOMER, ALASKA, CODE § 21.61.105 (15,000 sq. ft.); FORT COLLINS, COLO., LAND USE CODE § 3.5.4(C) (25,000 sq. ft.); GUNNISON, COLO., CODE § 15.40.010 (50,000 sq. ft.); ALBUQUERQUE, N.M., CODE, § 8 (75,000 sq. ft.); SANTA FE, N. M. CODE § 14-8.8 (30,000 sq. ft.); Moscow, Idaho, Ordinance 2006-03 (40,000 sq. ft.); Sequim, Wash., Design Standards & Guidelines for Large Retail Establishments, at 4 (Oct. 16, 2003). (20,000 sq. ft.).

⁸⁷ *See, e.g.*, FORT COLLINS, COLO., LAND USE CODE § 3.5.4(C) ("If the large retail establishment does not include a second side entrance that is fully operational and open to the public, then this standard shall be met by attaching smaller retail store(s) ('liner stores') to the side of the large retail establishment which is expected to generate the most pedestrian activity or which faces a public street."); ALBUQUERQUE, N.M., CODE § 14-16-3-2(D)(6)(a)(1) ("Main structures shall be screened from the adjacent street by means of smaller buildings, Retail Suite Liners, or 20' wide landscape buffers with a double row of trees.");

⁸⁸ *See, e.g.*, HOMER, ALASKA, CODE § 21.61.105(g) ("Parking facilities shall be designed and landscaped with increased emphasis on pedestrian ways that provide public connectivity to and through the site."); ALBUQUERQUE, N.M., CODE § 14-16-3-2(D)(5)(i) ("Internal Pedestrian Walkways shall be planned and organized to accommodate the inter-related movement of vehicles, bicycles, and pedestrians safely and conveniently, both within the proposed development and to and from the street, transit stops, and the surrounding area."); Sequim, Washington, Design Standards & Guidelines for Large Retail Establishments § B(1) (Oct. 16,

G. Regulation of Franchise Architecture

Another method of focusing on the aesthetic impacts of formula businesses is the prohibition of franchise architecture, which serves to prevent the construction of large, brightly colored logos and branded buildings. Franchise architecture is defined in one ordinance as “building design that is trademarked or identified with a particular franchise, chain or corporation and is generic or standard in nature.”⁸⁹ Several municipalities simply prohibit franchise architecture,⁹⁰ while another approach has been to ban the use of “stock building plans.”⁹¹ Franchise architecture ordinances, much like site design requirements, do not prevent formula businesses from operating, but merely require them to adjust their appearance to local styles.

Closely related to franchise architecture is the issue of signage. Corporations have their logos protected under federal trademark law (the Lanham Act), and as part of their branding strategy they display that logo as part of the on-site signage for the business. Through municipal design regulation, however, local governments have been successful in requiring formula retail outlets to comply with these standards even where the result is sign appearance that is different from the typically recognizable logo. For example, where a design ordinance required color uniformity in all of the signs for businesses located in a strip mall, the Second Circuit upheld the law even though the business owner alleged that the requirement violated the Lanham Act since its name/logo was multi-colored and it desired that its sign contain the multi-color message.⁹²

2003) (“Large retail development should ensure that the parking, lighting, circulation and landscaping aspects are well designed with regard to safety, efficiency and convenience for vehicles, bicycles, pedestrians and transit, both within the development and to and from surrounding areas.”).

⁸⁹ Hopkins, Minn., Ordinance 2003-900 § 556.12(2) (2003).

⁹⁰ See, e.g., COLD SPRING, MINN., ZONING ORDINANCE § 9(8) (2008); ASHEBORO, N.C., ZONING ORDINANCE art. 200A, § 3.4(a) (2008) (defining franchise architecture as “a distinct architectural building style and/or elements commonly employed by a fast food or other retail franchise, that serves to enhance or promote brand identity through visual recognition”).

⁹¹ See Georgetown, Colo., Design Guidelines book 3, § 1, ch. 6, *available at* <http://www.town.georgetown.co.us/drc/drcbk3ch6.html> (last visited Apr. 9, 2008).

⁹² See *Lisa’s Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999). *But see* *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1300 (9th Cir. 1998) (explaining the court was not as supportive of changing the color of the sign, but could still uphold a restriction that would prohibit the mark altogether). The Ninth Circuit explained that

a zoning ordinance may not require a change in a registered mark. A zoning ordinance may, however, preclude the display of a mark, as Tempe did when it precluded Blockbuster from constructing its awning on the exterior of its leased building in the shopping center. Precluding display of a mark for zoning purposes is permissible; requiring alteration of a mark is not.

H. Formula Business Restrictions

Municipalities across the country are picking up on the trend of regulating formula-based businesses.⁹³ “Formula businesses” are those that offer standardized services and methods of operation, including chain stores, chain restaurants, chain hotels, etc. Formula businesses include not just Wal-Marts, Starbucks, and Banana Republics, but also Hiltons, Wholefoods, Wachovias, and Rite-Aids. Under some definitions, professional businesses such as HR Block and Coldwell Banker would also be considered formula businesses.⁹⁴ Formula business restrictions do not automatically exclude chains, they simply require them to deviate from their standardized counterparts.⁹⁵

Defining what qualifies as a formula business has proven somewhat troublesome, as overly restrictive definitions may go beyond their goal of restricting large corporate chains and impose burdens on locally owned businesses with regional presences and multiple outlets. Some definitions focus on the number of businesses in the chain,⁹⁶ while others emphasize the common or “uniform” attributes of the businesses. The formula business ordinance of Calistoga, California, provides a typical definition:

Id. at 1300; *see also* Gateway 2000 Country Stores, Inc. v. Norwalk Zoning Bd. of Appeals, 13 F. Supp. 2d 247 (D. Conn. 1998) (holding that the regulation was based not on speech but rather on aesthetic interests, which are valid state interests).

⁹³ *See* The New Rules Project, Formula Business Restrictions, <http://www.newrules.org/retail/formula.html> (last visited Apr. 12, 2008).

⁹⁴ *See, e.g.*, BRISTOL, R.I., CODE ch. 1, art. 1, § 28-1 (2004) (“Formula businesses can include, but are not limited to: restaurants, retail stores, banks, real estate sales offices, spas, hair and nail salons, and hotel/motel/inn/B&B.”); *cf.* PORT TOWNSEND, WASH., MUN. CODE tit. 17, ch. 17.54.030(C) (current through April 21, 2008) (excluding from the formula business definition auto sales; auto tire sales and service; banks; gas stations; grocery stores; health care; professional services such as real estate offices, insurance offices, copy centers, and mail centers; and adult entertainment facilities), *available at* <http://www.codepublishing.com/wa/porttownsend.html>.

⁹⁵ *See* Spitzer & Yonkers, *supra* note 5, at 6.

⁹⁶ *See* ARCATA, CAL., LAND USE CODE § 9.100.020 (2007) (defining a formula restaurant as “substantially identical” to more than 11 other restaurants); BENECIA, CAL., CODE § 17.12.030 (2007) (defining a formula business as having more than four other establishments in the region); S.F., CAL., PLANNING CODE § 703.3 (2006) (formula retail defined as an establishment which shares features with eleven or more other establishments); SOLVANG, CAL., CODE § 11-3-1 (2006) (defining a formula restaurant as a restaurant with five or more similar locations nationwide, or a full service restaurant with twenty-five or more locations nationwide); BRISTOL, R.I., CODE ch. 1, art. 1, § 28-1 (defining a formula business as being “substantially identical” to more than five other businesses); NANTUCKET, MASS., CODE § 139-2 (2006) (defining formula business as one of fourteen or more other businesses or establishments); PORT TOWNSEND, WASH., CODE § 17.54.030 (2006) (defining a “formula retail” as a business which shares features with fourteen or more other establishments).

“Formula Business” shall mean a business or use, which by contractual or other arrangement, established or recognized business practice, or membership affiliation, maintains any of the following: A. business name common to a similar business located elsewhere; B. standardized services or uniforms common to a similar business located elsewhere; C. interior decor common to a similar business located elsewhere; D. architecture, exterior design, or signs common to a similar business located elsewhere; E. use of a trademark or logo common to a similar business located elsewhere (but not including logos or trademarks used by chambers of commerce, better business bureaus, or indicating a rating organization including, but not limited to AAA, Mobile or Michelin); or F. a name, appearance, business presentation or other similar features, which make the business substantially identical to another business within or outside Calistoga.⁹⁷

Some communities have limited their formula business regulations to certain types of commercial uses. A number of municipalities restrict only formula restaurants,⁹⁸ while others focus on formula restaurants and retail stores.⁹⁹ A few definitions specifically include formula hotels.¹⁰⁰ Some definitions simply apply to “formula businesses” without making any use distinctions.¹⁰¹ Others make provisions for specific types of businesses, such as banks, real estate offices, spas, salons, gas stations, auto sales, and grocery stores.¹⁰²

The formula business ordinances of some municipalities prohibit formula businesses from some or all districts,¹⁰³ while other

⁹⁷ CALISTOGA, CAL., MUNICIPAL CODE § 17.04.132 (2000).

⁹⁸ See ARCATA, CAL., LAND USE CODE § 9.100.020; BENICIA, CAL., CODE § 17.12.030; CARMEL-BY-THE-SEA, CAL., CODE § 17.70.020 (2003); SOLVANG, CAL., CODE § 11-3-1; OGUNQUIT, ME., ZONING ORDINANCE art. 2 (2006); PORT JEFFERSON, N.Y., CODE § 250-9 (2000); BAINBRIDGE ISLAND, WASH., CODE § 18.06.370 (1998).

⁹⁹ See, e.g., CALISTOGA, CAL., CODE § 17.04.132; SANIBEL, FLA., CODE § 126-102 (2007); PORT TOWNSEND, WASH., CODE § 17.54.030.

¹⁰⁰ See, e.g., CALISTOGA, CAL., CODE § 17.04.132; BRISTOL, R.I., CODE ch. 1, art. 1, § 28-1.

¹⁰¹ See, e.g., CORONADO, CAL., CODE § 86.04.309 (2005), available at <http://www.coronado.ca.us> (navigate to City Government, then Municipal Code); FAIRFIELD, CONN., ZONING REG. §§ 12.2, 12.5 & 31.2 (2004 & as amended July 10, 2007), available at <http://www.fairfieldct.org/zoning.htm>.

¹⁰² See, e.g., BRISTOL, R.I., ORDINANCES ch. 1, art. 1, § 28-1; SANIBEL, FLA., CODE § 126-102; PORT TOWNSEND, WASH., CODE § 17.54.030.

¹⁰³ See, e.g., CARMEL-BY-THE-SEA, CAL., CODE § 17.14 (prohibiting drive-thru, fast food, and formula restaurants); S.F., CAL., PLANNING CODE § 703.3 (2006) (prohibiting formula retail in certain districts); SOLVANG, CAL., CODE § 11-7A-2(E) (as amended by Ordinance 07-269 (2006)) (prohibiting formula restaurants in the tourist district); OGUNQUIT, ME., ZONING ORDINANCE table 702.1 (2006) (prohibiting formula restaurants); YORK, ME., ZONING

regulations place caps on the number of formula businesses permitted within the municipality,¹⁰⁴ or subject formula businesses to special permit requirements.¹⁰⁵ In Benicia, California, no more than one establishment of any particular formula business is permitted,¹⁰⁶ and in Calistoga, California, any formula business must be “resident-serving.”¹⁰⁷ Some communities require findings that a proposed formula business will enhance the local economy,¹⁰⁸ preserve the area’s distinctive character,¹⁰⁹ contribute to a diverse

ORDINANCE art. 4 (2007) (prohibiting formula restaurants in various districts); NANTUCKET, MASS., CODE § 139, 8-10 (2006) (prohibiting formula businesses); PORT JEFFERSON, N.Y., CODE § 250-18 (prohibiting formula fast food restaurants in certain districts).

¹⁰⁴ See, e.g., CORONADO, CAL., CODE § 86.55.360 (no more than 10 formula fast food sites allowed in the jurisdiction); SANIBEL, FLA., CODE § 126-102 (limiting the total amount of formula retail floor space in the city to 50,000 square feet); Arcata, Cal., Ordinance 1333 § 2 (Jun. 5, 2002).

¹⁰⁵ See, e.g., CORONADO, CAL., CODE § 86.55.360 (Major or minor special use permits are required for formula uses; formula fast food restaurants may not be located on street corners, unless the site was previously a fast food restaurant; formula businesses—except for grocery stores, banks, savings and loans, full service restaurants and theaters—may not have street level frontage of greater than 50 feet or occupy more than two stories.); BRISTOL, R.I., ORDINANCES ch. 1, art. 1, § 28-150(h)(1)(d.) (Formula businesses are limited in the historic district to 2,500 square feet with street frontage limited to 65 feet. No drive throughs are allowed. Screening is required for dumpsters. Anything with a corporate logo on it may be forbidden to be displayed in the windows. No internally illuminated signs are allowed.); SANIBEL, FLA., CODE § 126-102 (limiting formula businesses to 2,000 square feet); BAINBRIDGE ISLAND, WASH., CODE § 18.41.050 (2004) (Formula restaurants may be no larger than 4,000 square feet, and they must be located in a building with at least one other business that is not a formula restaurant.); PORT TOWNSEND, WASH., CODE § 17.54.040 (Formula businesses may not have street frontage greater than 50 feet, occupy more than two stories or exceed 3,000 square feet; drive-throughs are prohibited; formula businesses may not be located on street corners, except when the prior use was a formula business; a formula business must be in a building with at least one other business that is not a formula business; on larger lots, there can be no more than one formula business per 20,000 square feet.).

¹⁰⁶ BENECIA, CAL., CODE § 17.70.350 (2007).

¹⁰⁷ CALISTOGA, CAL., CODE § 17.22.040 (2007) (“‘Resident-serving use’ shall mean those uses or businesses that derive a significant portion of their revenues from Calistoga residents, and which provide products and services which satisfy Calistoga residents’ day-to-day needs. The majority of the customers of these uses or businesses are regular repeat customers from Calistoga.”).

¹⁰⁸ See, e.g., BENECIA, CAL., CODE § 17.70.350; CALISTOGA, CAL., CODE § 17.40.070 (“[T]he proposed development [must] be consistent with and enhance Calistoga’s history of independent, unique, and single location businesses, thus contributing to the uniqueness of the town, which is necessary to maintain a viable visitor industry in Calistoga and to preserve its economy.”); SAUSALITO, CAL., CODE § 10.44.240 (2003) (The formula establishment should “contribute to an appropriate balance of small, medium, and large-sized businesses in the community.”); BRISTOL, R.I., ORDINANCES ch. 1, art. 1, § 28-150(h)(1)(d) (Formula businesses must complement those businesses already in the historic district zone and help promote and foster the local economic base as a whole.).

¹⁰⁹ See, e.g., BENECIA, CAL., CODE § 17.70.350; CALISTOGA, CAL., CODE § 17.40.070(A) (“the proposed development [must] present[] a scale and design which are in harmony with the historical and small-town character of Calistoga . . . [and] the proposed development [must] complement[] and enhance[] the architectural integrity and eclectic combination of architectural styles of Calistoga”); CORONADO, CAL., CODE § 86.55.370 (must be operated in a nonobtrusive

array of businesses,¹¹⁰ or will not contribute to an overconcentration of formula businesses.¹¹¹

Formula business ordinances seem to be most prevalent in small communities that have a distinctive character and thriving tourism-based economy. For example, Ogunquit, Maine, Fairfield, Connecticut, and Nantucket, Massachusetts, are popular New England coastal destinations. A number of cities and towns along the California coast have also enacted formula business restrictions, including Carmel, Arcata and Sausalito. Solvang, California, relies on its historic Danish character to attract tourists,¹¹² and the colonial town of Bristol, Rhode Island, is known as “the most patriotic town in America.”¹¹³ San Francisco is the only large city to have enacted a formula business restriction.¹¹⁴

Most formula business ordinances include detailed purposes such as promoting a diverse business community, maintaining historic or unique community character, supporting the local economy by enhancing tourism attractions, and improving the general quality of life.¹¹⁵ These purposes are important because, as in the case of retail

manner to preserve the community’s character and ambiance); S.F., CAL., PLANNING CODE art. 10, § 1001 (allowing the planning commission to take existing architectural and aesthetic character into account in granting permits); BRISTOL, R.I., ORDINANCES art. 9, div. 1, § 28-281 (must not alter the identity of the historic district zone in a way which detracts from its uniqueness or contributes to a nationwide trend of standardized downtown offerings).

¹¹⁰ Some ordinances seek diversity in the size of businesses, while others aim to foster a mix of local and non-local business. *See e.g.*, BENICIA, CAL., CODE § 17.70.350 (must contribute to diversity in sizes and local/regional/national mix of businesses); CORONADO, CAL., CODE § 86.55.370 (must contribute to an appropriate balance of local and non-local businesses and businesses of various sizes); BRISTOL, R.I., ORDINANCES art. 9, div. 1, § 28-281 (must contribute to a diverse and appropriate blend of businesses in the historic district zone).

¹¹¹ *See, e.g.*, BENICIA, CAL., CODE § 17.70.350; S.F., CAL., PLANNING CODE art. 1.7, § 186.1 (the planning commission may take the existing concentration of formula businesses into account); SAUSALITO, CAL., ZONING ORDINANCE § 10.10.030 (2008).

¹¹² *See* Solvang, 10 Most Beautiful Small Towns in the Western United States, <http://www.solvangusa.com/static/index.cfm?contentID=5> (last visited Sept. 17, 2008).

¹¹³ Discover Bristol, <http://www.discoverbristol.com/> (last visited Apr. 9, 2008) (noting Bristol is the home of the oldest continuous Fourth of July parade in the country, with a red, white, and blue center line running down its main street).

¹¹⁴ However, a recent posting by the Campaign for Community-Based Planning reports that New York City may soon enact zoning regulations to address the challenges posed by formula retail. Campaign for Community-Based Planning, Could Formula Retail Zoning be in NYC’s Future, <http://communitybasedplanning.wordpress.com/2008/01/04/could-formula-retail-zoning-be-in-nycs-future> (last visited Apr. 12, 2008) (reporting that the East Village Community Coalition is seeking “changes to the city’s Zoning Resolution that would prevent so-called formula chain establishments such as Starbucks from displacing local businesses or appearing out of context with the neighborhood”); *see also* Patrick Hedlund, *Trying to Find a New Formula to Tame the Spread of Chains*, THE VILLAGER, Jan. 2, 2008, http://www.thevillager.com/villager_244/tryingtofind.html (last visited Apr. 12, 2008).

¹¹⁵ *See, e.g.*, BENICIA, CAL., MUN. CODE § 17.70.350; CALISTOGA, CAL., CODE § 17.40.070; CARMEL-BY-THE-SEA, CAL., MUN. CODE § 17.02.030 (2008); CORONADO, CAL.,

size caps, formula business restrictions that are enacted to protect local businesses from competition may be susceptible to dormant Commerce Clause challenges.¹¹⁶ Only two cases have addressed the validity of formula business ordinances, and the courts reached opposite conclusions. In *Coronadans Organized for Retail Enhancement v. City of Coronado*,¹¹⁷ a California appellate court upheld the city's formula business restriction against claims that it violated the dormant Commerce Clause. The court found that the ordinance did not discriminate against interstate commerce on its face or have discriminatory motives. Rather, the city's finding that a diverse blend of businesses would foster the tourist-based economy illustrated that

the city council's primary purpose was to provide for an economically viable and diverse commercial area that is consistent with the ambiance of the city, and that it believed the best way to achieve these goals was to subject to greater scrutiny those retail stores that are contractually bound to use certain standard processes in displaying and/or marketing their goods or services.¹¹⁸

The court further explained that "the fact that many stores falling within the Formula Retail definition are interstate businesses does not mean that the Ordinance will have a 'discriminatory effect.'"¹¹⁹

The District Court for the Southern District of Florida reached a different result in *Island Silver & Spice, Inc. v. Islamorada*.¹²⁰ Although the court agreed that "preserving a small town community is a legitimate purpose," it found that Islamorada had not shown that its purpose in enacting a formula business ordinance was to maintain its distinctive community character.¹²¹ Rather, "the ordinance appears tailored to serve local business interests by preventing competition from national chains."¹²² Finding that the ordinance's true purpose and effect was economic protectionism—"the very sort of protection

MUN. CODE § 86.55.370; BRISTOL, R.I., ORDINANCES art. 9, div. 1, § 28-281.

¹¹⁶ See Denning, *supra* note 43.

¹¹⁷ No. D040293, 2003 Cal. App. Unpub. LEXIS 5769 (Jun. 13, 2003).

¹¹⁸ *Id.* at *13-14.

¹¹⁹ *Id.* at *20.

¹²⁰ 475 F. Supp. 2d 1281 (S.D. Fla. 2007). The *Islamorada* case and the dormant commerce clause are discussed in more detail in Denning, *supra* note 43.

¹²¹ *Island Silver Spice*, 475 F. Supp. 2d at 1291.

¹²² *Id.*

against out of state competition that the Commerce Clause was designed to prohibit”—the court struck the regulation down.¹²³

Professor Brannon has suggested that differing outcomes in cases like *Coronadans* and *Island Silver & Spice* may be attributed to two primary reasons: “(1) lower court judges’ confusion about the [dormant Commerce Clause] and its proper application, a confusion aggravated by the [dormant Commerce Clause’s] own confused path in the Supreme Court; and (2) the local nature of the regulations.”¹²⁴ What is clear is that to avoid invalidation under the dormant Commerce Clause, communities enacting formula business ordinances should make clear that their purposes are not protectionist in nature, but that they are reasonably related to preserving the *unique* community character that supports tourism, contributes to a higher quality of life for residents, and that would be threatened by the intrusion of inherently non-unique formula businesses.

I. Vacant Store Ordinances

Municipalities have also struggled to find methods of ameliorating the problems of empty big boxes, strip malls, and other commercial developments. These “dark stores” may be fire hazards, or attract vandals, in addition to contributing to problems of blight.¹²⁵ Chains, in particular, may tend to “reinvent themselves” rather frequently, leading them to abandon older properties and build newer versions. And big boxes may be difficult to convert to new uses, making them less likely to be rented or sold.¹²⁶ It has been estimated, for example, that Wal-Mart had abandoned 246 stores by 2007.¹²⁷

One approach to this problem has been for municipalities to require developers to post demolition bonds before constructing commercial space. In Oakdale, California, for example, the city requires the developers of major retail projects (i.e. those over 40,000 square feet or shopping centers on more than ten acres) to post bonds sufficient to cover the cost of demolition and maintenance of the

¹²³ *Id.* at 1293 (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–52 (1977)).

¹²⁴ Denning, *supra* note 43, at 1246.

¹²⁵ Fact Sheet, Big Box Tool Kit, Big-Box Blight: The Spread of Dark Stores (2007), <http://bigboxtoolkit.com/images/pdf/bigboxblight.pdf>.

¹²⁶ See, e.g., Paul Alongi, *Communities Struggle with Empty ‘Big Box’ Stores*, GREENVILLE NEWS (Greenville, S.C.), Apr. 6, 2005, at 15B (explaining that “turning ‘big-box’ space into offices has its hurdles. . . . No one will want the rear corners, . . . and complying with fire codes that require exits at the front and back of buildings can be tricky”).

¹²⁷ The New Rules Project, Retail: Preventing Vacant Boxes, <http://www.newrules.org/retail/vacantbox.html> (last visited Apr. 12, 2008).

building site if the building remains vacant for more than twelve months.¹²⁸

Other communities, like Peachtree City, Georgia, have required that empty big-box stores go on the market as soon as they are vacated.¹²⁹ This type of ordinance prohibits businesses from holding on to vacant space in order to prevent competitors from moving in. In Moscow, Idaho, owners of large retail facilities that are vacant for more than 90 days must file monthly reports detailing the names of listing agents for the property, the length of the listing, and any events such as open houses, tours, and inquiries about the property.¹³⁰

Another approach to the problem has been to regulate building design to facilitate reuse. Mount Shasta, California, thus requires the developers of large-scale retail properties to “submit a proposal addressing plans for the reuse of the site in the case that the applicant abandons interest of [sic] the large scale building. The plan shall include design features . . . such as partitions and . . . multiple entryways to facilitate reuse by multiple tenants”¹³¹ Albuquerque has taken a slightly different route, tailoring its site design requirements for large-scale retail developments to “create block sizes . . . that are walkable and support land use changes over time.”¹³²

J. Coordinated Regional Review

Big-box stores and large retail complexes have impacts beyond the borders of the municipalities in which they are located. They may have economic, community, traffic, and environmental impacts that extend to neighboring towns.¹³³ This presents a land use and community development problem for municipalities that have enacted regulations on these types of uses—the developer can simply go to the next town over with fewer restrictions, imposing the same problems on the original municipality without adding to its tax base at all.¹³⁴

Regional land use review has been seen as a solution to this problem. In the areas that have regional review, municipalities have

¹²⁸ OAKDALE, CAL., CODE § 36-23.35(R) (2007).

¹²⁹ The New Rules Project, Dark Store Ordinance—Peachtree City, Georgia, <http://www.newrules.org/retail/peachtree.html> (last visited Apr. 12, 2008).

¹³⁰ MOSCOW, IDAHO, CODE tit. 4, § 3-7(D)(4) (2007).

¹³¹ MOUNT SHASTA, CAL., CODE § 18.70.150 (2005).

¹³² ALBUQUERQUE, N.M., CODE § 14-16-3-2(D)(3) (2007).

¹³³ See Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL. L. 48, 52–54 (2004).

¹³⁴ See The New Rules Project, Retail: Community and Economic Impact Review, <http://www.newrules.org/retail/impact.html> (last visited Apr. 13, 2008) [hereinafter The New Rules Project, Impact Review].

come together to develop shared land use and economic growth goals.¹³⁵ Some municipalities have developed voluntary inter-jurisdictional agreements to deal with the problems associated with big boxes.¹³⁶ Other have created tax base sharing and intergovernmental revenue sharing agreements that distribute revenues to communities outside the host municipality that are affected by these projects.¹³⁷

Regional or county level economic impact review requirements are another method by which the regional effects of big boxes can be dealt with.¹³⁸ Large developments generally need to obtain approval from the host town and from a regional review board that considers the impacts of the development on the region as a whole.¹³⁹ The Cape Cod Commission, for example, works with fifteen towns within Massachusetts' Barnstable County to implement a regional land use plan. The commission must approve projects of regional impact, and if it rejects a proposed development, none of the fifteen member municipalities may subsequently approve it. Permits for several big-box retailers, including Wal-Mart, Sam's Club, Costco, and Home Depot, have been denied by the commission.¹⁴⁰

K. State Required Coordinated Review

Some states have taken a more active part in influencing the project review process. For example, Vermont's Act 250,¹⁴¹ which requires regional impacts to be considered during the permit process, has also been cited as a successful regional review procedure for addressing challenges presented with big-box development. Under Act 250, developments of regional impact must obtain a permit from one of the state's District Environmental Commissions, and approval hinges on compliance with statutory criteria relating to air and water pollution, drinking water supplies, soil erosion, traffic and congestion, burdens, the ability of municipalities to provide services, aesthetics, historic sites, natural areas and wildlife, regional and municipal growth, energy conservation, and patterns of sprawl.¹⁴² Act 250 review has resulted in three of Vermont's four Wal-Marts being less

¹³⁵ *See id.*

¹³⁶ *See* Salkin, *supra* note 133, at 55–57.

¹³⁷ *See id.* at 57–60.

¹³⁸ *Id.* at 60; *see also* The New Rules Project, Impact Review, *supra* note 134 (providing a wide-ranging overview of various community efforts to regulate “big box” stores).

¹³⁹ The New Rules Project, Impact Review, *supra* note 134.

¹⁴⁰ Salkin, *supra* note 133, at 63–64.

¹⁴¹ VT. STAT. ANN. tit. 10, §§ 6001–6093 (2007).

¹⁴² *Id.* § 6081.

than half the size of the company's typical facilities,¹⁴³ and in 1997, the Supreme Court of Vermont upheld the denial of a Wal-Mart permit application that was based, in part, on the likely effects of the store on existing local businesses.¹⁴⁴

Act 250 was adopted in 1970, well before Wal-Mart and other big boxes became ubiquitous national presences. Since then, Maine has also enacted statewide legislation attempting to deal with the regional problems of large retail development. The 2007 Informed Growth Act requires communities to prepare comprehensive economic impact studies for all retail developments exceeding 75,000 square feet.¹⁴⁵ The study must:

identify the economic effects of the large-scale retail development on existing retail operations; supply and demand for retail space; number and location of existing retail establishments where there is overlap of goods and services offered; employment, including projected net job creation and loss; retail wages and benefits; captured share of existing retail sales; sales revenue retained and reinvested in the comprehensive economic impact area; municipal revenues generated; municipal capital, service and maintenance costs caused by the development's construction and operation, including costs of roads and police, fire, rescue and sewer services; the amount of public subsidies, including tax increment financing; and public water utility, sewage disposal and solid waste disposal capacity.¹⁴⁶

After holding a public hearing, the municipality can approve the development "only if it determines that there is likely to be no undue adverse impact."¹⁴⁷

While Maine and Vermont remain the only states to have enacted impact review requirements, similar regulations have been proposed in California, New Jersey and Oregon.¹⁴⁸

¹⁴³ The New Rules Project, Vermont's Act 250, <http://www.newrules.org/retail/vermont.html> (last visited Apr. 13, 2008).

¹⁴⁴ *In re Wal-Mart Stores, Inc.*, 702 A.2d 397 (Vt. 1997).

¹⁴⁵ ME. REV. STAT. ANN. Title 30-A, §§ 4365-4371 (2007).

¹⁴⁶ *Id.* § 4367(4)(A).

¹⁴⁷ *Id.* § 4369.

¹⁴⁸ The New Rule Project, Impact Review, *supra* note 134.

III. ECONOMIC, SOCIAL AND OTHER LOCALLY BASED INITIATIVES

A. Economic Impact Review

Economic impact review ordinances have emerged over the past several years as useful tools for communities to use to evaluate whether proposed retail developments will support and contribute to local economies.¹⁴⁹ The reviews function as cost-benefit analyses, requiring studies of the likely impacts of development on a community's municipal finances, job availability and quality, housing costs, and the likely effects on existing businesses. Many economic impact review procedures also assess impacts on environmental resources, community character, tourism, and residents' general quality of life. Generally, if the impact review determines that the development will have an undue adverse impact on the community, it will not be permitted.

Economic impact reviews are generally triggered by proposals to build commercial retail facilities over a certain size.¹⁵⁰ Developments that exceed the threshold must then undergo a detailed study of the impacts that they will have on the surrounding community and local economy. Although most impact review thresholds are targeted at big boxes, a few cities have set review thresholds that are low enough to encompass some stand alone chain stores such as pharmacies and

¹⁴⁹ See *id.* Grassroots groups have had a large hand in pushing communities to adopt economic impact review procedures. In Carbondale, Colorado, for example, Mountain Folks for Global Justice (MFGJ), urged the Board of Trustees (equivalent to a city council) to reject a Target superstore, and also to adopt ordinances that would not only put a cap on stores of over 60,000 square feet, but also would require impact reviews on stores over 20,000 square feet. The New Rules Project, Retail: Community Impact Assessment—Carbondale, CO, <http://www.newrules.org/retail/carbondale.html> (last visited Apr. 2, 2008). In Westbrook, Maine, the group called Westbrook Our Home, fought the establishment of a Wal-Mart in the community, and also won the passage of a law which limits retail stores to 160,000 square feet. The New Rules Project, Retail: Economic & Community Impact Review—Westbrook, Maine, <http://www.newrules.org/retail/westbrook.html> (last visited Apr. 2, 2008) (discussing WESTBROOK, ME., LAND USE ORDINANCES § 310.3 (2007)).

¹⁵⁰ See, e.g., HOMER, ALASKA, CODE § 21.61.105 (2005) (15,000 square feet); BENICIA, CAL., CODE § 17.70.360 (2007) (20,000 square feet); L.A., CAL., CODE § 12.24(U)(14)(a) (2004) (100,000 square feet with 10% of the floor area being devoted to tax-exempt items); MOUNT SHASTA, CAL., ZONING CODE § 18.70.030 (2005) (20,000 square feet); BENNINGTON, VT., LAND USE & DEV. REGS. § 5.22 (2006) (50,000 square feet); BRATTLEBORO, VT., ZONING ORDINANCE § 2337(A) (2006) (65,000 square feet). In Greenfield, Mass., any development that falls below the size threshold will still be required to go through economic impact review if it is projected to result in a certain number of additional daily vehicle trips. The New Rules Project, Retail: Community Impact Assessment—Greenfield, Mass., (Jun. 17, 1991), available at <http://www.newrules.org/retail/greenfield.html> (last visited Mar. 27, 2008) [hereinafter The New Rules Project, Greenfield, Mass.]. In Middletown, R.I., all new non-residential development is subject to economic impact review. MIDDLETOWN, R.I., CODE ch. 152, § 310 (2006).

clothing stores. The threshold set in Homer, Alaska, for example, is 15,000 square feet, and a 20,000 square foot threshold has been set in the California towns of Benicia and Mount Shasta.¹⁵¹ A few municipalities have extended their economic impact review requirements beyond retail developments to other commercial and non-commercial projects. For example, the ordinance enacted in Carbondale, Colorado, applies to all major developments and allows waivers to be granted only for medical establishments, educational facilities, and grocery stores.¹⁵² New developments of all types (except some residential projects) are also subject to economic impact review in Middletown, Rhode Island.¹⁵³

The economic elements that may be studied within an impact review study are varied and may be quite in depth. Common study factors include: the projected costs of infrastructure improvements required by the development (i.e. roads and sewerage) as compared to the value of those improvements to the municipality;¹⁵⁴ projected tax revenues from the development, offset by the costs of providing services and/or possible decreases in the values of surrounding properties;¹⁵⁵ projected net job loss and creation;¹⁵⁶ the effect on wages and benefits;¹⁵⁷ impacts on housing;¹⁵⁸ the estimated amount of revenue that will be retained in the local economy;¹⁵⁹ the effects of a project on existing businesses;¹⁶⁰ estimated costs of social services

¹⁵¹ HOMER, ALASKA, CODE § 21.61.105; BENICIA, CAL., CODE § 17.70.360; MOUNT SHASTA, CAL., ZONING CODE § 18.70.030.

¹⁵² CARBONDALE, COLO., CODE § 18.25.015(1)(3) (2006).

¹⁵³ MIDDLETOWN, R.I., CODE ch. 152, § 310.

¹⁵⁴ See CARBONDALE, CO., CODE § 18.55.090; BENNINGTON, VT., LAND USE & DEVELOPMENT REGULATIONS § 5.22 (2006); The New Rules Project, Greenfield, Mass., *supra* note 150.

¹⁵⁵ See HOMER, ALASKA, CODE § 21.61.105(1)(2)(e); L.A., CAL., CODE § 12.24(U)(14)(b)(4); CARBONDALE, COLO., CODE § 18.55.090(3)(d); MIDDLETOWN, R.I., CODE ch. 152, § 310; BENNINGTON, VT., LAND USE & DEVELOPMENT REGS. § 5.22; BRATTLEBORO, VT., ZONING ORDINANCE § 2337(A)(3)(c)(2006); The New Rules Project, Greenfield, Mass., *supra* note 150.

¹⁵⁶ See HOMER, ALASKA, CODE § 21.61.105(1)(2)(a); L.A., CAL., CODE § 12.24(U)(14)(b)(4)(ii); BENNINGTON, VT., LAND USE & DEVELOPMENT REGS. § 5.22; The New Rules Project, Greenfield, Mass., *supra* note 150.

¹⁵⁷ See HOMER, ALASKA, CODE § 21.61.105(1)(2)(a); L.A., CAL., CODE § 12.24(U)(14)(b)(4)(ii); CARBONDALE, COLO., MUN. CODE § 18.55.090(3)(d).

¹⁵⁸ See L.A., CAL., CODE § 12.24(U)(14)(b)(4)(ii); CARBONDALE, COLO., CODE § 18.55.090(3)(d).

¹⁵⁹ See HOMER, ALASKA, CODE § 21.61.10(1)(2)(d); BENNINGTON, VT., LAND USE & DEVELOPMENT REGULATIONS § 5.22; BRATTLEBORO, VT., ZONING ORDINANCE § 2337(A)(3)(e).

¹⁶⁰ See HOMER, ALASKA, CODE § 21.61.105(1)(2)(h); L.A., CAL., MUN. CODE § 12.24(U)(14)(b)(4)(ii); BRATTLEBORO, VT., ZONING ORDINANCE § 2337(A)(3)(d).

necessitated by the development,¹⁶¹ and the impacts of increased consumer spending and savings.¹⁶²

Many impact reviews go beyond strict economic concerns to encompass elements that bear on communities' quality of life. Traffic and environmental impacts are required to be analyzed under many review regulations.¹⁶³ Another common element in economic impact review studies is whether a project will comport with existing neighboring uses and be operated so as not to interfere with the community's unique character.¹⁶⁴ Impacts on important historical, natural, and cultural resources are also generally included in impact reviews.¹⁶⁵ The impact on parks, open space, and/or childcare facilities may also be a factor.¹⁶⁶ And in a few communities, a project's effect on public transportation options, walking, and bicycling will be taken into account.¹⁶⁷ Los Angeles also reviews the impacts of proposed large retail facilities on grocery and retail availability and whether a project may exacerbate problems of blight.¹⁶⁸

Most economic impact review ordinances require the developer to finance review by independent consultants or pay an impact fee to cover the cost of the assessment.¹⁶⁹ Once the review is completed, the municipality determines whether the project will have an undue

¹⁶¹ See BRATTLEBORO, VT., ZONING CODE, art. 2, § 2337(A)(2)(b).

¹⁶² See HOMER, ALASKA, CODE § 21.61.105(l)(2)(b); L.A., CAL., CODE § 12.24(U)(14)(d)(2)(v).

¹⁶³ See, e.g., HOMER, ALASKA, CODE § 21.61.105(l)(1) (traffic); CARBONDALE, COLO., CODE § 18.55.090(B)(6)(d)(a)(ii), (iv) (v) (traffic and environmental); MIDDLETOWN, R.I., CODE ch. 152, § 310(B)(a)(a) (2006) (traffic and parking); The New Rules Project, Greenfield, Mass., *supra* note 150, at §§ 3.2.1, 3.2.3 (traffic and environmental).

¹⁶⁴ See BENICIA, CAL., CODE § 17.70.360(B) (2007); L.A., CAL., CODE § 12.24(U)(14)(d)(2)(ix); CARBONDALE, COLO., CODE § 18.55.090(B)(6)(a)(iv); BRATTLEBORO, VT., ZONING CODE, art. 2, § 2337(A)(2)(b)(4); The New Rules Project, Greenfield, Mass., *supra* note 150, at §§ 3.2.1, 3.2.3.

¹⁶⁵ See CARBONDALE, COLO., CODE § 18.55.090(B)(6)(a)(i), (iv), (v) (historic districts); MIDDLETOWN, R.I., CODE ch. 152, § 310(B)(1)(d) (scenic, historic and archeological conditions); The New Rules Project, Greenfield, Mass., *supra* note 150, at §§ 3.2.1, 3.2.3 (scenic, historic and archeological conditions).

¹⁶⁶ See L.A., CAL., CODE § 12.24(U)(14)(d)(2)(iv) (parks, open space, playgrounds, child care facilities and community centers); MIDDLETOWN, R.I., CODE ch. 152, § 310(B)(1)(d) (open space).

¹⁶⁷ See CARBONDALE, COLO., CODE § 18.55.090(B)(6)(a)(ii); BRATTLEBORO, VT., ZONING CODE, art. 2, § 2337(A)(2)(b)(2).

¹⁶⁸ L.A., CAL., CODE § 12.24(U)(14)(d)(2)(i), (ii), (ix).

¹⁶⁹ See, e.g., HOMER, ALASKA, CODE § 21.61.105(l)(1) (2005) (paid for by applicant); MOUNT SHASTA, CAL., ZONING CODE § 18.70.140 (2005); CARBONDALE, COLO., CODE § 18.55.090(B)(3)(d) (\$4,500.00 fee); MIDDLETOWN, R.I., CODE ch. 152, § 310(D)(3) (For retail, the applicant pays a review fee of \$100.00 per 1,000 square feet.); BENNINGTON, VT., LAND USE & DEV. REGS. § 5.22 (2006) (paid for by the applicant); BRATTLEBORO, VT., ZONING CODE, art. 2, § 2337(A)(2)(b)(3), (B) (applicant must pay for review conducted by a consultant approved by the development review board).

adverse effect on the community, and if it does, then it must be rejected.¹⁷⁰ In other communities, the impact review criteria are mandatory and must be met before a permit can be issued.¹⁷¹ Carbondale, Colorado has a unique scheme under which the criteria required by a project are narrowed from a number of study areas at a preliminary meeting between the developer and municipal officials.¹⁷²

B. Community Benefits Agreements

Community benefits agreements (CBAs) are private agreements negotiated between a developer and community groups.¹⁷³ In exchange for community support of the development, which may need extensive government approvals or public subsidies, the developer agrees to provide the community with certain benefits. Most CBAs provide a host of different benefits, including requirements that the developer hire local residents and pay living wages, that residential projects include adequate affordable housing, and that money be set aside for community improvements and grants to local organizations. These types of obligations ensure that project developers will be accountable to the communities in which developments are located and that a certain degree of revenues will be retained in local economies.

Since CBAs are negotiated directly between private parties, the benefits can be tailored to each community's needs, and the needs of local businesses have been addressed in a number of CBAs. An agreement reached in relation to the expansion of Los Angeles' LAX airport, for example, requires the developer to set up a revolving loan program to benefit small businesses.¹⁷⁴ In Denver, a CBA involving the redevelopment of environmentally contaminated land provides that the property will not be used for any commercial establishment larger than 75,000 square feet, effectively prohibiting most big-box stores.¹⁷⁵ The Longfellow CBA, which involves a residential and

¹⁷⁰See L.A., CAL., CODE § 12.24(E), (U); BENNINGTON, VT., LAND USE & DEV. REGS. § 5.22.

¹⁷¹See, e.g., BENICIA, CAL., CODE § 17.70.360 (2007); BRATTLEBORO, VT., ZONING CODE, art. 2, § 2337(A)(1), (2); The New Rules Project, Greenfield, Mass., *supra* note 150, at § 7.12.5.

¹⁷²See CARBONDALE, COLO., CODE § 18.55.090(B)(1).

¹⁷³See Patricia E. Salkin, *Understanding Community Benefits Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations* (Oct. 29, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025724.

¹⁷⁴L.A. WORLD AIRPORTS, LOS ANGELES. INT'L AIRPORT MASTER PLAN PROGRAM, COMMUNITY BENEFITS AGREEMENT 30–31 (2004), http://www.laxmasterplan.org/commBenefits/pdf/LAX_CBA_Final.pdf.

¹⁷⁵COLORADO COMMUNITY BENEFITS AGREEMENT 2 (Jun. 11, 2003), <http://amy.m.lavine.googlepages.com/ColoradoCBAFRESCContract.pdf>.

retail complex in Minneapolis, includes even stronger support for local businesses. It requires that no retail tenant may occupy more than 30,000 square feet, effectively precluding big boxes, and that at least 30% of the retail space must be set aside for local businesses.¹⁷⁶ Several other CBAs have included requirements for space to be set aside for local businesses,¹⁷⁷ and this may become standard for future CBAs involving retail developments.

C. Independent Business Alliances

Independent business alliances (IBAs) are coalitions of locally owned businesses, citizens, and community organizations that work to support local businesses and entrepreneurs in order to enhance community character, build local economic strength, and prevent the displacement of local stores and service providers by chains.¹⁷⁸ According to the American Independent Business Alliance, IBAs accomplish these goals through three primary strategies:

- Informing citizens of the values provided by community-based businesses and their importance to the local economy, culture and social fabric. This helps residents view themselves as citizens, rather than as consumers, first by engaging them in active dialogue and decision-making about where they choose to spend their money.
- Group branding, promotion and advertising to elevate the collective profile of our community-based businesses to help level the playing field and bring to them some of the market advantages chains enjoy.

¹⁷⁶ PUINA SITE DEVELOPMENT COMMUNITY BENEFITS AGREEMENT 3 (July 26, 2007), http://www.longfellow.org/draft_CBA%20SummaryJuly2007.pdf (last visited Apr. 9, 2007).

¹⁷⁷ See, e.g., ATLANTIC YARDS DEV. CO., COMMUNITY BENEFITS AGREEMENT 19 (June 27, 2005), <http://www.atlanticyards.com/downloads/cba.pdf> (setting aside 15% of gross retail leasing space for community-based business, with a preference given to minority- and women-owned businesses); GATEWAY CENTER AT BRONX TERMINAL MARKET COMMUNITY BENEFITS AGREEMENT 29 (Feb. 1, 2006), http://www.bronxgateway.com/documents/copy_of_community_benefits_agreement/Signed_CBA_2_1_06.pdf; Ryan Juskus & Elizabeth Elia, *Long Time Coming*, SHELTERFORCE ONLINE (Nat'l Housing Inst. 2007), <http://www.nhi.org/online/issues/150/longtimecoming.html> (involving the Washington, D.C., Shaw District CBA); Memorandum from Board Members Cindy Chavez, David Cortese, & Lind LeXotte to the Mayor & Redevelopment Board Members, City of San Jose 1–2 (Dec. 10, 2002), <http://www.communitybenefits.org/downloads/CIM%20CBA.pdf> (San Jose CIM project CBA, including goals of 30% San Jose retailers and 30% regional retailers, with a set aside of 10% of the available retail space for existing small business in the downtown).

¹⁷⁸ American Independent Business Alliance (AMIBA), About Independent Business Alliances, http://amiba.net/about_ibas.html (last visited Apr. 5, 2008).

- Creating strong relationships with local government and the media to inform local decision-making and give a voice to the locally-owned independent business community and promote policy that supports community-rooted enterprise.¹⁷⁹

IBAs have been created across the country,¹⁸⁰ and they have been instrumental in encouraging residents to shop locally and in preventing national chains from locating in areas already served by existing businesses.¹⁸¹ They have also been driving forces in proposing land use regulations of chains and large retail developments and commissioning the studies to support these regulations.¹⁸²

D. Local Currency Movements

Local currency systems, such as the Ithaca Hours program in Ithaca, New York,¹⁸³ and the BerkShare currency of south Berkshire County, Massachusetts,¹⁸⁴ have started to appear in communities interested in keeping local revenues within their local economies.¹⁸⁵ These currency systems are not based on the purpose of excluding

¹⁷⁹ *Id.*

¹⁸⁰ American Independent Business Alliance (AMIBA), Find an Independent Business Alliance Near You, http://amiba.net/find/international_index.html (last visited Apr. 6, 2008).

¹⁸¹ See Stacy Mitchell, The New Rules Project, Homegrown Economics: How Boulder Businesses Are Staying Ahead of the Chains, <http://www.newrules.org/retail/smorionafield.html> (last visited Apr. 6, 2008) (noting that the IBA in Austin, Texas, succeeded in preventing the development of a sprawling shopping center).

¹⁸² See, e.g., The New Rules Project, Corvallis Business Alliance Urges Residents to Shop Locally (Apr. 1, 2004), http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=229 (noting that the Corvallis, Oregon, IBA “has begun forging a working relationship with elected officials and city government. One of its long-term goals is to advocate for policies that support independent, local businesses.”); The New Rules Project, Missouri Coalition Works to End Big Box Subsidies (Apr. 1, 2003), http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=170; The New Rules Project, San Francisco Weights Restrictions on ‘Formula’ Businesses (Sept. 1, 2003) http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=245 (noting that San Francisco small business associations supported the formula business regulations); The New Rules Project, Gaming Diversity: Formula Business Rules Spread (Aug. 1, 2000), http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=16 (noting that the Boulder, Colorado, IBA proposed a formula business ordinance); The New Rules Project, Local Stores Create Triple the Economic Activity of Chains (Feb. 1, 2003), http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=150 (stating that the Austin, Texas IBA hired a consulting firm to prepare a report on chain stores’ influence on the local economy); The New Rules Project, Salt Lake City Coalition Creates Voice for Independents (Aug. 1, 2000), http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=18.

¹⁸³ Ithaca Hours Online, <http://www.ithacahours.com> (last visited Apr. 9, 2008).

¹⁸⁴ BerkShares, Inc., <http://www.berkshares.org> (last visited Apr. 9, 2008).

¹⁸⁵ See Jeffrey Gangemi, *Buy Local—With Town Currency*, BUS. WK., Jul. 18, 2007, available at http://www.businessweek.com/smallbiz/content/jul2007/sb20070717_097103.htm.

national chain stores and big boxes; rather, they are intended to strengthen local economies by keeping money in local circulation and generally promoting the patronization of local businesses. Formula businesses are unlikely to sign onto such programs because the currencies cannot be used by corporations outside of the host community. This may place chains at a disadvantage in areas like Berkshire County, where BerkShares receive a favorable rate of exchange (vendors are required to value each 90 cent BerkShare as one dollar). Still, chains are not prohibited from opting into local currency systems, and in the Berkshires, at least one chain, Agway, does accept the local currency.¹⁸⁶

CONCLUSION

Communities and corporations have a love-hate relationship. Some national retail chain corporations can be economic engines for communities, generating revenue, creating jobs and in some cases, providing consumers with low-cost goods and services. At the same time, these formula retail establishments can overwhelm communities with their size, creating environmental and social challenges, and they often displace existing locally owned and operated businesses, shifting jobs, and offsetting negative economic impacts. Community character can suffer and tourism can be negatively impacted. The siting of certain larger retail outlets can emotionally divide a community. Communities need to use the consensus building mechanisms available through the land use planning process to determine how and where they want to grow with respect to formula retail. Careful, strategic, community planning, along with a combination of municipal regulatory programs and grass-roots initiatives, can yield thriving communities both with and without certain formula retail establishments.

¹⁸⁶ Telephone interview with Christopher Lindstrom, Special Projects Coordinator, E.F. Schumacher Society, and a founding member of BerkShares, Inc. (Jan. 2008).

