

# THE FUTURE OF ABANDONED BIG BOX STORES: LEGAL SOLUTIONS TO THE LEGACIES OF POOR PLANNING DECISIONS

SARAH SCHINDLER\*

*Big box stores, the defining retail shopping location for the majority of American suburbs, are being abandoned at alarming rates, due in part to the economic downturn. These empty stores impose numerous negative externalities on the communities in which they are located, including blight, reduced property values, loss of tax revenue, environmental problems, and a decrease in social capital. While scholars have generated and critiqued prospective solutions to prevent abandonment of big box stores, this Article asserts that local zoning ordinances can alleviate the harms imposed by the thousands of existing, vacant big boxes. Because local governments control land use decisions and thus made deliberate determinations allowing big box development, this Article argues that those same local governments now have both an economic incentive and a civic responsibility to find alternative uses for these “ghostboxes.” With an eye toward sustainable development, the Article proposes and evaluates four possible alternative uses: retail reuse, adaptive reuse, demolition and redevelopment, and demolition and greening. It then devises a framework and a series of metrics that local governments can use in deciding which of the possible solutions would be best suited for their communities. The Article concludes by considering issues of property acquisition and management.*

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\* Associate Professor of Law, University of Maine School of Law. I am grateful to Patty Salkin, Frank Alexander, Tanya Marsh, Keith Hirokawa, Dave Owen, Michael Lewyn, Peter Appel, Jessica Owley, Dmitry Bam, Orlando Delogu, Jennifer Wriggins, Harlan Cohen, and the participants of the 2011 Northeast Regional Scholarship Development Workshop for their helpful comments. Thanks also to Brianna Dietrich for excellent research assistance.

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## INTRODUCTION

Living in the sprawl  
 Dead shopping malls rise like mountains beyond  
 mountains  
 And there's no end in sight  
 —Arcade Fire, *Sprawl II (Mountains Beyond Mountains)*<sup>1</sup>

Once there were parking lots  
 Now it's a peaceful oasis . . .  
 This was a Pizza Hut  
 Now it's all covered with daisies  
 —Talking Heads, *(Nothing But) Flowers*<sup>2</sup>

Borders revealed in July 2011 that it would close its 399 remaining bookstores, after having closed approximately 200 earlier in the year.<sup>3</sup> In 2009, Linens 'n Things and Circuit City closed all of their retail locations, vacating approximately 1400

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1. ARCADE FIRE, *Sprawl II (Mountains Beyond Mountains)*, on THE SUBURBS (Merge Records 2010).

2. TALKING HEADS, *(Nothing But) Flowers*, on NAKED (Sire Records 1988).

3. Stephen Ceasar, *Borders Group Files for Bankruptcy Reorganization*, L.A. TIMES (Feb. 17, 2011), <http://articles.latimes.com/2011/feb/17/business/la-fi-0217-borders-bankruptcy-20110217>; Michael J. De La Merced & Julie Bosman, *Calling Off Auction, Borders to Liquidate*, DEALBOOK (July 18, 2011, 8:31 PM), <http://dealbook.nytimes.com/2011/07/18/borders-calls-off-auction-plans-to-liquidate/>

big box stores.<sup>4</sup> In addition to the loss of tax revenues and jobs, these departing retailers left behind something else: the structures that housed their products.

“Big box” stores<sup>5</sup> are a defining image of suburban commercial development. With their plentiful parking and loss-leader<sup>6</sup> item pricing, these massive chain stores originally stood as triumphant symbols of American capitalism. However, many have begun to “go dark”; big boxes are being vacated at alarming rates. Of 870.7 million square feet of currently vacant retail space in the United States, almost 300 million square feet—nearly 35%—is empty big box space.<sup>7</sup> The reasons for big box vacancy are numerous. The general economic downturn and the rise of online shopping contributed to the bankruptcy of many large brick-and-mortar chain stores, including Borders.<sup>8</sup> Other retailers, such as Wal-Mart, upsize: They close older facilities and build new, larger structures on different sites in the same city.<sup>9</sup> Wal-Mart alone currently has 103

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4. J.L. Cherwin, Jr. & Virginia M. Harding, *New Tenants for Big Boxes*, PROB. & PROP., Jan.–Feb. 2010, at 37, 37; see also Laura D. Steele, *Actual or Hypothetical: Determining the Proper Test for Trademark Licensee Rights in Bankruptcy*, 14 MARQ. INTELL. PROP. L. REV. 411, 412 (2010).

5. It is hard to set forth a precise definition for big box stores; like obscenities, you know them when you see them. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Much depends on surroundings and context, and what constitutes a big box for purposes of one city’s zoning ordinance might not for another’s; definitions range from 20,000 square feet (often called “junior boxes”) to nearly 300,000 square feet. See, e.g., AUSTIN, TEX., ORDINANCE NO. 20070215-072, § 25-2-813 (2007), available at <http://www.ci.austin.tx.us/edims/document.cfm?id=100656> (defining “large retail use” as “100,000 square feet or more of gross floor area”). For purposes of this Article, a big box store is a predominantly one-room, single-story building of at least 35,000 square feet that housed a single retailer or grocer and that is surrounded by a large parking lot. Big boxes are typically stand-alone structures, but much of the discussion in this Article is also relevant to empty big boxes that are located in vacant strip malls and shopping centers as well. See JULIA CHRISTENSEN, *BIG BOX REUSE* 4–5 (2008) (addressing possible definitions and settling on one similar to that presented here). Examples that meet this definition include Wal-Mart, Target, Costco, Best Buy, Home Depot, Lowe’s, Babies “R” Us, Kmart, Kroger, and Safeway.

6. Loss-leader pricing involves selling certain discounted products at a loss to bring in customers while selling other items for a profit. See *Ellis v. Dallas*, 248 P.2d 63, 64 (Cal. Dist. Ct. App. 1952).

7. GARRICK H.S. BROWN, *COLLIERS INT’L, THE BIG BOX DILEMMA PART 1: SECOND GENERATION BIG BOX RETAIL 2* (Christine Schultz et al. eds., 2010), available at [http://www.colliers.com/Markets/Retail\\_Services/content/Colliers\\_whitepaper\\_BigBoxDilemma\\_Summer2010.pdf](http://www.colliers.com/Markets/Retail_Services/content/Colliers_whitepaper_BigBoxDilemma_Summer2010.pdf).

8. See, e.g., *Borders Files for Bankruptcy, To Close Stores*, NPR (Feb. 16, 2011), <http://www.npr.org/2011/02/16/133802386/borders-files-for-bankruptcy-to-close-stores>.

9. Wal-Mart closed 107 stores in Texas between 1987 and 2004. In 92 out of the 107 closures, a new Wal-Mart supercenter (supercenters are larger than

formerly occupied properties available for lease and 48 for sale throughout the country.<sup>10</sup>

Although changes in retail and retail structures are not in themselves novel,<sup>11</sup> the rate at which retailers are vacating big box stores, and the number remaining vacant and becoming abandoned, is problematic. Large, empty big box buildings contribute to blight as the structures deteriorate and the parking lots sprout weeds and lure squatters. Minor signals of disorder such as these symbolize and possibly accelerate an area's decline. Empty buildings also repel shoppers from other retail stores in the vicinity and lower nearby property values. While big boxes previously served as a source of sales and property tax revenue for a community, once abandoned, they often contribute neither.

Scholars acknowledge the problems caused by construction and operation of big box stores.<sup>12</sup> Those articles discuss ways to limit their construction and prospectively address the problem of big box abandonment.<sup>13</sup> However, this Article is concerned with legal strategies for confronting the problem of big box stores that have already gone dark: those that were

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traditional Wal-Marts and include a grocery store) opened in the same city as the store that closed. Harold D. Hunt & John Ginder, *Lights Out: When Wal-Marts Go Dark*, TIERRA GRANDE, Apr. 2005, reprinted in TEX. A&M U. REAL EST. CENTER, <http://recenter.tamu.edu/pdf/1720.pdf>.

10. WALMART REALTY, <http://walmartrealty.com/Default.aspx> (under "Building Disposition," follow "Buildings For Lease" and "Buildings for Sale") (last visited Sept. 10, 2011). It is impossible to talk about big boxes without addressing Wal-Mart because of its sheer size; as of 2007, it had over 4000 stores in the United States alone. *How Big Box Stores Like Wal-Mart Effect [sic] the Environment and Communities*, SIERRA CLUB, [http://www.sierraclub.org/sprawl/reports/big\\_box.asp](http://www.sierraclub.org/sprawl/reports/big_box.asp) (last visited Sept. 3, 2011). One commentator put Wal-Mart's size in relative terms: "Wal-Mart is five times the size of the nation's second largest retailer, Home Depot. It's bigger than Target, Sears, Costco, JC Penney, Walgreens, Best Buy, The Gap, Staples, Toys "R" Us, Nordstrom, Blockbuster, and Barnes & Noble combined." STACY MITCHELL, *BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES* 13 (2006).

11. See Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L., no. 3, 2005, at 7, 14 ("Changes in retailing have been with us for as long as trade has existed.").

12. See, e.g., *id.*, at 29; Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251, 1251-52 (2008); Betsy H. Sochar, Note, *Shining the Light on Greyfields: A Wal-Mart Case Study on Preventing Abandonment of Big Box Stores Through Land Use Regulations*, 71 ALB. L. REV. 697, 699 (2008).

13. These techniques limit construction style and provide for disposal if the structures are abandoned. See, e.g., Salkin, *supra* note 12, at 1261-80; Sochar, *supra* note 12, at 710-13, 715-16.

constructed without, or before the adoption of, prospective solutions.<sup>14</sup> The majority of existing abandoned big box stores in the United States fall into this category, yet the scholarly literature is bereft of a thorough discussion of abandonment and how to alleviate it.<sup>15</sup> The specific question of what to do with empty big box stores has received even less attention than abandonment of commercial and residential properties generally.<sup>16</sup> This Article aims to fill those gaps in the literature and to assist municipalities<sup>17</sup> in confronting what has become a common concern.

Local governments cannot simply sit back and rely on the market to fill these empty spaces. Indeed, such an approach

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14. When discussing the trend of big box retailers, commentator F. Kaid Benfield states that this format of store can continue to be successful in the future; however, that success will involve placing these stores in traditional downtowns. F. KAID BENFIELD ET AL., *ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY, AND SOCIAL FABRIC* 149–51 (1999). This ignores the question of what cities should do with *existing*, suburban big box stores. This is the more difficult issue: to look at our existing suburban sprawl-based landscape and apply smart growth principles to its existing form. *See id.* at 151.

15. Two commentators believe that this is the case because scholars view property abandonment as a symptom of deeper community problems rather than a cause of those problems. John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000) (discussing the lack of scholarship). Some of the issues raised in this Article have been addressed in the related yet distinct context of brownfields reuse and redevelopment. *See infra* note 53 and accompanying text; *see, e.g.*, Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479 (2007) (discussing financing mechanisms available for brownfield redevelopment projects); Barry J. Trilling & Sharon R. Siegel, *Brownfield Development in Connecticut: Overcoming the Legal and Financial Obstacles*, 26 QUINNIPIAC L. REV. 919, 986–1009 (2008); Michael J. Minkus, Comment, *Fighting Uncertainty: Municipal Partnerships with Redevelopment Agencies Can Mitigate Uncertainty to Encourage Brownfield Redevelopment*, 1 GOLDEN GATE U. ENVTL. L.J. 267, 298–307 (2007).

16. *See* Merriam, *supra* note 11, at 29. There is a growing literature addressing the foreclosure crisis, but this tends to focus on mortgages and residential vacancies. *See, e.g.*, JULIE A. TAPPENDORF & BRIEN J. SHEAHAN, AM. LAW INST., *DEALING WITH DISTRESSED PROPERTIES: LOCAL GOVERNMENT STRATEGIES TO MITIGATE THE IMPACT OF FORECLOSURES ON COMMUNITIES* 1303 (2008); Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 103 (2009) [hereinafter Schilling, *Code Enforcement*]; Scott Horsley, *Town Compels Lenders to Care for Vacant Homes*, NPR (Aug. 9, 2007), <http://www.npr.org/templates/story/story.php?storyId=12623065>.

17. There are various forms of local governments, including counties, cities, municipalities, towns, townships, villages, and special districts. Although each form is distinct, for ease of readability, the terms will be used interchangeably throughout this Article. Thus, “city” does not necessarily imply an urban city center.

has not worked thus far.<sup>18</sup> Instead, a municipality should view an empty big box as an opportunity to create a new vision for its suburbs. To do this, it must first craft a strategy and a set of ordinances to address the problem of vacant and abandoned big box stores. Such a strategy should guide cities in: (1) tracking vacant property in the community; (2) requiring solvent building owners to maintain their vacant properties; (3) determining whether building reuse or redevelopment is most appropriate in a given community; (4) modifying existing zoning and building codes to incentivize market-based reuse or redevelopment of these properties; and, finally, (5) providing for direct intervention by the municipality.

Part I of this Article provides background on the history of suburban development and, specifically, big box development. It explains why municipalities invited big box stores into their communities and why these buildings are constructed as they are.

Part II addresses the problem of big box vacancy and abandonment. While some authors starkly distinguish between the terms “abandonment” and “vacancy,”<sup>19</sup> this Article uses both, as well as the term “empty,” to describe properties of concern. While the terms are used interchangeably herein, generally, abandoned property is in poorer condition than vacant property.<sup>20</sup> After defining these terms in more detail, the Part reviews the academic literature concerning property vacancy and abandonment and its impact on local communities. It then focuses on the severity of the empty big box epidemic, the reasons for that problem, and the harms that have resulted therefrom.

Part III posits that, in addition to the harms they inflict on communities, abandoned big boxes also present an opportunity to re-imagine the suburbs. To that end, it considers and evaluates a variety of solutions to the problem of existing big box abandonment. These solutions include straight retail

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18. See BROWN, *supra* note 7 and accompanying text; *infra* Part III.B.1.

19. See, e.g., David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1140 n.4 (1999) (distinguishing “between vacant and abandoned buildings, defining the latter as vacant properties that are also tax delinquent and for which services are not paid or provided”). This Article presents abandonment and vacancy as two end points on a continuum, where abandonment is more severe than vacancy. See *infra* Part II.A.

20. See *infra* notes 54–55 and accompanying text.

reuse, adaptive reuse, demolition and redevelopment, and demolition and re-greening.

Part IV addresses implementation of the solutions. It first considers issues of federalism and the proper scale of government to address the empty big box epidemic. It concludes that local governments are well suited to address this issue and focuses on drivers that should motivate them to take action. This Part then lays out ways that municipalities can use their police powers to solve the existing empty big box problem. It proposes specific zoning changes that local governments can make to incentivize market reuse and redevelopment of vacant big box stores and thus alleviate the problems caused by those structures in their communities. It then discusses the need for direct intervention by municipalities and methods of abandoned property acquisition. This Part also proposes a series of metrics—economic state, ecological goals, existing retail landscape, and existing land development patterns—that a local government can use in deciding which of the possible solutions would make the most sense in its community. The Article concludes by briefly addressing issues of financing to show that these solutions are not merely academic but that actual funding exists to promote sustainable development and smart growth projects across the country.

## I. BACKGROUND

### A. *The Rise of Suburban Development*

To understand big box stores, one must first understand the culture that allowed for, and welcomed, a retail landscape saturated by big box chain retailers: the suburbs. Big boxes were not always a distinctive feature of American development. Before most people owned automobiles, when streetcars and walking were the primary methods of transportation, “traditional neighborhoods” evolved to address people’s needs.<sup>21</sup> These neighborhoods contained a mix of uses—housing, shopping, and offices—within walking distance of one another.<sup>22</sup> Most traditional neighborhoods had a “Main Street”

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21. ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 3–4 (2000) (contrasting “traditional neighborhood” development with suburban sprawl).

22. *See id.*

not far from houses, where local businesses such as hardware stores, bookstores, and produce markets sold their goods to people in the neighborhood.<sup>23</sup> These small stores, and perhaps even the lively sidewalks that connected them, served as what planners and architects call a “third place.”<sup>24</sup> The third place provides a sense of community engagement and involvement, which is separate from those found at the first place (home) and the second place (work).<sup>25</sup>

The transition to suburbs began after World War II as young men returned home from war, started families, and wanted more space.<sup>26</sup> Although stores initially remained in city centers, their proprietors eventually realized that they needed to follow their customer base, and thus many moved their shops out of traditional downtowns and to the suburbs.<sup>27</sup> At the same time, national retailers began opening outlets near the new suburban houses.<sup>28</sup> However, because suburban neighborhoods exclusively contained housing, shops had to locate in separate areas, typically along the major roads that led to the suburban housing developments.<sup>29</sup> Euclidean zoning, under which different land uses are kept separate from one

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23. See generally Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 742 (1993) (describing “traditional main street . . . as the place to locate necessities in close proximity”).

24. See ELLEN DUNHAM-JONES & JUNE WILLIAMSON, RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS 59–60 (2009); see generally RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY* (Marlowe & Co. 1999) (1989).

25. See sources cited *supra* note 24.

26. See Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 138–42 (1999) (summarizing literature addressing urban sprawl); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 331 (2000) (describing how population congestion was remedied through suburban sprawl); Christopher B. Leinberger, *The Next Slum?*, THE ATLANTIC, Mar. 2008, at 70, 72, available at <http://www.theatlantic.com/magazine/archive/2008/03/the-next-slum/6653/>.

27. See DUANY ET AL., *supra* note 21, at 8–9; Lewyn, *supra* note 26, at 318–19 (describing how businesses moved to the suburbs to follow “highway-driven residential development”).

28. See, e.g., *Our History: Through the Years*, TARGET.COM, <http://sites.target.com/site/en/company/page.jsp?contentId=WCMP04-031697> (follow “Start Exploring” hyperlink; then follow “1950” on the timeline; then go to “1956”) (last visited Oct. 22, 2011) (describing the expansion of Target’s predecessor store to the suburbs in 1956 “[t]o meet the needs of busy suburban families”).

29. See sources cited *supra* note 27.

another, served to bolster these patterns and make them law.<sup>30</sup> In many ways, Euclidean zoning shaped the suburbs. Single-family homes—and their surrounding yards and the children playing in those yards—were viewed as the highest and best use of property, which would be sullied by proximity to uses like apartments (which were viewed as “parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district”), commercial uses, and industry.<sup>31</sup>

Thus, the suburbs were born: housing in one area, shopping in another, and work in yet another, all designed to be accessible by car, not by foot. Along traditional neighborhood Main Streets, people had lingered and shopped with their immediate neighbors. The suburban shopping experience, defined by stand-alone big box stores and strip malls, fosters a very different environment where people use their cars to run specific errands, rarely lingering in the large parking lots that serve as entryways to the stores. The result is that an individual’s interaction with her neighbors and the larger community is much more limited in suburbia than in traditional neighborhoods because the “third place,” which was so prevalent along Main Street, is lacking in suburbia.<sup>32</sup>

### B. *The Rise of the Big Box*

Big box development began in the early 1960s with construction of the first Target and Wal-Mart.<sup>33</sup> The idea

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30. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (validating zoning ordinances).

31. See *id.* at 394. There was fear of “fire, contagion, and disorder” spreading to the single-family homes from commercial and industrial uses. *Id.* at 391; see also Jay Wickersham, *Jane Jacobs’ Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 553–54 (2001) (noting that the Standard Zoning Enabling Act expressly sought to reduce density and “prevent the overcrowding of land”).

32. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 59–60.

33. See *Our History: Through the Years*, *supra* note 28 (follow “Start Exploring” hyperlink; then follow “1960” on timeline; then go to “1961”). In 1961, Target’s predecessor announced plans to open “a new discount chain store” that would contain seventy-five departments in one store with “wide aisles, easy-to-shop displays, fast checkout and, loads of well-lighted parking . . . for 1,200 cars.” *Id.* (quoting Minneapolis Tribune). Target was originally founded as the Dayton Dry Goods Company, a department store. *Id.* (follow “Start Exploring” hyperlink; then follow “1900” on timeline; then go to “1902”). Other predecessor suburban retailers included early, now defunct large department and catalogue stores such as Caldor, Rickle, and Service Merchandise. See generally Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV.

behind big box construction is that the building itself is just a shell in which to house low-price items.<sup>34</sup> Because the structure is so basic, it gives shoppers the impression that little money was spent on design and all of the savings are being passed on to them.<sup>35</sup> As for the retailers, they are able to offer low-cost goods, in part, because the stores' construction is standardized. It would require more time and money to develop an individual set of construction plans for each new store than it does to have a single plan that can be applied to developments throughout the country.<sup>36</sup> Additionally, the big box structure is consistent with the suburban life-choice: easy access to shopping and free parking.<sup>37</sup>

Another important reason that developers and retailers build big boxes is that local zoning ordinances dictate their structure and form.<sup>38</sup> Again, the standard Euclidean zoning ordinances in many suburban communities expressly disallow retail uses from being placed adjacent to, or intermingled with, residential, office, or industrial uses.<sup>39</sup> Thus, many towns have created commercial districts that only permit retail shops. Those ordinances also set forth height limits, which, in suburban neighborhoods, often cap buildings at a few stories. These restrictions prevent developers from constructing tall structures and instead promote low-density construction (and

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437, 457 (2009) (discussing early department stores). There are currently three types of big boxes: (1) "discount department stores," such as Wal-Mart, Target and Kmart, which sell a variety of items; (2) "warehouse clubs," like Sam's Club, Costco, and Price Club, which require membership; and (3) "category killers," which are the majority of big box retailers and are so named because they carry primarily one type of product (e.g., Barnes & Noble and Borders: books; Best Buy and Circuit City: electronics; Home Depot and Lowe's: hardware) and tend to destroy the market for locally-owned, independent stores that carry the same goods. Karen ZoBell & Kevin Reisch, *Containing Big-box Retailers: Land Use and Planning Challenges Confronting the Large-scale Retail Industry*, 25 CAL. REAL PROP. J., no. 4, 2007, at 4, 4.

34. See Sara Beth McLaughlin, *Large Scale Adaptive Reuse: An Alternative to Big-Box Sprawl* 43-44 (Jan. 1, 2008) (unpublished masters thesis, University of Pennsylvania), available at [http://repository.upenn.edu/hp\\_theses/111/](http://repository.upenn.edu/hp_theses/111/).

35. *Id.*

36. Salkin, *supra* note 12, at 1253 (discussing the benefits of standardized big box construction).

37. See BENFIELD ET AL., *supra* note 14, at 11 (addressing "sprawl").

38. DUANY ET AL., *supra* note 21, at 27-28.

39. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 365 (1926) (validating zoning ordinances); Rollin Stanley, e=mc<sup>2</sup> *The Relative City*, in *THE FUTURE OF SHRINKING CITIES: PROBLEMS, PATTERNS AND STRATEGIES OF URBAN TRANSFORMATION IN A GLOBAL CONTEXT* 127, 131 (Karina Pallagst et al. eds., 2009).

thus, more sprawl).<sup>40</sup> Therefore, even if a big box developer wanted to create an urban, dense, multi-story retail structure, many suburban zoning ordinances would prohibit it.<sup>41</sup>

Additionally, codes often require vast parking lots: Most suburban commercial zoning districts have minimum parking requirements keyed to a proposed building's floor area. For example, in Seattle at least one parking space is required for every 500 square feet of built retail space.<sup>42</sup> For a 200,000 square foot building, this equates to 400 parking spaces, which is a somewhat conservative requirement.<sup>43</sup> If a retailer or developer wanted to include fewer spaces, it would have to seek discretionary approval from the municipality, which might be denied. Setback requirements, which in most suburban communities prohibit a building from being constructed flush with the street or sidewalk,<sup>44</sup> also compel the big box model. Because setbacks require that the building be constructed a certain distance from the street, parking typically fills this space.<sup>45</sup> This standard suburban design discourages people

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40. See, e.g., PASADENA, CAL., ZONING CODE ORDINANCE art. 2, § 17.24.040 (2005) (limits buildings in commercial districts to forty-five feet), available at <http://ww2.cityofpasadena.net/zoning/P-2.html#17.24>; JOHNS CREEK, GA., ZONING ORDINANCE art. 9, § 9.1.3 (2009) (height restriction of sixty feet or four stories, whichever is less, in C-1 Community Business Districts, which include retail stores), available at [http://www.johnscreekgga.gov/pdf/zoning/article\\_9.pdf](http://www.johnscreekgga.gov/pdf/zoning/article_9.pdf); GREENWOOD, IND., CODE ch. 10, § 10-73 to -74, -79 tbl.E (2011), available at [http://www.greenwood.in.gov/egov/docs/1303311404\\_317260.pdf](http://www.greenwood.in.gov/egov/docs/1303311404_317260.pdf) (limiting the height of buildings in C-1 (“[c]ommercial—[n]eighborhood [s]hopping”) districts to three stories or thirty-five feet, whichever is less, and in C-2 (“[c]ommercial—[t]ourist”) districts to four stories or forty-five feet, whichever is less).

41. See sources cited *supra* note 40.

42. SEATTLE, WASH., CODE tit. 23, ch. 23.54, § 23.54.015(A), tbl.A (2010), available at <http://clerk.ci.seattle.wa.us/~public/code1.htm> (requiring one parking space for every 500 feet for general sales and services institutions).

43. In Glen Carbon, Illinois, the requirement is four spaces per 1000 square feet for buildings over 150,000 square feet, which translates to 800 parking spaces for a 200,000 square foot big box store. GLEN CARBON, ILL., CODE tit. 10, ch. 13, § 10-13-1G (2011), available at [http://sterlingcodifiers.com/codebook/index.php?book\\_id=599](http://sterlingcodifiers.com/codebook/index.php?book_id=599).

44. See, e.g., JOHNS CREEK, GA., ZONING ORDINANCE art. 9, § 9.1.3(B), 2.3(B) (2009), available at [http://www.johnscreekgga.gov/pdf/zoning/article\\_9.pdf](http://www.johnscreekgga.gov/pdf/zoning/article_9.pdf). In Johns Creek, a suburban city north of Atlanta, even the ostensibly mixed-use C-1 and C-2 districts require a forty-foot front yard setback and a four-story height limit. *Id.* § 9.1.3(A)–(B), 2.3(A)–(B); see also Julie Mason, *Urban Reviewal: Proposed Building Laws Seek an Appealing Look*, HOUS. CHRON., Aug. 18, 1997, at 1, available at ProQuest, File No. 13528235 (stating that the result of setbacks is that “most shopping centers . . . are designed with parking out front, creating a strip mall effect”).

45. See sources cited *supra* note 44.

from walking in commercial districts and practically mandates driving to reach a store's entrance.

Though these controls seem to suggest big box-style construction, localities can limit big box development; in almost every municipality, a big box store requires discretionary approval from the city council or planning commission.<sup>46</sup> Thus, across the country, local officials have directly considered whether to allow big box stores into their communities and have voted to permit them.<sup>47</sup> The reasons for their decisions are multi-faceted, but the "growth machine" model<sup>48</sup> of local government suggests that cities' primary rationale for approving, and often enticing, big boxes into their midst is to provide new jobs and maximize revenue from sales tax. Local officials permit construction because they believe that big box development will improve and enrich their communities.

These predictions tend to be borne out when a big box store first opens in a community. However, after that store has been operating for a time, its true costs reveal themselves. Big box stores typically open on the edge of town, close to highway intersections but outside of a traditional downtown (if one exists). In a process known as filtering, the big box tends to draw business away from the traditional downtown and away from local, independent stores, which are unable to match the prices or selection of a big box.<sup>49</sup> Over time, this results not

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46. For example, in Portland, Maine, any new construction that is over 10,000 square feet (or over 20,000 square feet in an industrial zone) and any parking lot with a capacity of over seventy-five cars is considered a "major" development, which requires approval by the Planning Board. PORTLAND, ME., CODE § 14-522 to -523(f) (2011), available at <http://www.ci.portland.me.us/citycode/chapter014.pdf>.

47. Importantly, some have voted not to allow these structures and have passed local laws for the express purpose of blocking big box development. See *infra* Part III.A.

48. See generally JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987); Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976). "[T]he scramble for sales tax dollars has led to what would otherwise be irrational land-use decisions, as cities forgo development of much-needed housing and high-wage enterprises in order to devote land to still more big-box stores and shopping malls." MITCHELL, *supra* note 10, at 169. This is especially true in states such as California and Colorado, whose ability to increase property taxes is limited. See CAL. CONST. art. 13A, § 1, cl. a ("The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property."); COLO. CONST. art. X, § 20 (TABOR); COLO. CONST. art. X, § 3, cl. (1)(b) (Gallagher Amendment).

49. See JEROME ROTHENBERG ET AL., THE MAZE OF URBAN HOUSING MARKETS (1991) (discussing filtering); see also MITCHELL, *supra* note 10, at 169; Jennifer S. Evans-Cowley, *Thinking Outside the Big Box: Municipal and Retailer*

only in a loss or blighting of the “third places” along Main Street, but in a loss of sales and jobs at the local competitor stores, many of which are unable to stay in business once a big box opens nearby.<sup>50</sup> Thus, a growing number of local governments are beginning to realize that the benefits promised by big box developers rarely outweigh their harmful secondary effects.<sup>51</sup>

## II. THE PROBLEM: VACANT AND ABANDONED BIG BOX STORES

### A. *Building Vacancy and Abandonment Generally*

Retailers are deserting big boxes in such large numbers that commentators have anointed the empty behemoths with their own name: ghostboxes.<sup>52</sup> They fit into a larger category of

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*Innovations in Large-scale Retail*, 13 J. URB. DESIGN 329, 332 (2008) (citing studies finding that “the entry of a Wal-Mart into a market does result in a decline of small retailers”).

50. DAVID NEUMARK ET AL., FORSCHUNGSINSTITUT ZUR ZUKUNFT DER ARBEIT, DISCUSSION PAPER NO. 2545, THE EFFECTS OF WAL-MART ON LOCAL LABOR MARKETS 34 (2007), available at [www.newrules.org/sites/newrules.org/files/images/neumarkstudy.pdf](http://www.newrules.org/sites/newrules.org/files/images/neumarkstudy.pdf) (“On average, Wal-Mart store openings reduce retail employment by about 2.7 percent, implying that each Wal-Mart employee replaces about 1.4 employees in the rest of the retail sector. Driven in part by the employment declines, retail earnings at the county level also decline as a result of Wal-Mart entry, by about 1.3 percent.”); see also MITCHELL, *supra* note 10, at 36 (“[R]etail development does not represent real growth. It does not generate new economic activity . . . . The size of the retail spending ‘pie’ in a local market is a function of how many people live in the area and how much income they have. Building new stores does not expand the pie; it only reapportions it.”); Evans-Cowley, *supra* note 49, at 332 (“While an average Wal-Mart store initially creates 100 retail jobs, a study of counties with Wal-Mart stores finds that overall retail employment declines by between 180 and 270 jobs. The result is that for every job a Wal-Mart store creates, 1.5 to 1.75 other retail employees are displaced.”) (internal citations omitted).

51. See, e.g., *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 424–25 (Cal. Ct. App. 2006) (upholding an ordinance prohibiting superstore development, which contained a finding that “the establishment of discount superstores in Turlock is likely to negatively impact the vitality and economic viability of the city’s neighborhood commercial centers by drawing sales away from traditional supermarkets located in these centers”) (internal quotation marks omitted).

52. See, e.g., Jessica LeVeon Farr, *The Ghost-Box Dilemma: Communities Cope with Vacant Retail Property*, 15 PARTNERS COMMUNITY & ECON. DEV., no. 1, 2005; Annysa Johnson, *Razing Fees for Big Box Stores Get 2nd Look: Amid Downturn, Cities Prepare for Vacant Sites*, MILWAUKEE J. SENTINEL, May 18, 2008, at 1, available at [NewsBank Inc.](http://www.newsbank.com), Record No. MERLIN\_13303435; ‘Ghostboxes’ Haunt Communities Across U.S., MSNCOM, July 6, 2009, [http://www.msnbc.msn.com/id/31748428/ns/businessreal\\_estate/t/ghost...#.To8ty3K2Z8E](http://www.msnbc.msn.com/id/31748428/ns/businessreal_estate/t/ghost...#.To8ty3K2Z8E).

built-out commercial properties that are now underperforming or abandoned known as greyfields.<sup>53</sup> As was the case with defining big boxes, it is difficult to settle on a single definition for a vacant or abandoned structure.<sup>54</sup> For purposes of this Article, vacancy and abandonment should be viewed as end points on an empty building continuum. Thus, a vacant or abandoned big box store is one that was formerly inhabited by a retail or grocery store that has since moved out. The newly vacant structure may be one where a tenant has recently departed, and the landlord is maintaining the structure and actively seeking a new tenant. At the other end of the spectrum, the truly abandoned building may be one where the

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53. There are numerous definitions for greyfields. According to one commentator:

Greyfields are old, obsolete and abandoned retail and commercial sites, namely malls. . . . Some [define greyfields as] enclosed, climate-controlled shopping centers that contain at least 400,000 square feet of retail space. Others consider strip centers, power centers (a center once dominated by a few large anchors like Kmart or Walmart), and even neighborhood centers that serve smaller geographic units and are usually anchored by a grocery store to be.

KENNETH M. CHILTON, CENTER FOR ENVTL. POL'Y & MGMT., UNIV. OF LOUISVILLE, GREYFIELDS: THE NEW HORIZON FOR INFILL AND HIGHER DENSITY REGENERATION 1 (2005). Unlike brownfields—former industrial properties that have actual or perceived environmental contamination that must be mitigated before redevelopment can occur—greyfields carry little risk of severe environmental harm because they have typically only been used for retail and parking. *Id.* at 3. Brownfields and greyfields provide redevelopable land that is more sustainable than development on greenfields, or never-before developed, lands.

54. See N.J. STAT. ANN. § 55:19-81 (Supp. 2011) (“[A]ny property that has not been legally occupied for a period of six months and which meets any *one* of the following additional criteria may be deemed to be abandoned property upon a determination by the public officer that: a. The property is in need of rehabilitation . . . c. At least one installment of property tax remains unpaid and delinquent . . . or d. The property has been determined to be a nuisance . . . .”) (emphasis added); ROBERT W. BURCHELL & DAVID LISTOKIN, THE ADAPTIVE REUSE HANDBOOK: PROCEDURES TO INVENTORY, CONTROL, MANAGE, AND REEMPLOY SURPLUS MUNICIPAL PROPERTIES 16 (1981) (“[V]acant structures, for which the original use is no longer economically viable, . . . are largely unoccupied due to their level of deterioration. The owners have walked away from these buildings and the services which normally keep them intact are no longer being provided. Additionally, required property taxes are frequently unpaid and the city is or may be in the process of taking title to the properties via tax foreclosure.”); ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 1 (2006) [hereinafter MALLACH, BRINGING BUILDINGS BACK] (“An abandoned property is a property whose owner has stopped carrying out at least one of the significant responsibilities of property ownership, as a result of which the property is vacant or likely to become vacant in the immediate future.”) (emphasis omitted).

landlord has given up trying to find a new tenant, stopped paying property taxes, and ceased all maintenance and upkeep. The existence of a big box store that sits anywhere on this continuum—empty and completely unused for a period of at least twelve months<sup>55</sup>—is significant and requires municipal attention. Municipalities should more aggressively pursue truly abandoned, deteriorating big box stores, as the harms they contribute are likely more severe. However, even recently vacated big boxes should be monitored because they also have negative effects and could become abandoned.

Some cities have begun to address vacant and abandoned property problems through vacant property regulations, many of which take the form of registration ordinances that track vacancy, finance programs to monitor vacant property, and authorize penalties for violations.<sup>56</sup> While these ordinances are a good first step, they are not comprehensive enough to solve the harms stemming from the vacancy epidemic. Ghostboxes have problems and particularities that are different from those of other abandoned property. First, their location is unique in that they are primarily located in suburban commercial areas, not traditional downtowns or inner city residential areas, which is where much of the abandoned property problem in the United States is located.<sup>57</sup> Second, their physical properties make them less suited for both redevelopment and reuse than other properties.<sup>58</sup> Thus, these structures pose unique challenges.

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55. This time period was selected based on the average amount of time it takes to re-tenant an empty big box store. See JEFF SIMONSON, *COLLIERS INT'L, RE-TENANTING BANKRUPTED BIG BOXES: PAVING THE WAY FOR RETAIL'S REBOUND 3* (James Cook et al. eds., 2011), available at <http://dsg.colliers.com/document.aspx?report=1207.pdf> (showing that empty big boxes in densely populated areas found new tenants in 2.4 quarters, on average, while those in less populated areas took 3.4 quarters, on average, to re-let the structure). However, if a landlord is maintaining the structure and actively seeking new tenants after twelve months, a municipality can decide to wait.

56. See Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URB. LAW. 627, 631 (2010) (discussing vacant property ordinances and explaining that registration requirements “involve[] the disclosure of information that will ease the burdens of code enforcement and facilitate more effective communication with the owner”).

57. See MALLACH, *BRINGING BUILDINGS BACK*, *supra* note 54, at 5.

58. Unlike industrial warehouses, which can be converted to lofts, or groups of abandoned homes, which can be demolished and redeveloped en masse, big box stores often sit on individual lots of less than ten acres, making large-scale redevelopment difficult. See *infra* Part III.B.1 (discussing the physical form of big box stores and its impact on adaptive reuse).

*B. The Severity of the Empty Big Box Problem*

Although turnover and short-term vacancy is normal in a retail landscape,<sup>59</sup> the vacancy rate for big boxes is unprecedented. One source estimated the national retail shopping center vacancy rate to be 11% after the first quarter of 2010.<sup>60</sup> This rate has increased since 2008, when the national retail vacancy average was 8.4%,<sup>61</sup> and 2000, when average retail vacancy was at a low of 6%.<sup>62</sup>

Not only are these stores going dark, but they are staying that way.<sup>63</sup> A study in Texas in 2005 found that the thirty empty former Wal-Marts in the state remained unoccupied for approximately three years on average.<sup>64</sup> A few of the stores remained empty for a decade; one stayed dark for seventeen years.<sup>65</sup> Similarly, a former Kmart in Hastings, Nebraska was vacated in 1992 and sat empty for a decade.<sup>66</sup>

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59. Kraut, *supra* note 19, at 1140 n.4 (“Short-term vacancy is a normal and healthy part of the real estate cycle . . .”).

60. BROWN, *supra* note 7, at 1 (noting that big box retail store losses have been “especially pronounced”).

61. Verne Kopytoff, *Empty Big-box Stores Drag Down Their Neighbors*, SFGATE (May 11, 2009), [http://articles.sfgate.com/2009-05-11/news/17199743\\_1\\_circuit-city-expo-design-center-big-box](http://articles.sfgate.com/2009-05-11/news/17199743_1_circuit-city-expo-design-center-big-box). At that time, San Francisco was on the low end of vacancies and Chicago was in the middle. *Id.*; Eddie Baeb, *Empty Big-box Stores Drive Up Retail Vacancy*, CHICAGOREALESTATEDAILY.COM (May 11, 2009), <http://www.chicagorealestatedaily.com/article/20090511/CRED02/200033999/empty-big-box-stores-drive-up-retail-vacancy> (noting that much of the empty space was in big box anchor stores, and that in the Chicago area alone in May 2009 there were 227 ghostboxes, contributing 10 million square feet). On the high end of retail vacancies, San Antonio, Texas was predicted to be at approximately 20%, and Kansas City at 17% in 2009. THEODORE C. TAUB, AM. L. INST., *DEALING WITH DISTRESSED PROPERTIES: EMPTY STRIP MALLS, FRACTURED CONDOMINIUMS, AND FORECLOSED HOMES 2* (2008).

62. RREEF REAL EST. RES., PUB. NO. 50, *US RETAIL MARKET—INVESTMENT OPPORTUNITIES AT THE PEAK OF THE MARKET 2* ex.2 (2006).

63. Merriam, *supra* note 11, at 29.

64. Hunt & Ginder, *supra* note 9. The study found that of 107 closed Texas Wal-Marts, 65 were occupied at the end of 2004. *Id.* Of those, approximately half were occupied by single tenants and half by multiple tenants. *Id.* As for the single-tenant occupancies, 10 were non-retail (including call centers, schools, and government offices). *Id.* The most common single retail tenant reuses were by Hobby Lobby (6 stores) and Tractor Supply (3 stores). *Id.* A few of the sites were purchased by private entities and then demolished and replaced by other uses, including a car dealership and big box home improvement stores. *Id.*

65. BIGBOXTOOLKIT, INST. FOR LOCAL SELF-RELIANCE, *FACT SHEET—BIG-BOX BLIGHT: THE SPREAD OF DARK STORES* (2007), available at <http://www.bigboxtoolkit.com/images/pdf/bigboxblight.pdf>.

66. CHRISTENSEN, *supra* note 5, at 104. The building is now inhabited by a Head Start program.

Regardless of the reasons for the long vacancies,<sup>67</sup> the number of communities plagued by empty big boxes is increasing, and the severity of the problem has not escaped local policymakers.<sup>68</sup> In a recent survey of city officials from the “200 most populous central [U.S.] cities,” 69% of respondents said that abandoned property was a problem for their cities.<sup>69</sup> More than 500 cities have enacted or proposed vacant property registration ordinances,<sup>70</sup> and at least 75 cities have implemented ordinances to prevent or limit the construction of new big box stores and to prevent abandonment of those already in operation.<sup>71</sup>

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67. There are many possible explanations for the long vacancies: the market cannot accommodate another retail establishment in that location; the former retail tenant prefers to continue paying rent under its lease to prevent competition from moving in; or the owner is waiting to see if the area or economy improve to get more rent or a higher purchase offer.

68. Artists and popular musicians also have taken note; Arcade Fire’s album “The Suburbs,” which contains the song *Sprawl II*, *supra* note 1, won the 2011 Grammy for Album of the Year. *Grammys 2011 Winners*, N.Y. TIMES ARTS BEAT BLOG (Feb. 14, 2011 12:06 AM), <http://artsbeat.blogs.nytimes.com/2011/02/14/grammys-2011-winners/>.

69. Accordino & Johnson, *supra* note 15, at 305 tbl.2 (showing that 69% of total respondents indicated that abandoned and vacant property was a “[p]roblem,” a “[b]ig [p]roblem,” or the “[b]iggest [p]roblem”).

70. *Vacant Property Registration*, SAFEGUARD PROPERTIES, [http://www.safeguardproperties.com/Resources/Vacant\\_Property\\_Registration/Default.aspx?filter=vpr](http://www.safeguardproperties.com/Resources/Vacant_Property_Registration/Default.aspx?filter=vpr) (last visited Feb. 20, 2011) (interactive map) (online database of vacant property registration ordinances that have been proposed, have been enacted, are pending, and are dead). Notably, most vacant property registration ordinances only apply to residential properties. See *Vacant Property Registration Ordinances*, SAFEGUARD PROPERTIES, <http://www2.safeguardproperties.com/vpr/city.php?p=1&l=&b=&s=&st=> (last updated Mar. 2, 2011); Daniel T. Engle & Bernard I. Citron, *Vacant Property Registration Ordinances*, THOMPSON COBURN NEWSLETTER (Thomson Coburn, LLP, St. Louis, MO), [http://www.thompsoncoburn.com/Libraries/Alerts/Vacant\\_Property\\_Registration\\_Ordinances.pdf](http://www.thompsoncoburn.com/Libraries/Alerts/Vacant_Property_Registration_Ordinances.pdf).

71. *Economic Impact Review*, NEW RULES PROJECT, <http://www.newrules.org/retail/rules/economic-impact-review> (last visited Nov. 11, 2011) (documenting nineteen community impact review ordinances); *Formula Business Restrictions*, NEW RULES PROJECT, <http://www.newrules.org/retail/rules/formula-business-restrictions> (last visited Nov. 11, 2011) (documenting twenty-two formula business restrictions); *Local Purchasing Preferences*, NEW RULES PROJECT, <http://www.newrules.org/retail/rules/local-purchasing-preferences> (last visited Nov. 11, 2011) (documenting fifteen local purchasing preferences ordinances); *Preventing Vacant Boxes*, NEW RULES PROJECT, <http://www.newrules.org/retail/rules/preventing-vacant-boxes> (last visited Feb. 20, 2011) (documenting three dark store ordinances); *Store Size Caps*, NEW RULES PROJECT, <http://www.newrules.org/retail/rules/store-size-caps> (last visited Feb. 20, 2011) (documenting over thirty-six store size cap ordinances).

### C. *Reasons for Big Box Vacancy and Abandonment*

There are a variety of forces behind the recent ghostbox trend, but they all have one element in common: the market. More specifically, there are two reasons: (1) over-retailing combined with decreased demand and (2) upsizing.

#### 1. Over-Retailing and Market Demand

Since the construction of the first Target and Wal-Mart stores in 1962, big box development has grown exponentially.<sup>72</sup> Recently, however, retail and commercial establishments have been “overbuilt,” creating more retail space than needed.<sup>73</sup> The amount of retail space per capita has increased 20% since 1970.<sup>74</sup> When developers build new commercial space, but demand for that space has not increased, competition (for shoppers as well as retail tenants) increases.<sup>75</sup> In many instances, the construction of new space also results in vacancies in older, existing structures.<sup>76</sup>

Not only has demand not increased enough to keep pace with new retail construction, but, in many instances, it has decreased. Since 2008, a number of retail chains have begun closing underperforming branches to reduce operating costs.<sup>77</sup> The recession has no doubt exacerbated this problem, contributing to the bankruptcy and liquidation of a number of

72. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66.

73. See *Bakersfield Citizens for Local Control v. City of Bakersfield*, 22 Cal. Rptr. 3d 203, 223 (Cal. Ct. App. 2004) (citing a report about the impact of two new Wal-mart Supercenters, which found that “[t]he two Supercenters represent significant excess capacity . . . [which] will result in oversaturation and fall-out of weaker competitors’ ”); Constance E. Beaumont, *Coping With Superstores*, PLAN. COMMISSIONERS J., Winter 1995, at 14, 14, 16; DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66.

74. James R. Valente & Leslie A. Oringer, *Retail’s Evolving Footprint: Is Excess Capacity Beginning to Develop Across Markets, or Is the Ever-Evolving Retailing Format Hastening Locational and Functional Obsolescence?*, URB. LAND, July 1998, at 30, 31–35.

75. See Kirk McClure, *Managing the Growth of Retail Space: Retail Market Dynamics in Lawrence, Kansas*, in DOWNTOWNS: REVITALIZING THE CENTERS OF SMALL URBAN COMMUNITIES 223, 231–33 (Michael A. Burayidi ed., 2001).

76. *Id.*; see also ALAN MALLACH, BROOKING INST. METRO. POLICY PROGRAM, *FACING THE URBAN CHALLENGE: THE FEDERAL GOVERNMENT AND AMERICA’S OLDER DISTRESSED CITIES* 2, 6 (2010) [hereinafter MALLACH, *FACING*] (“[L]ack of demand . . . has created a new urban landscape dominated by vacant lots and abandoned buildings.”).

77. BROWN, *supra* note 7, at 2 (noting that Sears and Home Depot have each closed fifty locations since 2008 due to underperformance).

large-format retailers.<sup>78</sup> The combination of overbuilding and lower demand has resulted in a glut of empty big box stores.

## 2. Upsizing

Despite overbuilding and the general lack of demand, some big boxes are doing well—so well that they need to move to larger stores. Most big box retailers that face this dilemma choose to build a new building and vacate their previous one.<sup>79</sup> It is typically less expensive for a big box retailer to create a new structure on an undeveloped parcel of land than it is to modify and reuse an existing structure or clean up and build on a brownfield site.<sup>80</sup> Moreover, retailers often prefer to construct a new building rather than add on to their existing building because revenue lost due to interruption of operations while the existing store is under construction would be too great.<sup>81</sup>

Wal-Mart upsizes regularly, though it refers to the practice as “consolidation.”<sup>82</sup> Pursuant to its business plan, Wal-Mart moves out of its original Discount Stores, which contain between 50,000 and 100,000 square feet, and builds new Supercenters—big boxes housing traditional discount department store goods as well as groceries—which may exceed 200,000 square feet.<sup>83</sup> Instead of relocating to a different market, Wal-Mart constructs the new Supercenter in the same community where its smaller, now-vacant store is located; sometimes the new store is on the same street as the empty one.<sup>84</sup> Because this is part of Wal-Mart’s business plan, it intentionally constructs big box stores that have a short life span; these buildings are not made to last.<sup>85</sup>

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78. *Id.* (shuttered retailers include “Linens ‘n Things, Circuit City, Steve & Barry’s, Mervyns, Goody’s, Gottschalks and Sportsman’s Warehouse”). Online shopping is also at fault. *Borders Files for Bankruptcy, To Close Stores*, *supra* note 8.

79. See Salkin, *supra* note 12, at 1278 (addressing the costs of big box construction).

80. *Id.* at 1256. This calculation ignores environmental costs.

81. CHRISTENSEN, *supra* note 5, at 8.

82. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66 (describing consolidation).

83. *Id.* (“In 1994 Wal-Mart had 147 supercenters; in 2002 it had 1,258.”).

84. Cherwin & Harding, *supra* note 4, at 38 (describing Wal-Mart upsizing techniques); Sochar, *supra* note 12, at 699 (same).

85. Merriam, *supra* note 11, at 29.

While these practices originally resulted in the shuffling of various retailers within the community,<sup>86</sup> it is becoming less common for another retailer to move into an abandoned big box store.<sup>87</sup> Many of the big box retailers who upsize are also under long-term leases that do not contain an operating covenant, which would require the tenant to continuously operate the store for a given period.<sup>88</sup> Thus, the retailer vacates and the store goes dark, but the building owner has no incentive (and, in some cases, no legal ability) to locate another tenant for the structure because the vacating retailer is still paying rent.<sup>89</sup>

*D. What Is the Harm in a Ghostbox? Reasons That Empty Big Boxes Are Problematic*

Empty big box stores impose numerous negative externalities on local communities.<sup>90</sup> Depending on where the physical structure lies on the vacancy/abandonment continuum, these harms may include blight, reduced property values, loss of tax revenue, decrease in social capital, and environmental problems. These externalities affect

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86. See generally McClure, *supra* note 75.

87. This is because fewer retailers are expanding and because of structural reasons. See Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 223–24 (Ct. App. 2004) (relying on a study finding “that it had been difficult to find tenants for buildings that formerly housed Wal-Mart stores”); David Winzelberg, *Empty Big-boxes on Long Island Struggle to Find Tenants*, ALLBUSINESS.COM, <http://www.allbusiness.com/real-estate/commercial-residential-property-commercial/12938534-1.html> (last visited Nov. 11, 2011); *infra* Part III.B.1.

88. Allan M. Kaufman, *Operating Clauses in Shopping Centre Leases: Lights Out for the Vacating Tenant*, 18 CAN. BUS. L.J. 245, 245–46 (1991).

89. BAY AREA ECON. FORUM, PUB. ECON. GRP., SUPERCENTERS AND THE TRANSFORMATION OF THE BAY AREA GROCERY INDUSTRY: ISSUES, TRENDS, AND IMPACTS 71–72 (2004) (discussing recapture clauses); ZoBell & Reisch, *supra* note 33, at 8. When a store upsizes, there is typically a solvent building owner and/or lessee who may be involved. Thus, this Article will propose different solutions based in part on the reason for the big box vacancy.

90. Accordino & Johnson, *supra* note 15, at 306. See, for example, S.C. CODE ANN. § 6-34-20(C) (Supp. 2010) stating that:

As a result of the existence of these abandoned facilities, there is an excessive and disproportionate expenditure of public funds, inadequate public and private investment, unmarketability of property, growth in delinquencies, and crime in the areas together with an abnormal exodus of families and businesses so that the decline of these areas impairs the value of private investments and threatens the sound growth and the tax base of taxing districts in the areas, and threatens the health, safety, morals, and welfare of the public.

communities in direct and specific ways and thus provide an incentive for cities to take action.

### 1. Blight and Symbolic Decline

Abandoned properties have “blighting effects,” including weeds, graffiti, litter, loitering, and crime,<sup>91</sup> and big box impact studies have shown that “physical decay and deterioration result[] from store closures.”<sup>92</sup> The extent to which blight is physically manifested on the site of an empty big box store often depends on whether the store is empty due to upsizing or downsizing and whether the building owner or lessee continues upkeep after it has vacated the premises.<sup>93</sup> While not every empty big box store would meet every state’s definition of blighted property,<sup>94</sup> many ghostboxes share characteristics that can generally be deemed blight.<sup>95</sup>

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91. Evans-Cowley, *supra* note 49, at 337 (noting that abandoned big box stores are often “neglected, surrounded by chain link fences and covered in graffiti”); *see also* WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 4 (1990); Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, in *THE CULTURAL MEANING OF URBAN SPACE* 139, 140 (Robert Rotenberg & Gary McDonogh eds., 1993) (addressing abandoned properties as a source of blight); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 *J. CRIM. JUST.* 481 (1993) (discussing a residential property survey finding that blocks containing abandoned buildings had higher rates of property crime than those that did not, even if the buildings were not obviously abandoned). *See, for example*, CONN. GEN. STAT. § 8-290 (1958), stating that:

[T]here exists within the municipalities of this state a large number of real properties containing vacant and abandoned buildings that were once used for industrial or commercial purposes, [and] many of these vacant and abandoned buildings are located in areas which are blighted or dilapidated and . . . the existence of such vacant and abandoned buildings contributes to the further decline of such blighted or dilapidated areas.

92. *Bakersfield*, 22 *Cal. Rptr.* 3d at 223–24.

93. Wal-Mart has an asset management division that “protect[s] the value of [its] assets by working with landlords, tenants and communities to properly maintain [its] excess buildings.” *Asset Management*, WALMART REALTY, <http://walmartrealty.com/Buildings/PropertyManagement.aspx> (last visited Sept. 10, 2011).

94. In the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005), many states enacted statutes defining blight such that non-blighted parcels of land could not be condemned for economic development purposes. *See* George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 *TUL. L. REV.* 45, 51 (2008) (addressing state legislative changes after *Kelo*). *See, for example*, N.C. GEN. STAT. § 160A-515 (2007), stating that:

The blighting effects of abandoned big box stores often contribute to more vacancies in the surrounding commercial district, perpetuating the problem.<sup>96</sup> The “broken windows” theory asserts that even minor signals of disorder, such as weeds in a parking lot or a single broken window in a building, contribute to and accelerate the decline of a neighborhood.<sup>97</sup> A broken window signals that “no one cares” (about the window or the community). As a result, there is no control over, or punishment for, vandalism, so there is no harm or cost imposed on one who breaks another window.<sup>98</sup> Though classically applied in urban environments, the theory translates to the suburbs; ghostboxes are a harm to be avoided.<sup>99</sup>

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“Blighted parcel” shall mean a parcel on which there is a predominance of buildings or improvements . . . and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare.

See, for example, GA. CODE ANN. § 22-1-1 (Supp. 2011), stating that:

As used in this title, the term: (1) “Blighted property,” “blighted,” or “blight” means any urbanized or developed property which: (A) Presents two or more of the following conditions: (i) Uninhabitable, unsafe, or abandoned structures; (ii) Inadequate provisions for ventilation, light, air, or sanitation; . . . (v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or (vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation . . .

95. See Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 833 (2007) (defining blight as “a vivid term used to describe conditions ranging from true dangers to the public health and safety, through obsolescent features reducing market value, to a scary pretext for the acquisition of land which is desired by others”).

96. See Greenbaum, *supra* note 91, at 140; Hirokawa & Gonzalez, *supra* note 56, at 627–28 (recognizing the connection between vacant properties and blight).

97. See S.C. CODE ANN. § 6-34-20(B) (Supp. 2010) (“Many abandoned retail facility sites pose safety concerns.”); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/2/>.

98. See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 2–3 (2004); see generally Kelling & Wilson, *supra* note 97.

99. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (allowing a suburb to rely on empirical evidence gathered in a nearby city, and holding that the suburb did not need “to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [suburb] relies upon is reasonably believed to be relevant to the problem that the [suburb] addresses”); *Bakersfield Citizens for Local Control v.*

## 2. Economic Harm to the Surrounding Community

Empty big box stores also harm communities economically.<sup>100</sup> When operational, many big box stores serve as “anchor stores” for larger shopping areas.<sup>101</sup> The anchor can be a big box store that sits in the middle or on the end of a larger strip shopping mall (often referred to as “power centers”), or it can be a stand-alone building surrounded by other free-standing shops or strip malls.<sup>102</sup> The role of the anchor store is to draw customers to an area; while they are there, they will stop into the other smaller satellite shops as well.<sup>103</sup> The combination of big boxes and smaller stores creates a new, suburbanized version of Main Street.

When cities approve new big box development, they often invest taxpayer money in the construction of infrastructure and provisions of support for these stores, including widened roads, streetlights, and increased police service.<sup>104</sup> Moreover, many local governments provide public subsidies to entice big box developers and retailers to locate in their communities.<sup>105</sup>

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City of Bakersfield, 22 Cal. Rptr. 3d 203, 221 (Ct. App. 2004) (“[P]roposed new shopping centers do not trigger a conclusive presumption of urban decay. However, when there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact.”).

100. See CONN. GEN. STAT. § 8-290 (2009) (“[T]he abandonment and forfeiture of real properties with structures thereon is adversely affecting the economic well being of the municipalities and is inimical to the health, safety and welfare of the residents of this state.”).

101. Raymond G. Truitt, *Retail Giants Rule Power Centers*, PROB. & PROP., Mar.–Apr. 1996, at 38, 38–42 (discussing power centers and anchor stores).

102. *Id.*

103. *Id.*

104. The less desirable a given market, the more likely it is that the city paid for these improvements. See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1090–91 (2005).

105. Farr, *supra* note 52, at 3 (“A 2004 study by Good Jobs First identified 244 Wal-Mart stores that received public subsidies totaling over \$1.0 billion from communities where they opened stores or distribution centers.”) (citation omitted). “Financing usually comes from tax funds that help finance the retrofitting of the abandoned building, providing an incentive to companies that are willing to reuse buildings rather than building new ones.” Sochar, *supra* note 12, at 707 n.78. For example, the city of Brookings, South Dakota bought “a vacant Kmart site for \$3.1 million, demolishing the building at a cost of about \$250,000, and selling the improved property to Lowe’s for \$618,000—giving the chain a subsidy of \$2.7 million.” MITCHELL, *supra* note 10, at 163; see also PHILIP MATTERA & ANNA PURINTON, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS NEVER-ENDING GROWTH, GOOD JOBS FIRST 15–17 (2004); Constance

These take the form of property tax abatements, state corporate income tax credits, the use of tax-increment financing (TIF) districts, reduced land prices, public-private partnerships, and infrastructure assistance such as new highway exits.<sup>106</sup>

After all of these sunk costs have been invested—often to the detriment of existing downtowns—many retailers then abandon their structures. When a big box store goes dark, it harms the smaller shops that it was anchoring. The closure of the big box means less traffic will be drawn to an area, which results in fewer potential customers. Further, the sight of an empty ghostbox parking lot tends to repel many shoppers who might otherwise have shopped at the smaller, still-open stores.<sup>107</sup> Thus, the abandonment of a single big box may result in the shuttering of an entire strip mall.<sup>108</sup> Julia Christensen provides a stark example: “When Kmart moved, so did the surrounding businesses. A grocery store across the street vacated the area, as did supporting businesses nearby. The vacancy left a footprint two blocks long ghostly and barren for over a decade.”<sup>109</sup>

The existence of vacant and abandoned structures also lowers surrounding property values.<sup>110</sup> A study of residential property values in Philadelphia found that houses located adjacent to vacant, derelict sites had an approximately 18% reduction in property value.<sup>111</sup> That study also found that basic

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Beaumont & Leslie Tucker, *Big-Box Sprawl (And How to Control It)*, MUN. LAW., Mar.–Apr. 2002, at 7, 30.

106. Farr, *supra* note 52, at 3 (discussing subsidies); *see also* CHRISTENSEN, *supra* note 5, at 15.

107. *See* McClure, *supra* note 75, at 232; Winzelberg, *supra* note 87; *see, e.g., Atlanta-area Cities Find Abandoned ‘Big-box’ Stores a Big Nuisance*, BUS. LIBR., [http://findarticles.com/p/articles/mi\\_qn4182/is\\_20010202/ai\\_n10142927/?tag=content;col1](http://findarticles.com/p/articles/mi_qn4182/is_20010202/ai_n10142927/?tag=content;col1) (last visited Nov. 11, 2011).

108. Kris Hudson, *More Vacancies at U.S. Malls*, WALL ST. J. (July 8, 2011), <http://online.wsj.com/article/SB10001424052702304793504576432151521531880.html>; *see, e.g., Big-Box Store Closures Hit Plaistow, Salem, N.H. Especially Hard*, ALLBUSINESS.COM, <http://www.allbusiness.com/retail/retailers/11853217-1.html> (last visited Nov. 11, 2011). Moreover, even after a big box store or strip mall has gone dark, environmental problems related to the structure and parking lot continue.

109. CHRISTENSEN, *supra* note 5, at 123.

110. CHILTON, *supra* note 53, at 1; *cf.* Greenbaum, *supra* note 91, at 140 (noting that abandoned properties devalue nearby houses, even if those houses themselves are well taken care of).

111. CLEVELAND LAND LAB, CLEVELAND URB. DESIGN COLLABORATIVE, KENT STATE UNIV., RE-IMAGINING A MORE SUSTAINABLE CLEVELAND: CITYWIDE STRATEGIES FOR REUSE OF VACANT LAND 6 (2008) [hereinafter RE-IMAGINING A

landscaping and cleanup of those vacant lots could increase nearby home values up to 30%.<sup>112</sup> Although these trends are often more obvious in urban, residential neighborhoods, which are denser, the analysis holds true for abandoned big box stores in suburban communities and is often exceedingly evident with respect to the effect of big box abandonment on surrounding retail properties.<sup>113</sup>

Abandoned big box stores further harm communities through loss of local sales and property taxes.<sup>114</sup> This is especially troubling for communities that rely to a large extent on sales tax to fund their operations. Moreover, not only do cities no longer have money coming in after abandonment, but they often must expend additional public money after a piece of property has been abandoned.<sup>115</sup> These expenses include greater police service to monitor the property, greater fire services due to the likelihood of fires in abandoned structures, and the provision of cosmetic improvements meant to make the property look occupied.<sup>116</sup> Further, once a property is abandoned and in a blighted condition, any private party engaging in redevelopment of that parcel will want, and expect, public funding to aid in a redevelopment project.<sup>117</sup>

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MORE SUSTAINABLE CLEVELAND], [http://neighborhoodprogress.org/uploaded\\_pics/reimagining\\_final\\_screen-res\\_file\\_1236290773.pdf](http://neighborhoodprogress.org/uploaded_pics/reimagining_final_screen-res_file_1236290773.pdf).

112. *Id.*

113. *Supra* notes 99, 108 and accompanying text.

114. Garnett, *supra* note 98, at 12–13; McClure, *supra* note 75, at 245.

115. See, for example, S.C. CODE ANN. § 6-34-20(B) (Supp. 2010), stating that:

The abandonment of retail facility sites has resulted in the disruption of communities and increased the cost to local governments by requiring additional police and fire services due to excessive vacancies. A public and corporate purpose of the local governments will be served by restoring the retail facility sites to a productive asset for the communities and result in increased job opportunities.

116. Garnett, *supra* note 98, at 16 n.79; see also INST. FOR LOCAL SELF-RELIANCE, WAL-MART'S IMPACT ON LOCAL POLICE COSTS, [www.newrules.org/retail/policefactsheet.pdf](http://www.newrules.org/retail/policefactsheet.pdf) (“[B]ig-box stores can also increase [police and] 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.”); Schilling, *Code Enforcement*, *supra* note 16, at 110 (“In Austin, Texas, blocks with vacant buildings had 3.2 times as many drug calls to police, 1.8 times as many theft calls, and twice the number of calls for violent behavior as those neighborhoods without vacant properties. Annually, there is over \$73 million in property damage as a result of more than 12,000 fires in abandoned structures.”).

117. McClure, *supra* note 75, at 245 (“[T]he public sector is looked to as a major source of capital for the redevelopment of blighted areas and as a party that must

### 3. Community Health, Social Capital, and Public Space<sup>118</sup>

All of these harms are connected. Pursuant to the broken windows theory, if a community seems to lack order, people will believe that it is dangerous (not just disorderly).<sup>119</sup> This may result in people being less comfortable in their communities, staying inside, and disconnecting from their neighbors.<sup>120</sup> They may tend to use the streets less frequently (which, in the suburbs, is already a small amount) and grow increasingly atomized.<sup>121</sup> In her classic book about urban environments, Jane Jacobs explains that a neighborhood is made safe, lively, and inviting through the presence of activity and “eyes on the street,” which in turn reduces crime.<sup>122</sup> By their nature, the suburbs lack this type of street life; indeed, many lack sidewalks. When the few semblances of third places that people in the suburbs have to be social and interact—their commercial retail spaces—begin to decline, it can accelerate this atomization and reduce social capital,<sup>123</sup> leading to a

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minimize the risk of the other parties who participate in the redevelopment process.”).

118. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 287 (2000) [hereinafter PUTNAM, *BOWLING ALONE*] (“By virtually every conceivable measure, social capital [in the United States] has eroded steadily and sometimes dramatically over the past two generations.”); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 *YALE L.J.* 598, 628 (2006) (describing Joel Kotkin’s idea of a sacred city and noting that “‘sacredness’ is an expression of the kind of social capital that correlates with, and is promoted by, healthy city life” and noting that “[a]rchitectural beauty may indeed help build such social capital”); Robert D. Putnam, *The Strange Disappearance of Civic America*, *AM. PROSPECT*, no. 24, Winter 1996.

119. See *supra* Part II.D.1.

120. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165, 1177–78 (1996) (discussing “a general apprehension in pedestrians” associated with “chronic street nuisance”).

121. Kelling & Wilson, *supra* note 97, at 31. See generally PUTNAM, *BOWLING ALONE*, *supra* note 118 (discussing the erosion of civic engagement).

122. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 35 (1961) (“[T]he sidewalk must have users on it fairly continuously, both to add to the number of effective eyes on the street and to induce the people in buildings along the street to watch the sidewalks in sufficient numbers.”).

123. See Frank B. Cross, *Law and Trust*, 93 *GEO. L.J.* 1457, 1476–77 (2005). Cross writes that:

Despite the vagueness of attempts to define social capital, something in the concept seems to be closely related to levels of societal trust and trustworthiness, and to the participation in private groups . . . . It is thought to be embedded in a network or networks in which members cooperate thanks to some level of mutual trust.

breakdown of community.<sup>124</sup> As Professor Nicole Stelle Garnett recognizes, “[s]ocial scientists have long linked property conditions with community health. Put most simply, the presence of an ‘eyesore’ is a negative indicator of neighborhood health.”<sup>125</sup> A decrease in public space, and thus in social capital, may also lead to a decrease in economic productivity.<sup>126</sup> The damage to urban and suburban vitality that results from the loss of these quasi-third spaces provides yet another incentive for cities to take action to alleviate the harms caused by ghostboxes.

### III. SOLUTIONS

In the face of these harms, it is easy to forget that in ghostboxes also lies opportunity for revisioning. Traditionally, vacant greenfield<sup>127</sup> space exemplifies opportunity, while vacant and abandoned structures symbolize decline.<sup>128</sup> Perhaps this is because “[r]ather than comprehensive, forward planning which reflects a community’s considered vision of its future, we in the United States have a land-use ‘plan’ produced in reaction to individual developer’s proposals.”<sup>129</sup> This approach is

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*Id.* (footnotes omitted).

124. JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 175–216 (1993) (addressing urban sprawl as a cause of loss of community); cf. John N. Tye & Morgan W. Williams, *Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans*, 44 HARV. C.R.-C.L. L. REV. 255, 257–58 (2009) (“Scholars have found relationships between high levels of social capital and positive social phenomena, including well-functioning democratic governments, better health and education outcomes, and happiness and life satisfaction.”) (footnotes omitted).

125. Garnett, *supra* note 98, at 4 (footnotes and parentheses omitted).

126. See Cross, *supra* note 123, at 1477 (“[T]here is a widespread and growing belief that social capital is important to economic growth.”).

127. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 791 (1995) (defining a greenfield as “land that has never been used for manufacturing or commercial activities and which carries with it none of the potential for environmental liability of a Brownfield”); Lincoln L. Davies, Note, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 293 (1999) (defining greenfields as “open areas of land not yet consumed by growing cities and suburbs”).

128. H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 29, 44 (1996) (“Abandoned houses are not only symbols of decline, but they actively cause decline.”).

129. John L. Horwich, *Environmental Planning: Lessons from New South Wales, Australia in the Integration of Land-Use Planning and Environmental Protection*, 17 VA. ENVTL. L.J. 267, 271 (1998).

beginning to change, both in the scholarly literature and in practice.<sup>130</sup> Local governments can work with their communities to create a new image and identity.<sup>131</sup> Thus, the failure or departure of a big box retailer reveals the opportunity for something creative, sustainable, and community-serving to enter in its place, which can in turn create a more competitive economic and business climate.

Having presented the extent of the ghostbox epidemic and the evidence that communities are suffering as a result, this Article will now briefly discuss what some municipalities have done to prevent the construction of big box stores. It will then turn to the heart of the problem at hand—existing empty big box stores—and present and evaluate the primary solutions: reinhabitation and reuse, or demolition and redevelopment or regreening.<sup>132</sup> The Article proposes a framework to aid local officials in choosing the best solution for their community, and Part IV.B provides specific ways that officials can use their police powers to implement those solutions.

#### A. *Prospective Solutions*

As municipalities come to understand the destruction that big box stores have wrought in their communities, many have begun to control and limit their construction. While the scholarly literature pertaining to big box abandonment is thin, it is nearly all concentrated on forward-looking policies and prospective solutions.<sup>133</sup> One of the most popular solutions is to

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130. Jerrold A. Long, *Sustainability Starts Locally: Untying the Hands of Local Governments to Create Sustainable Communities*, 10 WYO. L. REV. 1, 2 (2010) (“Sustainable communities must emerge from a *local* exercise in creating an imagined future and developing the means to achieve that future.”).

131. Peter Pollock, *A Comment on Making Sustainable Land-Use Planning Work*, 80 U. COLO. L. REV. 999, 1001 (2009) (discussing Boulder, Colorado’s “history of using a variety of different land-use planning tools in order to achieve the community’s vision”).

132. See generally DUNHAM-JONES & WILLIAMSON, *supra* note 24 (using the term “regreening”).

133. See, e.g., 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., no. 3, 2005, at 31; Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907 (2005); Evans-Cowley, *supra* note 49, at 330 (recognizing that “there has been limited research on the design impacts” of big box retailers); Salkin, *supra* note 12; Sochar, *supra* note 12, at 699–700; ZoBell & Reisch, *supra* note 33, at 4; Akila Sankar McConnell, Note, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, 53 DUKE L.J. 1537 (2004).

impose a size cap ordinance that limits the square footage of new development.<sup>134</sup> Setting a cap of 20,000 or 30,000 square feet might allow for a grocery store, but would prohibit a Wal-Mart Supercenter from entering the community.<sup>135</sup> Some municipalities have also begun to require certain design standards, such as roof and façade modulation or the specification of certain building materials.<sup>136</sup> Design requirements can make it easier for a big box store to be broken down into multiple smaller stores should it become vacant.

Some municipalities are now imposing bonding measures on big box retailers. These ordinances require the retailer or developer to provide money at the time of construction that can be used to demolish the building in the event of its future abandonment.<sup>137</sup> Similarly, some new ordinances include accountability clauses, which require a big box developer to provide, at the time of permit approval, plans for reuse of the building if it were to be vacated.<sup>138</sup> Various communities have adopted formula retail ordinances, which require special

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134. See, e.g., Paul Shigley, *Big Box Regulations Sweep the State: Proposed Wal-Mart Supercenters Are at Center of Debate*, CAL. PLAN. & DEV. REP., Jan. 2004 (noting that numerous California cities and counties have regulations that limit big box style development).

135. See, e.g., BOXBOROUGH, MA., ZONING BYLAW art. 4, § 4003(4) (2000), available at <http://www.town.boxborough.ma.us/ZoningBylaws.pdf> (establishing a 25,000 square foot cap on business and industrial uses); ROCKVILLE, MD., CODE § 25-332(a)(1) (2000), available at <http://www.newrules.org/retail/rules/store-size-caps/store-size-cap-rockville-md> (“[N]o retail establishment shall exceed 65,000 square feet of total gross floor area.”); SANTA FE, N.M., CODE § 14-8.8(C) (2011), available at <http://clerkshq.com/default.ashx?clientsite=Santafe-nm> (“In no case shall any one retail establishment exceed 150,000 square feet of gross floor area . . .”).

136. Façade modulation serves to “break up the overall bulk and mass of the exterior of buildings and structures” in order to provide visual interest. MERCER ISLAND, WA., CODE § 19.12.030(B)(2) (2010), available at <http://www.codepublishing.com/wa/mercerisland/>; see also Evans-Cowley, *supra* note 49, at 334–35 (describing adopted regulations).

137. See, e.g., OAKDALE, CAL., CODE § 36-23.35(R) (2011), available at <http://clerkshq.com/default.ashx?clientsite=oakdale-ca> (requiring all major retail development to carry a performance/surety bond that provides sufficient funding to demolish the building and maintain the vacant site if the building is abandoned for more than a year). These ordinances fail to confront a key underlying issue: whether demolition is better than the possibility of reuse.

138. See, e.g., BOZEMAN, MONT., CODE § 18.66.040(A) (2003), available at <http://www.newrules.org/retail/rules/development-moratoria/store-size-cap-bozeman-mt> (“Applications for large scale retail development shall include a renewal plan that will afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the structure in the event of closure or relocation by the original occupant.”).

discretionary approval, such as a conditional use permit, for any “chain” store that has more than a given number of existing locations or branches.<sup>139</sup> Finally, developers wishing to construct a big box store in certain municipalities must conduct traffic and/or economic impact analyses showing what effects the new big box store will have on the community.<sup>140</sup>

These anti-big box ordinances are innovative and have had some success.<sup>141</sup> Unfortunately, most communities in the United States do not currently have such ordinances in place.<sup>142</sup> Further, even in those towns that have adopted these types of regulations, there are existing big boxes that were constructed prior to enactment of the ordinances and thus are not subject to them. Therefore, the focus of this Article is the numerous existing, empty big box stores—those that were constructed without a demolition bond or reuse plan in place.

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139. See, e.g., S.F., CAL., PLANNING CODE § 703.3(a)(9) (2011), available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco\\_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca). The formula retail use ordinance sets forth findings, including that:

[T]he unregulated and unmonitored establishment of additional formula retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.

*Id.*

140. See, e.g., BRATTLEBORO, VT., ZONING ORDINANCE art. 2, § 2337(A) (2010), available at <http://www.brattleboro.org/vertical/Sites/%7BF60A5D5E-AC5C-4F97-891A-615C172A5783%7D/uploads/%7B38BE2D4F-F65A-482E-8A84-2AAA3D4DDFB1%7D.PDF> (“No single Retail Store . . . shall have a Floor Area greater than 65,000 square feet, unless it . . . provide[s] . . . detailed analyses” of: (1) the “[i]mpact on employment;” (2) the “costs of public and social services attributable to the project;” and (3) the “[i]mpact on commercial and residential property values.”).

141. A recent study of U.S. planners found that these big box regulatory techniques have had only moderate success. See Evans-Cowley, *supra* note 49, at 342.

142. There is some question about the ability of these ordinances to withstand constitutional challenge. See *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 848 (11th Cir. 2008) (holding that the formula retail ban violated the Dormant Commerce Clause); Brannon P. Denning, *Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update*, 58 CASE W. RES. L. REV. 1233 (2008). *But cf.* *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1022 (E.D. Cal. 2006) (upholding an ordinance that banned discount superstores).

*B. The Possible Second Lives of Existing Empty Big Box Stores*

1. Reuse

When considering what should be done with an empty big box building, the simplest answer would be reuse by another big box retail tenant: The location is probably suitable, the general structure of most big boxes (warehouse and loading areas) is identical, and the parking is sufficient. However, there are a number of problems that make reinhabitation by another big box retailer less common than one might expect.

First, many big box leases have clauses that expressly disallow a competitor from leasing space after it is vacated.<sup>143</sup> For example, Wal-Mart leases commonly disallow a Kmart or Target from taking over after Wal-Mart vacates a building.<sup>144</sup> Additionally, if the abandoned big box store is in a popular suburban retail shopping destination, it is possible that the other, successful big box stores already have outlets in the vicinity.

In some cases, economics are the cause of abandonment: Some big boxes go dark because a location can no longer sustain retail use.<sup>145</sup> Thus, that location would no longer be “appropriate or viable” for another big box retailer.<sup>146</sup> In today’s market, the owners of empty big box stores that are releasing space to other retailers are often forced to do so at dramatically low rental rates.<sup>147</sup> Further, new leases are for

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143. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 67; TAUB, *supra* note 61, at 2.

144. Cherwin & Harding, *supra* note 4, at 39.

145. CHILTON, *supra* note 53, at 3–4. While the location might not support a year-round retail use, there has been some success with seasonal “pop-up” stores: The big box retailer is only present and open during the holidays when people tend to shop more. See Julie Bosman, *Borders to Open 25 Temporary Stores for Holiday Sales*, N.Y. TIMES, Sept. 29, 2010, at B2 (noting that Borders opened pop-up stores during the holiday season in malls where they once had stores that they had recently closed); Keith Mulvihill, *Very Brief Tenants, and Why Landlords Like Them*, N.Y. TIMES, June 23, 2010, at B5 (“[I]n the last few years pop-ups have flourished in New York regardless of the holiday calendar. For building owners they are a way to fill vacant space . . .”).

146. BURCHELL & LISTOKIN, *supra* note 54, at 2 (discussing property reuse).

147. Some evidence shows that current rents are nearly half of what the prior tenant was paying. BROWN, *supra* note 7, at 3 (noting that most leases signed in the first half of 2010 for reuse of empty big box stores “have been executed at rates from 30 to 40 percent below the peak levels of just a few years ago” and sometimes “as much as 50 percent or more”).

shorter periods of time—often ten years instead of twenty.<sup>148</sup> In the face of these figures, some owners of vacant big box stores would prefer to find different paths forward. Thus, because direct reuse is often unlikely or unsatisfactory, cities and developers have begun to think of ghostboxes as sites for potential *adaptive* reuse, the objective of which is to use

surplus structures or land for something different from their original purpose. . . . [I]t is the conversion of these structures into sufficiently unique economic entities that secure a potential to succeed in the future where a reinstatement of uses similar to those of the past would be likely to fail.<sup>149</sup>

#### *a. Benefits of Adaptive Reuse*

Local governments are beginning to recognize the sustainable development opportunities embodied in adaptive reuse projects and thus some have passed adaptive reuse ordinances.<sup>150</sup> Adaptive reuse is popular in urban cores, where old, historic, industrial properties are reborn as lofts and mixed-use buildings. Many of these ordinances have historic preservation as their goal.<sup>151</sup> Others, however, seek to foster economic development and sustainable, infill development. For example, Los Angeles recently adopted an adaptive reuse ordinance that incentivizes developers to reuse existing

148. *Id.*

149. BURCHELL & LISTOKIN, *supra* note 54, at 2.

150. *See, e.g.*, MANHEIM TOWNSHIP, PA., ORDINANCE art. 23, § 2309 (2011), available at <http://www.manheimtownship.org/DocumentView.aspx?DID=944>; BURLINGTON, VT., ORDINANCE app. A, art. 4, pt. 4, § 4.4.5(d)(7)(C) (2011), available at <http://library.municode.com/index.aspx?clientID=13987&stateID=45&statername=Vermont> (Adaptive Reuse Bonus).

151. *See, e.g.*, PHX, ARIZ., ZONING ORDINANCE ch. 5., § 507 TAB I(K)(2) (2011), available at <http://www.codepublishing.com/az/phoenix/> (“[H]istorically significant buildings and their related landscape setting should be retained and restored, or put to adaptive reuse . . . .”); LAWRENCE, KAN., LAND DEVELOPMENT CODE art. 5, ch. 20, § 20-501(1) (2006), available at [http://www.lawrenceks.org/planning/documents/DevCode\\_2009.pdf](http://www.lawrenceks.org/planning/documents/DevCode_2009.pdf) (“Special Use approval may be granted in any Zoning District for an Adaptive Reuse provided the property is listed individually or as a contributing Structure to a historic district . . . .”); BELLINGHAM, WASH., CODE tit. 20, ch. 37, § 20.37.210(B)(2) (2011), available at <http://www.cob.org/web/bmcode.nsf/f6281a531e9ead4588257384007b2367/b89877bad63f7d9e882577cf008038a5%21OpenDocument> (“Height limits and building square footages are lowered to . . . discourage demolition of buildings with historic integrity and encourage adaptive reuse of structures by providing additional flexibility of use.”).

buildings by lowering the cost of renovation projects<sup>152</sup> and also promotes the city's goal of smart growth.<sup>153</sup>

Adaptive reuse of abandoned big box stores is a burgeoning topic in the architecture and design communities. Julia Christensen recently published *Big Box Reuse*, which provides case studies of vacant big boxes across the United States that have been adaptively reused.<sup>154</sup> Further, there have been many competitions seeking creative ideas for proposed reuses, such as the Dead Malls<sup>155</sup> and ReBurbia contests.<sup>156</sup> These competitions have resulted in some outstanding proposals, such as turning big box stores into greenhouses and farms.<sup>157</sup> Though some would argue that these ideas are too idealistic or utopian, they are beginning to be put into practice.<sup>158</sup>

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152. Costs are reduced through incentives such as waivers of density restrictions, parking requirements, and exemption from site plan review requirements. *See, e.g.*, L.A., CAL., CODE ch. I, art. 2, § 12.22-A(26)(h)–(j) (2011), available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lmc\\_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lmc_ca).

153. *See* James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001) ("Smart growth includes a modernization of land use policy that can affect land use, growth management, public infrastructure and facilities, social welfare, natural resources, environment quality, and the quality of life."); Matthew A. Young, Note, *Adapting to Adaptive Reuse: Comments and Concerns About the Impacts of a Growing Phenomenon*, 18 S. CAL. INTERDISC. L.J. 703, 703–11 (2009).

154. *See generally* CHRISTENSEN, *supra* note 5.

155. In 2003, the Los Angeles Forum for Architecture and Urban Design launched the Dead Malls competition to "challenge[] the design and planning community to counter the trend towards the dereliction, abandonment, and 'death' of the regional mall and invite[] approaches to rethinking its urbanistic and architectural milieu." *Dead Malls Competition*, L.A. F. ARCHITECTURE & URB. DESIGN, <http://www.laforum.org/content/competitions/dead-malls> (last visited Sept. 5, 2011).

156. The ReBurbia design competition sought submissions from architects, urban designers, planners and engineers to "re-envision[]" the suburbs. *Announcing the Reurbia Design Competition!*, REBURBIA, <http://www.reurbia.com/about/> (last visited Oct. 8, 2011). The second-runner-up proposed turning a ghostbox parking lot into a farm and the structure into a greenhouse and restaurant. *Reurbia Winners Announced!*, REBURBIA, <http://www.reurbia.com> (last visited Sept. 5, 2011).

157. *Reurbia Winners Announced!*, *supra* note 156.

158. For example, the Galleria Mall in Cleveland, Ohio, is growing food for local restaurants in space where retail stores have closed. Katie McCaskey, *Future Farmers of the Mall*, AOL REAL EST. (Mar. 12, 2010, 5:04 PM), <http://www.rentedspaces.com/2010/03/12/future-farmers-of-the-mall/>. A portion of the mall now functions as an indoor greenhouse called "Gardens Under Glass." GARDENS UNDER GLASS, <http://web.me.com/gardensunderglass/gardensunderglass/Welcome.html> (last visited Sept. 5, 2011). Those who run the program have a number of long-term goals, including serving as an educational resource for urban gardeners and cultivating a community of like-minded businesses in the

There are a number of benefits to adaptively reusing existing structures. In addition to furthering infill development goals and promoting reuse of existing buildings instead of new construction, adaptive reuse also allows for more diversity, which is especially relevant in the suburban context. Typically, the rent in an existing, abandoned big box building will be much cheaper than that in a newly developed shopping center.<sup>159</sup> Thus, businesses that might not be able to afford space in a new development, such as community-serving non-profit enterprises or ethnic specialty stores, can reinhabit an abandoned big box.<sup>160</sup> These types of uses can then serve as a new “third place” for local communities.<sup>161</sup>

Another benefit to adaptive reuse is that, from a green building and sustainable development perspective, it is always more efficient to modify and reuse an existing building than it is to construct a new building—even an energy-efficient or LEED-certified one.<sup>162</sup> This is so for a number of reasons. First, the infrastructure surrounding and supporting an existing big box store is already in place. Water, electrical feeds, and telephone and sewer systems are connected; lighting is installed; roads leading to the area are constructed and maintained; and intersections leading to store entrances have often been widened and traffic lights have been installed.<sup>163</sup>

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unused portion of the mall. *Our Mission*, GARDENS UNDER GLASS, [http://web.me.com/gardensunderglass/gardensunderglass/our\\_mission.html](http://web.me.com/gardensunderglass/gardensunderglass/our_mission.html) (last visited Sept. 5, 2011). Of course, examples such as these are still the exception, not the rule.

159. BROWN, *supra* note 7, at 3.

160. Many first-ring suburbs—the innermost, original suburbs—now predominantly house immigrants. The location of ethnic restaurants and specialty stores in abandoned big box stores contributes to the diversity of these neighborhoods. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 68.

161. One concern with this approach is that the adaptive use would not serve as an anchor and thus could result in failure of satellite stores.

162. Michele Lamprakos, *The Greenest Building Is One Already Built*, BUS. J., <http://www.bizjournals.com/triad/stories/2009/04/20/editorial1.html> (last modified Apr. 20, 2009, 2:49 PM) (quoting Carl Elefante); *see also* Sarah Schindler, *Following Industry’s LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 349 (2010).

163. *See* CHILTON, *supra* note 53, at 2–3 (noting that redevelopment of older structures may be less expensive than new development because of the existing infrastructure); *Greyfields Can Be Green Too*, GREEN-BUILDINGS.COM, <http://www.green-buildings.com/content/78241-greyfields-can-be-green-too> (last visited Oct. 22, 2011).

Adaptive reuse reduces new sprawl by concentrating development on greyfields instead of greenfields.<sup>164</sup>

Additionally, existing big box stores have a tremendous amount of embodied energy, which is “all the energy necessary to extract, refine, transform and utilize the materials.”<sup>165</sup> Because new building codes are more arduous to comply with than they once were,<sup>166</sup> it may be less expensive from a purely monetary standpoint to construct a new building than to retrofit an existing building to current code standards. However, because there is so much embodied energy in an existing building, the carbon investment in constructing a new building is much higher, and thus it is more sustainable to retrofit an existing one.<sup>167</sup> A new building requires not just the purchase of building materials but the construction and fabrication of those materials, as well as their shipping to the construction site.

Just as there are problems with straight reinhabitation by an existing big box retailer, there are also problems with adaptive reuse of abandoned big boxes. Nevertheless, most of these can be overcome.

#### *b. Problems with Adaptive Reuse*

The biggest hurdle in adaptive reuse of empty big box stores is the structures themselves, which are cavernous and lack windows or interior walls. Thus, difficulties arise when trying to put new uses in these spaces; especially problematic are the dark back corners and an inability to comply with the placement of exits pursuant to the fire code.<sup>168</sup> While these problems prohibit many uses from reinhabiting an abandoned

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164. Philip Carter Strother, *Brownfields of Dreams in the Old Dominion: Redeveloping Brownfields in Virginia*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 269, 270–71 (2000) (addressing brownfield redevelopment).

165. William A. McDonough, *A Dialogue on Design*, 30 U. RICH. L. REV. 1071, 1089 (1996); see also HOWARD T. ODUM, ENVIRONMENTAL ACCOUNTING: ENERGY AND ENVIRONMENTAL DECISION MAKING 1 (1996) (defining embodied energy as “both the work of nature and that of humans in generating products and services”).

166. This is especially true in earthquake-prone areas such as San Francisco and Los Angeles.

167. See generally Schindler, *supra* note 162.

168. Paul Alongi, *Communities Struggle with Empty 'Big Box' Stores*, GREENVILLE NEWS, Apr. 6, 2005, at 15B (addressing difficulties with reusing abandoned big box stores). If multiple tenants attempt to reuse a ghostbox, it is difficult to provide easy access to the outside, as most big boxes have a single entrance and exit.

big box store, a small number of these structures have been successfully modified and reused as churches, bowling alleys, charter schools, museums, and libraries.<sup>169</sup> However, the modifications required to make ghostboxes suitable for these new uses are varied and expensive.<sup>170</sup> For example, because big boxes lack windows, skylights must usually be installed for new uses. Also, because big boxes are constructed as large warehouses, there are no internal walls or divisions, which other uses typically need or desire.<sup>171</sup>

In addition to interior spatial problems, big box stores are typically constructed with inexpensive exterior materials and little to no façade modulation. This makes it extremely difficult to divide a big box store into multiple smaller stores after it has been vacated.<sup>172</sup> If a prospective re-user wants to make drastic exterior modifications and structural alterations, it is possible that new site requirements will be triggered, such as setback or open space requirements that were not yet in place when the

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169. See CHRISTENSEN, *supra* note 5 (providing examples of reuse); Bryan J. Paulsen, *Smart Moves in Small Towns: Creative Reuse Strategies Help Put Local Communities on the Map*, COM. INV. REAL EST., July–Aug. 2004, available at [http://www.ciremagazine.com/article.php?article\\_id=92](http://www.ciremagazine.com/article.php?article_id=92); Don Walker, *Milwaukee May Get Indoor Bike Park*, MILWAUKEE WIS. J. SENTINEL (Mar. 2, 2010), <http://www.jsonline.com/blogs/business/85995622.html> (announcing the conversion of a Menard’s department store into a BMX park).

170. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 75 (“[I]mplementation of redevelopment projects is usually more difficult—and more costly—than new construction.”); Cherwin & Harding, *supra* note 4, at 40 (“Refitting the space for a use often can be more expensive than new construction, particularly in communities where land is relatively cheap.”).

171. See LISA REAGAN ET AL., COUNCIL OF EDUC. FACILITY PLANNERS INT’L, BUILDING COMMUNITY: A POST-OCCUPANCY LOOK AT THE MARYVALE MALL ADAPTIVE REUSE PROJECT 2 (2006), available at <http://web.archive.org/web/20060929024822/http://www.cefpi.org/pdf/issuetrak0206.pdf>. When an entity leases a space, it typically installs its own “tenant improvements” (T.I.s), which can also be costly and time-consuming. See John C. Murray, *The 2001 Leasehold Endorsements for Owner’s and Lender’s Policies (With Forms)*, PRAC. REAL EST. LAW., May 2006, at 53, 55 (2006) (discussing “major tenants (such as large law firms) who may have hundreds of thousands (or even millions) of dollars invested in tenant improvements”). However, rental space is typically constructed with potential T.I.s in mind and has windows and partitions in place. Cf. 1 REAL ESTATE TRANSACTIONS: STRUCTURE AND ANALYSIS WITH FORMS § 3:119–20 (2011) (describing the benefits from the landlord, rather than the tenant, making improvements).

172. Some building owners are finding ways to work around these problems, such as subdividing former big box stores into a few smaller stores. See Winzelberg, *supra* note 87. However, “this process is far more complex and expensive than merely putting up drywall. Plumbing, heating, air conditioning and ventilation systems need to be adapted and can cost \$4 to \$6 per square foot.” BROWN, *supra* note 7, at 9. Further, when dividing a big box into smaller stores, the result is a series of long, narrow stores.

original structure was built.<sup>173</sup> This adds an additional level of costly permits and approvals.<sup>174</sup>

Moreover, there are a number of legal and real estate considerations that must be taken into account before an empty big box can be adaptively reused. First, one must examine the ownership and leasing structure of the store. If the structure and the land are both owned by the vacating big box retailer, that retailer will have control over—and will want to restrict—those who may use the space in the future. For example, when Wal-Mart sells a structure that it formerly owned, it requires the purchaser to sign a letter of intent that prohibits the property from being used as a large discount store, warehouse membership club, grocery store, pharmacy, large bowling alley, movie theatre, or health spa in the future.<sup>175</sup> Similarly, the retailer could have been leasing the store from the owner but might have required the owner to include a non-compete clause in the original lease, restricting the ability of the owner to lease the site to a retail competitor for a certain amount of time after the original lease ends.<sup>176</sup> These restrictive covenants and contract clauses are legally permissible but they severely limit the possibilities for creative reuse.<sup>177</sup> It is also important to examine whether there is a master lease in place that covers the empty big box; the existence of such an agreement might mean that multiple parties have interests in the land and structure, and multiple leases might cover a single big box store.<sup>178</sup> If the store is vacant but the tenant is continuing to

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173. CHILTON, *supra* note 53, at 5.

174. However, cities could alleviate these problems through ordinances that promote adaptive reuse.

175. See Cherwin & Harding, *supra* note 4, at 39; Walmart Realty, Purchaser's Letter of Intent, available at [www.walmartrealty.com/Media/128566298747968750.doc](http://www.walmartrealty.com/Media/128566298747968750.doc) (last visited Sept. 5, 2011).

176. See Cherwin & Harding, *supra* note 4, at 39.

177. As between a restrictive covenant and a zoning ordinance, the more restrictive controls, unless the zoning makes the covenanted use or non-use illegal. See *Byrd v. City of N. Augusta*, 201 S.E.2d 744, 746 (S.C. 1974); see also 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 242 (1995). Thus, it is possible that a well-crafted zoning ordinance intended to avoid prolonged abandonment, especially when conditions of blight become visible, could override these restrictions. See *infra* note 270 and accompanying text.

178. If the ghostbox is part of a larger shopping center, there might be an agreement in place governing the relationship between the developer and retail tenants; these interests might need to be consolidated before reuse could take place. See Cherwin & Harding, *supra* note 4, at 39; Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622–23 (1998) (noting that part of the reason empty storefronts in Moscow remained empty was because there were multiple levels of

pay the rent, the owner might not be interested in finding a replacement tenant or new use. This scenario is not uncommon, and is used by some big box retailers to protect their market share and prevent competition from moving in, especially if the vacating retailer has upsized and opened a new store nearby.<sup>179</sup>

These problems combine to explain the reason that letting the private market find adaptive reuses for these structures has not been successful on a large scale.<sup>180</sup> Thus, municipalities must step in and support or require adaptive reuse of empty big box structures. The biggest question that cities must answer when considering adaptive reuse of big box stores is what they want the future of their communities to look like.<sup>181</sup> “The primary objection is that the [big box] site is culturally toxic; it was probably imposed upon the town with such corporate voracity that they question whether the building should even be there in the first place . . . .”<sup>182</sup> Abandoned big box stores are legacies of poor planning decisions made by planners and city councilpersons; they are seen as “symbols of a deeper-rooted pattern of haphazard development.”<sup>183</sup> They are often located in suburban commercial districts that are removed from homes and offices on land that was cheap to purchase.<sup>184</sup> So, despite the multifarious benefits of adaptive

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ownership within a single building, and “each owner can block the others from using the space as a storefront. No one can set up shop without collecting the consent of all the other owners”).

179. If the vacating retailer is still paying a mortgage on the property, the lender might also have rights, especially as to the structure’s reuse by another retailer. Loan documents often provide lenders with the ability to approve or deny a new building tenant, use, or proposed demolition. See Brad Messer, *Redeveloping Mall and Shopping Center Space Vacated by Big Retailers*, PRAC. REAL EST. LAW., Nov. 2003, at 39, 41–42.

180. “[L]and banks arose from the recognition that an increasing number of parcels of land, whether privately owned or held by the local government as a result of foreclosure procedures, were not being reclaimed or redeveloped by market forces.” Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., no. 2, Winter 2005, at 140, 142.

181. See CHRISTENSEN, *supra* note 5, at 121 (“Is this the building typology that we want our future museums, churches, and libraries to operate out of?”).

182. *Id.* at 119.

183. CHILTON, *supra* note 53, at 1.

184. Before constructing a new building, a developer typically conducts a feasibility analysis. While some big boxes are built on cheap land, and then draw traffic out to these former greenfields, some are constructed at busy intersections and highway exchanges—sites that already had large amounts of traffic. See CHILTON, *supra* note 53, at 2.

reuse, cities must seriously examine whether they want to reuse these structures just because they are there. If one were able to reverse the poor planning decisions of the past and start with a clean slate, it is unlikely that one would choose to place all the big box structures in their current locations.

## 2. Demolition and Redevelopment or Regreening

Because big box stores are most often constructed on inexpensive parcels of suburban land, rather than in town centers,<sup>185</sup> municipal officials must consider whether their communities would be better served by reuse of these structures in their current locations or by their demolition. The goal of many city planners is to move away from sprawl-style construction and toward a smart growth ideal of clustered, walkable, mixed-use development—housing and office space over ground-floor retail.<sup>186</sup> Placing a library or a community center where a Wal-Mart used to be will only continue to require people to get in their cars in order to participate in civic life. Instead, some see the existence of ghostboxes as an opportunity to bring new urbanism<sup>187</sup> to suburbia; these spaces can be repurposed into new town centers, traditional main

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185. *Supra* Part I.B.

186. See PEORIA, ILL., LAND DEVELOPMENT CODE § 1.5(B), available at <http://www.formbasedcodes.org/files/Peoria%20Land%20Development%20Code.pdf>. Peoria's code states that:

New development regulations for the Heart of Peoria are necessary because the existing zoning and subdivision ordinances include provisions that work against the realization of revitalized, pedestrian-friendly commercial areas, and the renovation and preservation of inner city neighborhoods. This development code in contrast with previous codes focuses on the creation of mixed-use, walkable neighborhoods.

*Id.* See generally DUANY ET AL., *supra* note 21.

187. "New urbanists want to transform the current mix of residential neighborhoods, office complexes, strip malls, shopping centers, and underused city land that now dominates America's metropolitan landscape into 'neighborhoods of housing, parks, and schools placed within walking distance of shops, civic services, jobs, and transit.'" Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1091 (1996) (quoting PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* 16 (1993)). Examples of new urbanist communities include Seaside, Florida, and Celebration, Florida. See Michael J. Stewart, Comment, *Growth and Its Implications: An Evaluation of Tennessee's Growth Management Plan*, 67 TENN. L. REV. 983, 995 (2000); Michael Pollan, *Town Building Is No Mickey Mouse Operation*, N.Y. TIMES, Dec. 14, 1997, (Magazine), at 56.

streets, or public open space.<sup>188</sup> In order for such sweeping change to occur, though, it will first be necessary to demolish the existing structures and modify the existing zoning ordinances to allow for dense, mixed-use development in formerly low-density, commercially zoned areas.

Once an abandoned structure has been demolished, there are two options for the site: redevelopment of a new structure or structures in its place or “regreening” of the parcel—turning it into a park, community garden, or other environmentally sensitive, non-built use.<sup>189</sup> Complete demolition and rebuilding is not uncommon and has been used widely in the housing sector.<sup>190</sup> It is now becoming more common in the case of abandoned commercial structures as well.<sup>191</sup> There have also been recent successes with regreening. For example, a project is underway to convert large swaths of abandoned property in

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188. Some commentators see demolition and redevelopment as a panacea, ushering in a new era of suburbia done correctly. Peter Calthorpe and William Fulton “advocate the ‘maturation’ of the suburb, via redevelopment of suburban ‘greyfields’ (old or abandoned commercial areas and mall sites), which they propose should be recycled into walkable village and town centers.” Ashley S. Miler, Book Note, *Developing Regionalism: A Review of The Regional City: Planning for the End of Sprawl* by Peter Calthorpe and William Fulton, 11 N.Y.U. ENVTL. L.J. 842, 848 (2003) (quoting PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL 204–08 (2001)). According to Stacy Mitchell, the author of *Big-Box Swindle: The True Cost of Mega-Retailers and the Fight for America’s Independent Businesses*, “[m]ost of these buildings are pretty cheaply constructed, not made to last a century . . . . The ideal situation is that these sites are redeveloped completely as multistory properties, and that the building isn’t saved.” Lisa Selin Davis, *What Should Be Done with the Empty Big Box?*, GRIST (Dec. 4, 2008, 12:38 PM), <http://www.grist.org/article/always1> (internal quotation marks omitted).

189. See *infra* Part III.B.2.c (discussing regreening options).

190. For example, the city of Baltimore obtained title to a number of abandoned houses in the city, demolished those structures, and constructed new homes in their place. James L. Dunn, Jr., *Bureaucracy and the Bulldozer*, GOVERNING MAG., July 1994, at 22, 22, 24.

191. In their book, *Retrofitting Suburbia*, Ellen Dunham-Jones and June Williamson present a number of case studies involving strip centers and empty malls that have been turned into new urbanist town centers. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 95–171 (describing Mashpee Commons in Cape Cod, Massachusetts, which has assumed the role of town center but used to be the site of an early suburban strip center, and Belmar in Lakewood, Colorado, which involved the complete demolition of an enclosed mall and replacement with a series of urban blocks and a mixed-use downtown). See also CALTHORPE & FULTON, *supra* note 188, at 230–31 (noting how the Old Mill Site in Mountain View, California, once housed a mall, but the mall became underutilized and was completely demolished. It has since been redeveloped into a mixed-use neighborhood containing housing surrounded by office and retail uses).

Detroit to urban agriculture and farming.<sup>192</sup> In Cleveland, the National Science Foundation awarded an Ultra-Ex (Urban Long-Term Research Area Exploratory) grant for the study and documentation of the ecological benefits that reclaimed vacant lots can provide to neighborhoods.<sup>193</sup> And Minneapolis recently adopted a new plan that will permit commercial farms on vacant urban plots of land.<sup>194</sup> Despite their successes, these examples are few and thus far are mostly being implemented in residential areas. Further, like adaptive reuse, there are both positive and negative elements that municipalities should consider before adopting a policy supporting demolition of ghostboxes.

*a. Benefits of Demolition*

In many ways, the benefits of demolition mirror the problems with adaptive reuse. First, demolishing an abandoned big box store addresses one of the biggest concerns present with reuse: the structure itself. Imagining a future filled with reused one-story sprawling big box stores is much bleaker than one filled with interesting and varied façades that sit flush with the sidewalk or vast swaths of suburban greenspace. Further, not only is reusing a big box store difficult from an architectural standpoint, but sometimes the spaces are so specialized that remodeling them is nearly impossible.<sup>195</sup>

Demolition also provides an opportunity for a municipality to implement smart growth and sustainable development visions. Rebuilding on the site of a former big box store allows for new construction at a higher density along commercial corridors, which can help transform those corridors from car-

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192. See David Whitford, *Can Farming Save Detroit?*, ASSIGNMENT DETROIT (Dec. 29, 2010, 11:37 AM), [http://money.cnn.com/2009/12/29/news/economy/farming\\_detroit.fortune/index.htm](http://money.cnn.com/2009/12/29/news/economy/farming_detroit.fortune/index.htm); *Introducing Hantz Farms*, HANTZ FARMS DETROIT, <http://www.hantzfarmsdetroit.com/introduction.html> (last visited Feb. 19, 2011).

193. See [GREATER] CLEVELAND ACTION PLAN FOR VACANT LAND RECLAMATION, 9 (2010) (draft), [http://www.gcbl.org/system/files/reimag+action+plan\\_8-24-10.pdf](http://www.gcbl.org/system/files/reimag+action+plan_8-24-10.pdf); Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES (Aug. 3, 2011), <http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all>.

194. See generally CITY OF MINNEAPOLIS CMTY. PLANNING & ECON. DEV. DEPT., URBAN AGRICULTURE POLICY PLAN: A LAND USE AND DEVELOPMENT PLAN FOR A HEALTHY, SUSTAINABLE LOCAL FOOD SYSTEM (2011), [http://www.ci.minneapolis.mn.us/cped/docs/UAPP\\_Chapter1.pdf](http://www.ci.minneapolis.mn.us/cped/docs/UAPP_Chapter1.pdf).

195. Winzelberg, *supra* note 87 (discussing Circuit City stores, which are extremely specialized, making reuse difficult).

centered arterials to walkable boulevards. For example, Uptown District is a mixed-use retail and housing development in San Diego's Hillcrest neighborhood. It was constructed on a fourteen-acre site that contained an abandoned Sears store.<sup>196</sup>

Demolition can also result in an increase in the amount of public open space available and a greater diversity of housing choices.<sup>197</sup> Although projects that replace a single abandoned big box store might not be big enough to create an entirely new neighborhood, they can restore a sense of urbanism to a suburban area, which is a step in the right direction toward sustainable development and building social capital.<sup>198</sup> Thus, demolition provides local governments with the opportunity to

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196. Originally, the city bought the property for \$9 million for use as a library. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, TERRAIN.ORG, <http://www.terrain.org/unsprawl/1/> (last visited Sept. 5, 2011). However, local neighborhood groups convinced the city that they would prefer a mixed-use development with a residential component, so the city issued a request for proposals to private developers. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. The winning developer purchased the property from the city for \$10.5 million; the project cost \$70 million. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. While the Sears store sat on one large superblock, the redevelopment demolished the structure and broke the area into four smaller blocks. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. The development, which has been in operation for nearly twenty years, includes a mix of residential unit types, as well as retail space and a large community center. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. Many of the retail stores are built up to the sidewalk fronting on a major thoroughfare. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. While the residential portion of the project has been a success, a number of retail uses in the project have failed. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*.

197. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 14 (discussing the benefits of “retrofit[ting]” the suburbs).

198. Ellen Dunham-Jones & June Williamson, *Retrofitting Suburbia*, URB. LAND, June 2009, at 38, 43 [hereinafter Dunham-Jones & Williamson, URB. LAND], <http://www.uli.org/ResearchAndPublications/Magazines/UrbanLand/2009/June/~media/Documents/ResearchAndPublications/Magazines/UrbanLand/2009/June/Jones.ashx> (“Projects as small as 15 acres . . . such as San Diego's Uptown District . . . can transform the character of suburban areas and generate local input concerning future changes. But larger parcels can more easily justify the inclusion of public space, decked parking, and a fine-grained street network on suburban superblocks.”).

be forgiven for their poor decisions, as well as the opportunity to choose a different way forward.<sup>199</sup>

*b. An Evaluation of Demolition and Rebuilding*

There are some problems with an approach that envisions large-scale demolition and rebuilding on abandoned big box sites. First, from a sustainable development and embodied energy perspective, demolition is not green. It is always more environmentally sound to reuse an existing building than to tear it down and reconstruct, even if the new construction is “green.”<sup>200</sup> Big box demolition requires a tremendous amount of energy, and the resulting debris winds up in already overflowing landfills.<sup>201</sup>

Second, a municipality must seriously consider whether there is a local market for a new development located on the site of an old big box store. In most communities, those stores sit on land that is surrounded by other large retail stores and malls, isolated from other uses, not connected to mass transit, and located at the intersection of major highways. Imagining new urbanist mixed-use communities on the sites of abandoned big box stores is idyllic, but that type of transformative power is more likely if the redevelopment sites are located near a new or existing public transit station, as is the case for many of the Washington D.C. suburbs.<sup>202</sup> New transit-oriented

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199. See Shannon Kincaid, *Democratic Ideals and the Urban Experience*, 6 PHIL. & GEOGRAPHY 145, 149 (2003) (quoting LEWIS MUMFORD, *THE URBAN PROSPECT*, at x (1956)). Kincaid described Mumford’s argument:

Mumford argues that as a society, we face a profound choice in determining urban development, and we can either “rob ourselves of [the benefits of civic development] by adjusting our plans to the forces that were dominant in the recent past; or we can remold our plans and guide our actions in terms of a more desirable future.”

*Id.* (alteration in original).

200. Lamprakos, *supra* note 162.

201. This criticism holds true whether the site is redeveloped or left as green space. The only counter to the criticism is that the demolition of the parking lot, as well as the building, can bring some environmental benefits. Removal of existing parking lots and black rooftops can decrease the heat island effect as well as negative impacts from impervious surfaces, and thus runoff and pollution that tend to increase river temperatures and raise stream levels, harming fish and other wildlife. See Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 434 (2011).

202. See, e.g., *Transforming Tysons*, FAIRFAX COUNTY, VA., <http://www.fairfaxcounty.gov/tysons/> (last visited Feb. 19, 2011); *Transportation*, FAIRFAX COUNTY, VA., <http://www.fairfaxcounty.gov/tysons/transportation/> (last visited Oct. 9, 2011) (redevelopment in Tysons Corner aided by four planned metro stations).

development projects have the potential to become new destinations. Unfortunately, since most of the big box stores that go dark are not located in these areas, creating a new town center or new urbanist redevelopment alongside a major suburban arterial may become nothing more than a “stand-alone fragment[.]”<sup>203</sup>

Third, and perhaps the greatest argument against demolition and rebuilding, is that “it is difficult to establish a sense of place or urban synergy on less than 15 acres.”<sup>204</sup> Most of the suburban renewal success stories have succeeded only because they were able to rebuild on very large areas of land by demolishing extremely large structures—an entire enclosed mall or strip mall.<sup>205</sup> It is less clear whether demolition of a single big box store—for example, one that sits alongside a suburban commercial arterial without sidewalks or anywhere to which a person might want to walk—would allow for large-scale changes in a community. However, such demolition could replace a low density single-use building with a higher density, multi-story, mixed-use one. While this is a step in the right direction toward more sustainable development, a single building will not change an entire community.

A final concern, which is more prominent if the demolished site is redeveloped (as opposed to regreened), is whether current members of society, specifically planners and city officials, know what will be lasting and timeless.<sup>206</sup> As

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203. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 10–11; Dunham-Jones & Williamson, URB. LAND, *supra* note 198, at 44. It is possible that if enough suburban greyfields are densified suburban transit may become feasible. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 10–11. The redevelopment may even encourage transit to be built.

204. See DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72; see also LEE S. SOBEL, EPA, 231- R-10-001, MARKET ACCEPTANCE OF SMART GROWTH 5 (2011), [http://www.epa.gov/smartgrowth/pdf/market\\_acceptance.pdf](http://www.epa.gov/smartgrowth/pdf/market_acceptance.pdf) (examining smart growth projects of at least 15 acres and setting that requirement because sites must be “large enough to include a variety of public and private uses to create a complete neighborhood or community”). Most stand-alone big box store lots are nine to fourteen acres. BAY AREA ECON. FORUM, SUPERCENTERS AND THE TRANSFORMATION OF THE BAY AREA GROCERY INDUSTRY: ISSUES, TRENDS, AND IMPACTS 54 (2004), <http://againstthewal.com/studies/norcalstudy.pdf> (discussing Wal-Mart supercenters).

205. Decommissioned military bases, amusement parks, and former hospitals could also succeed. See CALTHORPE & FULTON, *supra* note 188, at 227–29.

206. Some academics question whether it is possible to plan intelligently. See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROL: CASES AND MATERIALS 65–69 (3d ed. 2005); John Rahenkamp, *Land Use Management: An Alternative to Controls*, in FUTURE LAND USE: ENERGY, ENVIRONMENTAL, AND LEGAL CONSTRAINTS 191, 191–92 (Robert W. Burchell & David Listokin eds.,

Professor Vicki Been has noted, “[t]he end result may be a uniformity that is just as, or even more, stultifying than the current predictability in suburban design”;<sup>207</sup> perhaps all planning decisions will eventually be viewed as poor by some segment of the population.<sup>208</sup> The history of urban design is littered with poor decisions, as well as many great ones. When the highway system and the suburbs were envisioned and created, planners thought that they would revolutionize the way people lived, traveled, and communicated for the better. Urban renewal was going to clear the slums and revitalize cities.<sup>209</sup> The wisdom of those decisions is now less clear.

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1975) (suggesting that “any fixed plan is inevitably wrong”). *But cf.* John R. Nolon, *The Law of Sustainable Development: Keeping Pace*, 30 PACE L. REV. 1246, 1254–55 (2010) (tying origins of the power to zone to German zones and efficient planning).

207. See Vicki Been, *Comment on Professor Jerry Frug’s The Geography of Community*, 48 STAN. L. REV. 1109, 1114 (1996); Stanley, *supra* note 39, at 132 (“New urbanist communities springing up in farmer’s fields are simply better sprawl.”) (internal quotation marks omitted). A related concern is the permanence of the decision to demolish; once the economy recovers, perhaps more big box retailers will be looking for vacant space.

208. One common criticism of suburban renewal projects is that they create “instant cities.” See, e.g., Thaddeus Herrick, *Fake Towns Rise, Offering Urban Life Without the Grit*, WALL ST. J., May 31, 2006, at A1, reprinted in TOWN OF HURLEY, <http://townofhurley.org/plan/assets/WSJ%20Faux%20Centers.pdf>; John King, *Instant Urbanism: Cited Suburbs Becoming New Model for the Bay Area*, SFGATE (Apr. 8, 2007), [http://articles.sfgate.com/2007-04-08/news/17238280\\_1\\_stapleton-project-stapleton-international-airport-lakewood](http://articles.sfgate.com/2007-04-08/news/17238280_1_stapleton-project-stapleton-international-airport-lakewood). People are able to live and shop in these urban-style communities, but avoid problems of homelessness, garbage, and graffiti that plague some true downtowns. Further, because lifestyle centers tend to house upscale shops that cater to middle and upper-middle class suburbanites, they do not allow for the same diversity as would a refurbished or renovated abandoned big box. See Parija Bhatnagar, *Not a Mall, It’s a Lifestyle Center*, CNN MONEY (Jan. 12, 2005, 3:14 PM), [http://money.cnn.com/2005/01/11/news/fortune500/retail\\_lifestylecenter/](http://money.cnn.com/2005/01/11/news/fortune500/retail_lifestylecenter/).

209. Many of the same concerns and problems that plagued urban renewal are present in the context of suburban renewal—the key difference is that urban renewal destroyed functional neighborhoods, not abandoned buildings. For example, a pamphlet entitled *Tomorrow’s Chicago* was created in 1953 to inform the public about the need for and benefits of urban renewal and comprehensive planning. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POLY REV. 1, 28–29 (2003). In describing that pamphlet, Professor Pritchett wrote:

In Chicago, planners envisioned a central city that, once cleared, would be opened up into ‘superblocks’ one-fourth square mile in area. Each community within the newly organized city would have a school and park in the center, and clusters of high and low-rise apartment buildings would surround the central square. . . . With a master plan, ‘as we build and rebuild, we would leave the right places vacant, and what we build would be where it belongs,’ argued *Tomorrow’s Chicago*.

*c. An Evaluation of Demolition and Regreening*

Instead of seeking a new retail or mixed-use project for the demolished site, municipalities have another option: They may choose to regreen the space. For example, in Cleveland, fifty-six pilot projects are underway to regreen vacant sites.<sup>210</sup> The regreening idea has an especially strong hold in areas where the market demand for additional retail or vacant building space is low;<sup>211</sup> it makes little sense for cities to spend money on incentives to lure private development projects to a commercial area when the market might not support those projects if not for the incentive funding. The money that might otherwise be used for subsidies and incentives could instead provide an opportunity to do something truly creative with these properties. Further, the size of the big box parcel is typically large enough to accommodate any of these regreening techniques.

Regreening is a key element in any attempt at suburban revitalization.<sup>212</sup> The term “regreening” is very broad and can encompass many different non-structural “green” uses of formerly abandoned properties. The most basic of these uses would be for a city to take ownership of and then demolish the big box store and its parking lot and replace them with public

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*Id.* at 29. The irony of this pamphlet is all too clear today; proponents of urban renewal thought they were being progressive, but the result was perhaps more problems than solutions.

210. MALLACH, FACING, *supra* note 76, at 2, 57. Cleveland, in collaboration with a non-profit group, selected the projects based on responses to a Request for Proposals. See David Beach, *Vacant Property Initiatives in Greater Cleveland*, GREENCITYBLUELAKE, <http://www.gcbl.org/neoeco/research-projects/vacant-property-initiatives-greater-cleveland> (last modified Mar. 19, 2010, 11:25 AM). Projects underway include community and market gardens, orchards, vineyards, native plant projects, pervious pavement parking lots, and pocket parks. *Id.*; see also RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111. St. Paul, Minnesota, bought a failed twenty-acre strip center that sat on the site of a former lake. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 73. Using a plan created by the University of Minnesota’s College of Architecture and Landscape Architecture, the city restored the lake and wetlands and created a public park on the property. *Id.*; see also LEE SOBEL, GREYFIELDS INTO GOLDFIELDS 50–51 (2002); Jennifer Dowdell et al., *Replacing a Shopping Center with an Ecological Neighborhood*, 17 PLACES, no. 3, 2005, at 66, 66–68.

211. RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 3 (addressing regreening projects in Cleveland and noting that “[t]he lack of strong market demand and an abundance of vacant land create unprecedented opportunities to improve the city’s green space network and natural systems”).

212. MALLACH, FACING, *supra* note 76, at 3 (noting that neighborhood regeneration requires focusing on the goal of “identifying long-term non-traditional and green uses for vacant lands and buildings”).

open space, such as a park or field that would be owned and maintained by the city.<sup>213</sup> Due to standard suburban zoning, there are surprisingly few large public parks in the commercial districts of suburbs. Public spaces foster community and connectivity, and they “are an important facility for public discussion and political process.”<sup>214</sup> Thus, such a resource—true public open space—could function as a new gathering place, akin to a traditional town center, or a place to rest after a day at the mall.<sup>215</sup>

Another greening technique that is gaining force throughout the country is to turn these demolished parcels into community gardens or urban agriculture plots.<sup>216</sup> For example,

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213. The antithesis of Joni Mitchell’s famous line, “[t]hey paved paradise and put up a parking lot,” JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON (Warner Bros. Records 1970), is the Talking Heads’ song (*Nothing But Flowers*, which describes a re-greened suburbia: “There was a shopping mall / Now it’s all covered with flowers . . . This used to be real estate / Now it’s only fields and trees / Where, where is the town / Now, it’s nothing but flowers / The highways and cars / Were sacrificed for agriculture.” TALKING HEADS, *supra* note 2.

214. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 (1965); *see also* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”). *See generally* EVERYDAY URBANISM (John Chase et al. eds., 1999).

215. Increasingly, truly public spaces are being supplanted by privately owned space made available to the public, such as the corridors of shopping malls, the lounge areas in a Barnes & Noble store, or privately owned parks that are open to the public. *See, e.g.*, Michael Kimmelman, *In Protest, the Power of Place*, N.Y. TIMES (Oct. 15, 2011), <http://www.nytimes.com/2011/10/16/sunday-review/wall-street-protest-shows-power-of-place.html?pagewanted=all> (discussing the Occupy Wall Street movement, the base camp of which is located in the privately owned Zuccotti Park). Some commentators even argue that public space is becoming less important for building community because people are turning to the Internet, Skype, and social networking websites for their public interaction. *See, e.g.*, WILLIAM J. MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN 7–8 (1995) (noting that gatherings have traditionally taken place in physical public space, but the Internet changes this reality); HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (1993) (discussing the difference between virtual and real-life communities); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003) (discussing physical metaphors that have been applied to cyberspace). *But see* JESSE DUKEMINIER ET AL., PROPERTY 175 n.36 (7th ed. 2010) (“Some say there is no need for a city, a center . . . They say you can communicate in the future with television phones. You may be able eventually to talk to your girl friend by television, but you can’t kiss her that way.”) (quoting Victor Gruen).

216. *See, e.g.*, Catherine J. La Croix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 231–35 (2010); Brian Meyer, *Urban Farming Touted As Tool for Neighborhood Revival*, BUFFALONEWS.COM

the Philadelphia Green program, which is run by the Philadelphia Horticultural Society, has redeveloped hundreds of abandoned properties into community gardens.<sup>217</sup> Community gardens have a variety of excellent functions: they provide food for the local community;<sup>218</sup> they function as a third place, where members of the community can come together and socialize;<sup>219</sup> and they have been shown to raise nearby property values.<sup>220</sup> Municipalities could also consider replacing abandoned big box stores with green energy generation sites.<sup>221</sup>

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(Mar. 23, 2010, 3:57 PM), <http://www.buffalonews.com/city/article39994.ece>; GROW YOUNGSTOWN, <http://www.growyoungstown.org/> (last visited Oct. 9, 2011).

217. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72.

218. In this way, community gardens serve both as a form of economic development and as a “food security resource.” MALLACH, *FACING*, *supra* note 76, at 32. This function is especially important in “food deserts”—areas with few grocery stores and many fast-food restaurants—where those who live nearby tend to eat fewer fruits and vegetables and suffer from an increased likelihood of diabetes. See Avi Brisman, *Food Justice As Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 8–11 (2009). Brisman describes the health impacts associated with residing in a food desert and notes that when a neighborhood becomes a food desert due to the loss of a grocery store, concerned residents often attempt to launch community gardens or farm vacant land. *Id.* at 11 n.37, 17–19. Interestingly, the closure of a Wal-Mart or other big box store that included a grocery section can turn an area into a food desert. See RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 26–29 (noting that community gardens result in increased consumption of fruits and vegetables).

219. This function decreases atomization and provides for a sense of place. See RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 26–29 (noting that community gardens “bring neighbors together and make neighborhoods safer and more attractive”). One suburban town in Georgia, Johns Creek, recently created a community garden program; all of the plots sold out the first year it was implemented. Interview with Stephen Schindler, Resident & Member, Leadership Johns Creek, in Alpharetta, Ga. (Aug. 13, 2010); see also *Newtown Community Garden Growing and Thriving*, CITY OF JOHNS CREEK, GA. (May 20, 2010), [http://www.johnscreekga.gov/news2010/2010-05-20\\_newtown-garden.asp](http://www.johnscreekga.gov/news2010/2010-05-20_newtown-garden.asp). The city provides water but does not expend any other funds on the garden. Interview with Stephen Schindler, *supra*; *Newtown Community Garden Growing and Thriving*, *supra*. Supplies were donated by Home Depot and Whole Foods, each of whom has a dedicated plot in the garden. *Newtown Community Garden Growing and Thriving*, *supra*; Interview with Stephen Schindler, *supra*.

220. Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 242–43 (2008); see also SUSAN WACHTER, *THE DETERMINANTS OF NEIGHBORHOOD TRANSFORMATION IN PHILADELPHIA IDENTIFICATION AND ANALYSIS: THE NEW KENSINGTON PILOT STUDY 2* (2005), [http://www.kabaffiliates.org/uploadedFiles/KAB\\_Affiliates.org/Wharton%20Study%20NK%20final.pdf](http://www.kabaffiliates.org/uploadedFiles/KAB_Affiliates.org/Wharton%20Study%20NK%20final.pdf) (finding that improving vacant land via mowing lawns and planting trees caused surrounding housing values to increase by up to 30%).

221. These parcels could be used as solar fields (covered with solar panels to collect solar energy), geothermal wells, tree or plant nurseries, wind turbine farms, stormwater management sites, or ethanol or biodiesel production sites. RE-

Nontraditional reuse strategies such as these contribute to the local economy and go far in fostering healthier local ecosystems and communities.<sup>222</sup>

The biggest problem with regreening suburban spaces is a fiscal one. Whereas reuse and new development will likely result in some tax revenue, public open space will not. That said, some of the options addressed above, such as community gardens or energy generation sites, could provide some taxes to the municipality.<sup>223</sup> Similarly, the increase in property values that results from adjacent regreening projects will contribute to the locality's property tax base.<sup>224</sup> Further, in terms of funding and maintenance, there are a number of ways that regreened suburban sites could be maintained, whether by the municipality or others.<sup>225</sup> Thus, there are maintenance solutions that would not cost the municipality additional money,<sup>226</sup> yet could increase the beauty and sense of community in these suburban landscapes, again providing an otherwise lacking third place.

#### IV. IMPLEMENTATION OF THE SOLUTIONS

##### A. *Who Should Take Responsibility for Implementing Solutions?*

In examining the harms created by ghostboxes, it becomes clear that in addition to the vacating big box retailer, the local governments themselves are at the heart of the problem.

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IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 29–31 (suggesting green energy land uses).

222. See MALLACH, FACING, *supra* note 76, at 28.

223. For example, the city could tax sales of the items produced, and these uses may increase surrounding property values and thus property taxes. See Been & Voicu, *supra* note 220.

224. JOSEPH SCHILLING, BLUEPRINT BUFFALO—USING GREEN INFRASTRUCTURE TO RECLAIM AMERICA'S SHRINKING CITIES 149, 154 (2007) [hereinafter SCHILLING, BLUEPRINT BUFFALO] (noting that “profit is achieved by the stabilized and improved values of adjacent properties”).

225. For example, the Philadelphia Green program helps community groups organize and maintain vacant sites that have been transformed to green spaces. *Id.* at 153 (describing ways to support green infrastructure). High schools, senior groups, and other volunteer organizations have also shown willingness to help man community gardens. See Kathryn A. Peters, Note, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 236–37 (2010) (describing how in Portland, Oregon, community gardeners receive assistance and advice from volunteer garden managers).

226. See sources cited *supra* note 225.

Municipal decision makers crafted zoning ordinances and granted permits allowing development of big box stores in their communities, which led to a decline of their downtowns. As the big boxes began to go dark, local suburban shopping areas were destroyed as well; this reduces the local tax base, harms property values, and leads to general neighborhood malaise. At the same time, municipalities have expended large amounts of money: luring the big boxes in with subsidies; providing and maintaining infrastructure leading to these fringe shopping areas; and contributing funds to redevelopment projects. By failing to regulate and monitor how much retail development they have approved, and by allowing new stores to be constructed while numerous vacant ones exist, cities have exacerbated the ghostbox problem.<sup>227</sup>

The suggestions in this Part flow from the conclusion that local governments should alleviate the harms caused by ghostboxes within their jurisdictions. Thus, before moving forward, it is necessary to examine why local governments, as opposed to federal or state governments, should take the lead.

1. Authority, Federalism, and the Scale of Governance

Municipalities use their police power to regulate land use in the interests of health, safety, morals, and general welfare;<sup>228</sup> they do this through zoning, planning, subdivision, and building codes.<sup>229</sup> Because empty big box stores impact the health and safety of a neighborhood, as well as its aesthetics,<sup>230</sup> regulation of ghostboxes is well within the ambit of local government authority.

Though municipalities have the authority to address the problem, one must consider issues of scale to determine whether they are well-suited to do so.<sup>231</sup> Big box stores are

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227. See McClure, *supra* note 75, at 231–33.

228. *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.”) (citation omitted).

229. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROL: CASES AND MATERIALS* 74 (3d ed. 2005).

230. See Curtin, *supra* note 133, at 40 (“[C]oncern for neighborhood aesthetics has long been justified as a legitimate governmental objective.”).

231. I addressed similar issues of scale in the context of municipal green building regulations in Sarah Schindler, *Following Industry’s LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010).

being abandoned on a nationwide scale—often by companies with a national presence—and they impose similar externalities on each of the communities in which they are situated. This might lead some to assert that big box abandonment is an interstate commerce issue with localized impacts, and thus federal regulation is constitutionally permissible and logistically advisable.<sup>232</sup> Thus far, however, there has been no federal attempt to address ghostbox-related harms.<sup>233</sup>

Some commentators assert that a regional government structure would be best suited to address the problem of empty big box stores and, more generally, the problem of declining suburbs.<sup>234</sup> “New regionalists” argue that governments acting at a regional level benefit from economies of scale to a greater extent than individual municipalities and thus may be able to obtain greater amounts of revenue, enabling larger scale revitalization of the suburbs.<sup>235</sup> Further, one reason for over-retailing, and thus eventual abandonment, is the willingness of communities to pirate retail activity from surrounding towns. While a regional system might be beneficial, the bottom line is that regional governance is still relatively uncommon; land use regulation traditionally is a local concern.<sup>236</sup>

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232. Perhaps a federal solution could emulate Superfund. See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, YALE L. & POL’Y REV., symposium issue, 1996, at 23, 25 (“[T]he size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.”); see also *infra* note 327 and accompanying text.

233. See generally Tanya Marsh, *Too Big to Fail vs. Too Small to Notice: Addressing the Commercial Real Estate Debt Crisis*, 63 ALA. L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1775984](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1775984) (noting that the federal government’s response to the commercial real estate debt crisis “has been to allow the market to work itself out”). Although no national response has been forthcoming, that is not to say that one would not be welcomed; indeed, it could work in conjunction with the solutions suggested in this Article. See *infra* note 240 and accompanying text.

234. Some proponents of regional government assert that “decisions about land use and infrastructure policy should be centralized to prevent fragmented local governments from making decisions that exacerbate regional inequities.” Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 484 (2005). See generally Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

235. Thomas J. Vicino, *The Quest to Confront Suburban Decline: Political Realities and Lessons*, 43 URB. AFF. REV. 553, 569–70 (2008).

236. Merriam, *supra* note 11, at 17 (asserting that these issues will continue to be addressed at a local level).

Local governments have already begun to take the lead in enacting experimental, forward-thinking, smart growth policies and ordinances, including those that combat sprawl.<sup>237</sup> Further, through their code enforcement offices, local governments have “special legal powers to address blight and vacant properties that no other entity possesses.”<sup>238</sup> Finally, solutions to the empty big box problem will vary by locality, and local governments need the flexibility to discover and attract new uses for these structures and spaces in accordance with the needs of their particular locations.<sup>239</sup> Thus, because there are important local dimensions to both the problem and the solutions, local action is key.<sup>240</sup>

## 2. Drivers

In addition to the fact that local governments are well-suited to combat the problem of ghostboxes, they should do so for two primary reasons, one pragmatic and one normative. From a pragmatic standpoint, cities have a direct economic incentive to eliminate abandoned big boxes from their communities. From a normative perspective, cities have the

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237. See, e.g., DURHAM, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 10, §§ 10.3.1.D., 10.5.1.C. (2010) (allowing for modification to parking requirements for smart growth and transit-oriented development); CITY OF PORTLAND, OR., BUREAU OF PLANNING, COMPREHENSIVE PLAN: GOALS AND POLICIES, at V-2 (1988) (establishing the need to balance new development with reduction of urban sprawl and an increase in energy efficiency); see generally John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENVTL. L. REV. 757, 758 (2006) (describing “dramatic local inventions emanating from [a city’s] approach to smart growth”).

238. Schilling, *Code Enforcement*, supra note 16, at 150.

239. “A state, let alone the national government, sits far removed from the idiosyncratic qualities that make each locality unique.” Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court’s Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL’Y & L. 373, 383 (2010); see also Schilling, *Code Enforcement*, supra note 16, at 151 (“State and federal policymakers are less likely to recognize code enforcement’s special powers to stabilize neighborhoods and protect federal and state investments in neighborhood revitalization. Alternatively, they see code enforcement as the domain of local governments and, therefore, do not support using state or federal funds.”).

240. This does not mean that there is no role for federal and state governments to play in the context of abandoned properties and the declining suburbs. Municipalities and community organizations could greatly benefit from financial and technical state and federal support. For example, some states have enacted enabling legislation expressly allowing cities to create land-banking agencies to acquire and manage vacant and abandoned property. See, e.g., MICH. COMP. LAWS §§ 124.751–.754 (2006); see infra Part IV.B.1.c (discussing land banks).

civic responsibility to their citizens to alleviate the harms caused by empty big box stores.<sup>241</sup>

*a. Pragmatic Claim: Economic Incentive*

In light of the harms addressed in Part II.D, municipalities have a clear economic incentive to get rid of abandoned big box stores in their communities and spur them toward a productive second life. If a new retail tenant reoccupies a vacant big box store, this aids the municipality by increasing its tax revenue. By getting rid of these eyesores in the community, municipalities may be able to attract additional residents.<sup>242</sup> The existence of a ghostbox also gives municipalities an opportunity to consider possible alternative uses for the site that might contribute to economic development within the locality: a new, urban-style mixed-use development that includes retail and housing, or public open space that enhances surrounding property values and thus increases the tax base in the community as a whole. Nearly any use would be more economically beneficial to a municipality and its residents than an abandoned property. Thus, especially during this time when many cities face budget deficits, they should play a key role in remedying the abandonment situation.<sup>243</sup>

*b. Normative Claim: Civic Responsibility*

Municipalities should also take responsibility for alleviating the harms caused by empty big box stores out of an inherent civic responsibility owed to their citizens.<sup>244</sup> By doing

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241. See Schilling, *Code Enforcement*, *supra* note 16, at 104 (“Local code enforcement officials have the legal and policy responsibilities to enforce a wide array of building, housing, and property maintenance codes and to administer special nuisance abatement processes.”).

242. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (espousing the idea of residents as consumer-voters who express their preferences by seeking out municipalities that provide the public goods and services that appeal most to them).

243. See Hirokawa & Gonzalez, *supra* note 56, at 627–30 (discussing financial problems facing cities).

244. See Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 365 (2008) (describing “the cardinal civic responsibilities of protecting health, safety, and welfare”) (internal quotation marks omitted); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 331–32 (2007) (“[G]overnment’s important responsibilities to protect the health, safety, and welfare of its citizens set it apart from a typical private business.”) (citation omitted); Sean Carey, *Post-Davis Conduit Bonds: At the Intersection of the Dormant Commerce Clause and*

so, these localities would be accepting responsibility for the negative impacts on local health, safety, and welfare that resulted from poor land use decisions. Further, only when municipalities carry the burden and the consequences of their actions will they internalize the harms imposed by abandoned big box stores. Such internalization forces municipalities to factor the approval of big box stores into their cost-benefit analysis and thus would hopefully deter them from making similar, anti-forward-thinking determinations in the future.

Some may argue that the retailers are at least as responsible as the cities, if not more so: they are the ones who decided to construct, and then exit, the stores (arguably, with more foresight about that result than the municipality possessed).<sup>245</sup> With respect to stores that have upsized, and solvent owners or lessees who have abandoned, there is some validity to this point. Indeed, there is a role for those actors to play.<sup>246</sup> However, in the discretionary land use-permitting arena, the municipality holds the cards: Retailers can only do what local governments allow them to do.<sup>247</sup> Thus, as landlords often have a duty to mitigate if a tenant abandons the premises,<sup>248</sup> cities should now accept responsibility for the demise of their neighborhoods caused in part by the stores' abandonment.

### *B. How Can/Should Municipalities Implement the Solutions?*

Having analyzed and evaluated the benefits and harms of the two primary options for empty big box stores—reuse and demolition—this Article now presents specific ways that municipalities can implement these options through market-tweaking mechanisms and a strategy for direct intervention and provides a series of metrics to assist decision makers in

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*Municipal Debt*, 78 *FORDHAM L. REV.* 121, 125–26 (2009) (explaining that governments sell municipal bonds and collect taxes so that they may “fulfill the basic civic responsibilities of government”).

245. However, even though criminals cause crime, cities still take action to address it.

246. See *infra* Part IV.B.1.a.

247. See *supra* Part II.D.2.

248. See *Sommer v. Kridel*, 378 A.2d 767, 773 (N.J. 1977) (holding that landlords have a duty to mitigate damages and must show that they used reasonable diligence in attempting to re-let abandoned premises). Although this is a duty owed to the tenant, I would argue that in this instance, the duty is owed to the citizens of the community.

deciding which solution would work best in a given community. By creating a strategy and municipal ordinances designed expressly to implement these solutions, local governments can start to see ghostboxes as opportunities to create more sustainable places out of their sprawling suburbs, instead of as symbols of suburban decline and blight.

### 1. Create and/or Revise Existing Ordinances

To solve its empty big box problem, a municipality should start by examining its zoning and building codes to determine which provisions allowed the big box to be constructed and then to become vacant or abandoned. Because empty big box stores are often scattered throughout a community, they may not be as visually noticeable as a cluster of abandoned houses, or an entire shuttered shopping mall, and thus local governments may believe it is appropriate to deal with them on a case-by-case basis. However, because “the difficulties of dealing with individual treatment of numerous discrete parcels, particularly in administrative front-end costs, may be quite consequential,” municipalities should adopt a strategy and ordinance that will allow them to approach the problem in an organized, consistent, and cost-effective manner.<sup>249</sup>

#### *a. Setting the Stage: Creating a General Abandoned Property Ordinance*

As a first order of business, if the municipality does not already have a general vacant or abandoned property ordinance in place, it should create one. Such an ordinance can take many forms.<sup>250</sup> I propose a structure for an abandoned property ordinance that is adapted from the four-step process for managing abandoned properties described by Robert W.

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249. BURCHELL & LISTOKIN, *supra* note 54, at 24.

250. For example, the town of Sleepy Hollow adopted the Abandoned Industrial Property Reclamation Law, which applied to the owners of industrial properties that housed manufacturing space and took effect when those owners proposed termination of their operations. Nolon, *supra* note 237, at 790–92. The ordinance required the property owner to demolish all structures on the site and remediate environmental problems within eighteen months after termination of the use. *Id.*; *cf.* SAN DIEGO, CAL., MUN. CODE art. 4, ch. 5, div. 3, § 54.0315 (2006) (the owner of a structure vacant for more than ninety days will be liable for a \$500 civil penalty, with incremental increases of \$500 for every ninety days, not to exceed \$5,000 per vacant structure per year).

Burchell and David Listokin in their seminal work on the issue of abandoned properties.<sup>251</sup> This ordinance should allocate the burden of action between empty big box building owners or lessees, to the extent they are solvent, and the local government.

The first stage of abandoned property management—and thus the first part of an ordinance—should involve planning and inventory, wherein the municipality develops a strategy and creates a surplus or vacant property inventory system. Recently, a number of local governments have created vacant property registration ordinances that track vacancy, finance programs to monitor vacant property, and authorize penalties for violations.<sup>252</sup> While this is a good first step, cities should take these ordinances further. The ordinance should expressly place the burden of reporting vacancy or abandonment on the property owner and should either incentivize them to do so or punish them if they do not.<sup>253</sup> It should also seek to determine whether the property is owned by the vacating retailer, another private owner, or a lender.<sup>254</sup> If funding is available, the local government should seek to create an entity that is tasked with the management of this inventory.<sup>255</sup>

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251. BURCHELL & LISTOKIN, *supra* note 54, at 41–43.

252. *See, e.g.*, COCONUT CREEK, FLA., CODE pt. II, ch. 6, art. III, § 6-39(i) (2011), *available at* <http://library.municode.com/index.aspx?clientID=10928&stateID=9&statername=Florida> (requiring mortgagee to register vacant property's occupancy status and owner information upon default by mortgagor); MIAMI, FLA., CODE pt. II, ch. 10, art. IV, § 10-61 (2011), *available at* <http://library.municode.com/index.aspx?clientID=10933&stateID=9&statername=Florida>; *see* Hirokawa & Gonzalez, *supra* note 56, at 630–31 (noting the “striking” number of cities that have adopted such ordinances and listing some of those ordinances); sources cited *supra* note 70.

253. For example, fines could increase each day the vacating or abandoning owner fails to report, or the property owner could be prohibited from obtaining additional permits for similar projects in the future for failure to report.

254. Because lenders are not in the business of commercial property management, they might be more willing to strike a deal with a municipality.

255. For example, a redevelopment agency or land-banking agency. *See* FRANK S. ALEXANDER, LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS 5 (2005), *available at* [www.lisc.org/content/publications/detail/793/](http://www.lisc.org/content/publications/detail/793/) (describing a land bank as “a governmental entity that focuses on the conversion of vacant, abandoned, and tax-delinquent properties into productive use”); MALLACH, *FACING*, *supra* note 76, at 66 n.49 (noting that this entity would be dedicated to this task and would ideally be created at the county or regional level). Some states expressly grant this power to their municipalities via statute. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 33000–33855 (West 2010); CONN. GEN. STAT. ANN. §8-292 (West 2010) (“Any municipality may, by ordinance, establish an urban rehabilitation program and may authorize any existing board, commission, department or agency to be the

Step two of Burchell and Listokin's process involves property control, including stabilization and maintenance of the property.<sup>256</sup> An ordinance should therefore compel the owner or lessee of a vacant piece of property to maintain it: weed the parking lot, scrub graffiti off the walls, and perhaps maintain a security guard to keep out squatters and others who would use the property for illegal purposes.<sup>257</sup> The ordinance might include other affirmative requirements, such as landscaping or operating lights to make the property appear neater, if not inhabited.<sup>258</sup> An ordinance should provide the municipality with the power to enter the premises and undertake these tasks at the property owner or lessee's cost if that party cannot or will not comply.<sup>259</sup> The municipality could then attach a lien to the property, which, if not paid, could

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urban rehabilitation agency or may, by ordinance, establish a new board, commission, department or agency to act as the urban rehabilitation agency.”). The City of Lakewood, Colorado established the Lakewood Reinvestment Authority as an urban renewal authority pursuant to its City Charter and the Colorado Urban Renewal law. See COLO. REV. STAT. § 31-25-104 (2009); *Lakewood Reinvestment Authority*, LAKEWOOD, COLO., <http://www.lakewood-colorado.org/urbanrenewal/urbanrenewal.htm> (last visited Nov. 15, 2011).

256. BURCHELL & LISTOKIN, *supra* note 54, at 41.

257. See *Adjile, Inc. v. City of Wilmington*, No. 432, 2007, 2008 WL 660139 (Del. Mar. 13, 2008) (upholding the Wilmington ordinance that assessed fees and required action by vacant property owners). Before the enactment of an ordinance, the city would have the power to control these elements through its nuisance abatement authority and general police powers. See *Hirokawa & Gonzalez*, *supra* note 56, at 629–30.

258. In the absence of mandates, property owners and vacating lessees typically do not want to expend funds to landscape the vacant parcel, which exacerbates problems of neighborhood blight. Sochar, *supra* note 12, at 705. Some cities have solved this problem through prospective ordinances requiring performance bonds, which are used to perform upkeep on a vacant store until it is leased, purchased, or used by another tenant. *Id.* at 715; see also CHILTON, *supra* note 53, at 6.

259. This is not a novel idea. Some cities have instituted a program for abandoned residences wherein the city will enter, hang curtains, mow lawns and keep lights on to provide an appearance that the house is not abandoned and thus preserve the property values in the surrounding neighborhood. See, e.g., HOLLYWOOD, FLA., CODE tit. XV, ch. 157, §§ 157.77, 90.09 (2011), available at [http://www.amlegal.com/nxt/gateway.dll/Florida/hollywood/cityofhollywoodfloridacodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:hollywood\\_fl\\_mc\\$anc=\(authorizing trash removal, hedge trimming, and lawn-mowing\)](http://www.amlegal.com/nxt/gateway.dll/Florida/hollywood/cityofhollywoodfloridacodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:hollywood_fl_mc$anc=(authorizing trash removal, hedge trimming, and lawn-mowing)). To avoid charges of warrantless searches, the municipality should first obtain the property owner's consent. See *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (holding that municipal administrative searches for health and safety purposes “are significant intrusions upon the interests protected by the Fourth Amendment”).

eventually result in the municipality obtaining ownership of the structure.<sup>260</sup>

Regardless of who has control over the property—the owner, the municipality, or a third party to whom the original owner sells it—the third aspect of the abandoned property ordinance should address ongoing management and disposition of the property. In crafting this portion of the ordinance, municipalities should consult the metrics proposed in Part IV.B.2 to determine their long-term goals for the property. These may include continued maintenance of the empty structure while waiting for it to be purchased, re-leased, reused, demolished and redeveloped, or regreened. In pursuit of those goals, the municipality should then implement market-tweaking mechanisms—code revisions that should spur market reuse or redevelopment, described in Part IV.B.1.b—as well as a plan for direct intervention if the market fails to find a new use for the parcel within a given period of time. The local government should also ensure that there is dedicated funding for maintenance or demolition.<sup>261</sup>

This step ties into the fourth step in Burchell and Listokin's process, which is the actual physical revitalization of the property. If the market-tweaking mechanisms are successful, the market should take care of this step; if they are not, the municipality should directly intervene.

*b. Market-Tweaking Mechanisms: Modifying Existing Zoning Ordinances to Minimize Disincentives to Reuse or Redevelopment*

Once the municipality has created its abandoned property ordinance, it should examine other elements of its existing zoning code, which, if modified, could alleviate harms stemming from the existence of empty big box stores in the community and allow for the creation of better suburbs. These code changes should incentivize redevelopment or reuse and disincentivize new greenfield development.<sup>262</sup> After these

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260. Obtaining ownership in this manner may be a long process, and the specifics vary between states. See Dunn, *supra* note 190, at 22; *infra* Part IV.B.1.c (discussing vacant property acquisition).

261. See MALLACH, FACING, *supra* note 76, at 30; *infra* Part IV.B.2.1.C (addressing availability of funding).

262. Most zoning codes provide that if a nonconforming use is discontinued for a set period of time, it cannot be restarted. See, e.g., PORTLAND, ME., CODE art. III, ch. 14, § 14-387 (2011), available at <http://www.ci.portland.me.us/citycode/>

changes are implemented, the market will decide what will become of the ghostbox, but the municipality can steer that determination to meet its predetermined goals for the empty big box parcels in its community based on which of these code modifications it chooses to implement.

i. Incentivizing Reuse

As previously noted, many big boxes exist in exclusive commercial or retail zones; residential and office uses are often not permitted.<sup>263</sup> This type of Euclidean zoning may work to dissuade or discourage adaptive reuse of ghostboxes. Thus, if a municipality has set a long-term goal of ghostbox reuse or retrofitting, the municipality should adopt a new mixed-use zoning designation for the area containing the vacant big box.<sup>264</sup> The ordinance could expressly permit large-scale formula retail use,<sup>265</sup> which would allow for reuse by another retailer, but the zoning would also allow for a school or community center to adaptively reuse the space.

In addition to focusing on the specific site or commercial district where the empty big box is located, municipalities with ghostbox problems should look at their entire land use map and comprehensive plan. One way to encourage reuse of big box stores is to limit or eliminate any existing retail zones that encompass undeveloped greenfield space.<sup>266</sup> Such a change

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chapter014.pdf (“If a nonconforming use . . . is discontinued for a period of twelve (12) months . . . the building or premises shall not thereafter be occupied or used except in conformity with the provisions of this article.”). Thus, any suggested modifications to the zoning code proposed in this Article that make big boxes a nonconforming use would apply to ghostboxes, assuming they have been abandoned for the requisite period of time.

263. See *supra* notes 27–30 and accompanying text.

264. To avoid charges of spot zoning, the city should rezone entire commercial strips, not just the big box parcel. Because this is a form of upzoning—allowing a greater range of uses—the likelihood of a Fifth Amendment takings claim is low. See *generally* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (holding that a state landmark preservation law did not effect a taking of property); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVTL. L. 101, 117 n.117 (1993) (“[T]he developer bringing a ripe claim after an upzoning request faces an uphill battle to establish an unconstitutional taking on the merits . . .”).

265. See *supra* note 139 and accompanying text.

266. This type of downzoning could so severely impact a property owner’s investment-backed expectations as to result in an unconstitutional regulatory taking of property. See *Penn Cent. Transp. Co.*, 438 U.S. at 124, 127–28. *But see* Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1057 (1999) (noting that a taking is less likely if the land was purchased for

would be helpful because big box developers and retailers have little incentive to reuse an existing store, which will necessitate costly changes to the structure and format, when there is an empty, inexpensive piece of land across town that is already zoned for retail use and ready to be built upon. A land use plan that limits sprawl has the effect of encouraging reuse of existing empty structures and fostering a culture of infill development.

Similarly, municipalities could incentivize reuse through the implementation of a building moratorium. A moratorium gives a municipality time to consider its needs and future land use planning while halting approval of new development.<sup>267</sup> This approach would be beneficial in an area that has a number of vacant big box stores as well as retailers who are submitting applications to create new ones.<sup>268</sup> The moratorium might prohibit a developer or retailer from constructing any new retail or commercial structure for a given period of time, or while there are existing ghostboxes in the municipality; in either case, reuse of an existing structure becomes more likely. Though a moratorium might decrease revenue or developer interest in investment in the short-term, the goal is not to limit development indefinitely; rather, it is to allow a municipality time to determine what location and what type of new development make sense for the community.

A final important market-tweaking change that local governments should make to incentivize ghostbox reuse is related to the leases that govern those stores. Big box retailers who lease stores commonly include a provision in their leases that restricts the building's owner from leasing the property to

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agricultural, as opposed to development, purposes); *La Croix*, *supra* note 216, at 227, 247–74 (discussing potential takings claims when a city “downzon[es] urban property for urban agriculture and other green uses” and concluding “that takings issues, though potentially difficult, can for the most part be overcome” but cautioning that rezoning privately-owned land “for exclusive use as ‘green infrastructure’ would be vulnerable to attack as a taking”).

267. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (upholding a temporary moratorium but leaving open the possibility that certain moratoria could constitute impermissible takings of private property).

268. *See generally* *Home Depot U.S.A., Inc. v. Vill. of Rockville Ctr.*, 295 A.D.2d 426, 428–29 (N.Y. App. Div. 2002) (upholding a temporary moratorium on large retail structures); *BELLINGHAM, WASH., CODE* tit. 20, ch. 10, § 20.10.025 (2010), available at <http://www.cob.org/web/bmcode.nsf/f6281a531e9ead4588257384007b2367/91d83026b9a5e8d188257297005d5b72!OpenDocument> (imposing a moratorium on retail development over 90,000 square feet unless the proposed development meets or exceeds LEED standards).

a competing retail tenant if the original big box retailer vacates the premises.<sup>269</sup> Some cities have begun to proactively eliminate these contract clauses.<sup>270</sup> The extent to which local governments can interfere with existing private contracts is more questionable, but likely to be acceptable in this context. Under the Contract Clause,<sup>271</sup> the government can only substantially impair existing private contracts if (1) there is “a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,”<sup>272</sup> and (2) “the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’ ”<sup>273</sup> Thus, relying on the significant and legitimate economic and social harms addressed earlier in this Article as a basis for the use of its police power, a municipality might consider passing an ordinance that voids such existing non-compete clauses in the leases of big box retail tenants or prohibits them from including such provisions if they are to renew their leases.<sup>274</sup> Such a provision would make it easier for an empty big box store to be reused, and thus would lessen the likely amount of time it will remain dark, as well as reduce the impact of other related harms.<sup>275</sup>

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269. See, e.g., TAUB, *supra* note 61, at 1253.

270. For example, Peachtree City, Georgia, passed an ordinance that requires conditional use approval for buildings over 10,000 feet; to obtain that approval, the retail tenant must submit a copy of its lease agreement to the city attorney, who then verifies that it does not contain a non-compete clause. PEACHTREE CITY, GA., ORDINANCE pt. II, app. A, art. X, § 1006.3(a)(6) (1999), available at <http://library.municode.com/index.aspx?clientid=11414> (“If such tenant . . . voluntarily vacates such premises or otherwise ceases to conduct its retail business on the premises, the landlord shall be free to market and lease such premises to another person or company.”). Because these ordinances are forward-looking and do not interfere with performance of already existing contracts, the Contract Clause does not apply. See *Ogden v. Saunders*, 25 U.S. 213, 262 (1827).

271. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

272. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983) (citation omitted).

273. *Id.* at 412 (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)) (alterations in the original).

274. But see Note, *Constitutionality of the New York Emergency Housing Laws*, 34 HARV. L. REV. 426, 430 (1921) (“Where . . . the contract in question is an ordinary private contract, valid when made, it would seem to be going counter to the plain words of the Constitution to hold that a state, even in the exercise of the police power, could impair it.”).

275. The counterargument is that a tenant who insists on such a lease provision might refuse to renew its lease if such an ordinance were adopted. This

Of course, municipalities can also provide direct financial incentives for reuse in order to induce developers to do what the city hopes they will do.<sup>276</sup> Because reuse of an existing big box building is often more costly than constructing a new one,<sup>277</sup> some communities have begun to provide tax credits to developers if they reuse existing big box stores.<sup>278</sup> Similarly, municipalities can encourage reuse of existing structures by adopting the International Existing Building Code.<sup>279</sup> Developers and retailers who reuse a building would thus be subject to the existing building code instead of requirements for new construction, which are often more stringent and costly to implement in older structures.<sup>280</sup> Finally, municipalities could provide fast-tracked permitting, which can be very helpful in communities where the queue for major development approval might be months or years long.<sup>281</sup>

## ii. Incentivizing Redevelopment

There are also a number of changes that a municipality can make to its zoning ordinances to incentivize redevelopment of its empty big box stores and encourage replacement with more sustainable development projects. First, just as to

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may create an additional ghostbox in the short run, unless the city had other suggested provisions in place, such as a moratorium.

276. James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POLY 421, 426 nn.5–6 (2001) (discussing sticks and carrots).

277. See *supra* note 170 and accompanying text.

278. At the state level, South Carolina adopted the Retail Facilities Revitalization Act, which provides tax credits to developers who improve, renovate or redevelop abandoned big box stores of 40,000 square feet or larger. S.C. CODE ANN. § 6-34-10 to -40 (2010).

279. *International Existing Building Code*, INT'L CODE COUNCIL, <http://publicecodes.citation.com/icod/iebc/2009/index.htm> (last visited Sept. 19, 2011). The International Existing Building Code (IEBC) “is designed to encourage the re-use of older existing buildings and help efforts to revitalize older areas of the city.” Ellen Krafve, *Tyler Adopts Existing Building Code*, KLTV (Mar. 10, 2010, 12:13 PM), <http://www.kltv.com/Global/story.asp?S=12117573>.

280. See Krafve, *supra* note 279; *Effective Use of the International Existing Building Code*, INT'L CODE COUNCIL, [http://publicecodes.citation.com/icod/iebc/2009/icod\\_iebc\\_2009\\_effectiveuse.htm](http://publicecodes.citation.com/icod/iebc/2009/icod_iebc_2009_effectiveuse.htm) (last visited Oct. 10, 2011).

281. Expedited permitting is often used to incentivize green building and affordable housing projects. See, e.g., MIAMI-DADE COUNTY, FL., CODE pt. 3, ch. 8, art. I, § 8-6 (2010), available at <http://library.municode.com/index.aspx?clientID=10620&stateID=9&statename=Florida> (expedited permit program for green buildings); San Diego, Ca., Affordable/In-fill Housing and Sustainable Buildings Expedite Program, Council Policy, No. 600-27 (effective May 20, 2003).

incentivize reuse, the municipality should rezone the area to allow for a mix of uses—not just commercial, but also residential, urban agriculture, office, and light industrial.<sup>282</sup> Further, if a municipality decides to adopt a regreening strategy and demolish its existing vacant big box stores, it could rezone the land containing the ghostboxes from commercial to open space.<sup>283</sup> This would prohibit new commercial development in those locations, while at the same time limiting and thus increasing the value of the existing supply of actively used commercial and big box buildings.<sup>284</sup>

Because funding assistance is a strong incentive to developers, some municipalities have created a public improvement fee system, whereby a private developer partially finances a reuse or redevelopment project through bonds. The city then passes a resolution or ordinance allowing the developer to pay off the bonds by charging a public improvement fee, which looks a lot like a sales tax (e.g., 1% on top of existing sales tax) that is paid by shoppers and remits to the developer.<sup>285</sup> The developer records a private covenant requiring retailers to charge the fee, which may continue until the debt has been paid or for a given time period.<sup>286</sup>

Because the physical layout of a site is dictated by the zoning code, revising these physical requirements can encourage redevelopment of ghostbox sites,<sup>287</sup> as well as better-

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282. “Simply rezoning the commercial properties along strip corridors to allow for residential use can stimulate gradual transformation in a hot market area.” DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 87.

283. *But see supra* notes 264, 266 (discussing potential regulatory takings claims that could result from rezoning).

284. Jonathan Lerner, *Turning Failed Commercial Properties into Parks*, MILLER-MCCUNE (Dec. 28, 2010), <http://www.miller-mccune.com/business-economics/turning-failed-commercial-properties-into-parks-26410/>.

285. *See, e.g.*, Lakewood, Colo., Ordinance § 0-2002-7 (Feb. 26, 2002), *available at* <http://www.lakewood.org/index.cfm?&include=/citycouncil/2002archive/ordinances/o200207.cfm>; *see* Kieran Nicholson, *Villa Italia Successor Wins Tax: Improvement Fee Will Pay Off Developer's Bonds*, DENVER POST, Dec. 20, 2001, at B02, *available at* ProQuest, File No. 96175911.

286. Lakewood, Colo., Ordinance § 0-2002-7, *supra* note 285; *see also* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 159. Though it is beyond the scope of this Article, a city considering a public improvement fee should consult state law to ensure that it will be considered a fee and not a tax, to which special requirements might attach. *See Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (“To determine whether a particular charge is a ‘fee’ or a ‘tax,’ the general inquiry is to assess whether the charge is for revenue raising purposes, making it a ‘tax,’ or for regulatory or punitive purposes, making it a ‘fee.’”).

287. *See supra* Part I.B.

designed suburbs. Any redevelopment would be subject to the new regulations. Commercial zones, especially those in suburban areas, often have setbacks that require a structure to be constructed a certain distance from the street or sidewalk (if there is one),<sup>288</sup> minimum parking requirements (meaning a developer must provide at least a given number of parking spaces),<sup>289</sup> and maximum building height limits.<sup>290</sup> These requirements serve to foster low-density sprawl development. Thus, municipalities should do away with minimum setbacks, instead requiring buildings to be placed up to the edge of the sidewalk. This design encourages more pedestrian traffic and fosters a more comfortable pedestrian environment. Such a change can turn major arterial streets into boulevards that promote walking and shopping instead of driving and parking. Local governments should also implement a maximum parking requirement instead of a minimum, which would cap the number of parking spaces permitted, or require shared or stacked parking. By reducing the amount of land that could be used for parking, localities increase the efficiency of land being used.<sup>291</sup>

Although these changes would encourage suburban redevelopment “done right,” some developers will balk at them—especially those involving implementation of a maximum parking requirement.<sup>292</sup> Under current minimum

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288. See, e.g., SPOKANE, WA., CODE, tit. 17C, ch. 17C.120, § 17C.120.230A (2011), available at <http://www.spokanecity.org/services/documents/smc/?Section=17C.120.230> (“The required structure setbacks promote streetscapes that are consistent with the desired character of the different commercial zones.”).

289. See *supra* notes 42–43 and accompanying text.

290. See, e.g., YARMOUTH, ME., ZONING ORDINANCE, ch. 701, art. II, § K (2010) (imposing a thirty-five foot height limit).

291. This is because sites can be demolished and redeveloped at greater densities, since square footage that previously would have been required for parking can now be used as part of the new structure. This change also increases the tax base. See Tyler Cowen, *Free Parking Comes at a Price*, N.Y. TIMES (Aug. 14, 2010), <http://www.nytimes.com/2010/08/15/business/economy/15view.html> (“Many suburbanites take free parking for granted, whether it’s in the lot of a big-box store or at home in the driveway. Yet the presence of so many parking spaces is an artifact of regulation and serves as a powerful subsidy to cars and car trips. Legally mandated parking lowers the market price of parking spaces, often to zero.”).

292. One could argue that while new regulations would result in a better quality of design and environment, they might in fact hinder redevelopment of the site. If a city’s goal is simply to get *anything* in place of the abandoned big box, perhaps these revisions would not be beneficial. However, if its goal is to learn from past mistakes, and foster what it views as better development in the future, these suggestions are applicable.

parking standards, parking lots are large enough to accommodate every shopper on the busiest shopping day of the year.<sup>293</sup> One purported purpose of these minimums is to reduce the negative externalities such as pollution and green house gas emissions that are caused by cars driving around and idling while looking for parking spaces.<sup>294</sup> Further, if a potential shopper is driving by and sees available parking spaces, she will believe that the store is not overly crowded and that it will be easy to get in and get shopping done. Conversely, parking maximums provide a reduced number of parking spaces to potential shoppers, which might regularly all be taken up. Thus, some potential shoppers will choose not to stop and shop, because finding parking elsewhere and walking to the store is not part of the big box shopping culture. Further, while parking maximums may make sense in locations that are well served by mass transit or are accessible by bicycle, they make less sense in areas that are strictly accessed via car (as is the case for many big box locations).<sup>295</sup> Thus, a town that decides to implement parking maximums on sites containing ghostboxes should be serious about its desire to urbanize the area at issue. The town's goals should likely not be to attract another big box retailer to reuse the vacant space but to foster a redevelopment project that will bring more pedestrian activity into the community. Although the changes that will result from these zoning revisions will occur slowly—redevelopment of one abandoned parcel at a time—in the aggregate they will make a dramatic difference in the look and feel of a community.<sup>296</sup>

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293. See Evans-Cowley, *supra* note 49, at 335 (discussing minimum parking requirements and demand, and noting that retailers often provide *more* parking than is required under the code); Richard W. Wilson, *Suburban Parking Requirements: A Tacit Policy for Automobile Use and Sprawl*, 61 J. AM. PLAN. ASS'N 29, 30 (1995) (discussing minimum parking standards).

294. *Stroud v. City of Aspen*, 532 P.2d 720, 723 (Colo. 1975) (suggesting that minimum parking requirements might address pollution caused by drivers looking for places to park). *But see* Michael Lewyn, *What Would Coase Do? (About Parking Regulation)*, 22 FORDHAM ENVTL. L. REV. 89, 91 (2010) (noting that minimum parking requirements might result in more negative externalities than they eliminate).

295. One could argue that even in areas that are well-served by mass transit, people will still want their cars when they shop at big box stores, as they often buy large items, or bulk supplies, and thus cannot easily carry their purchases home on transit.

296. See, e.g., DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 3 (“A decade after Boulder, Colorado, revised zoning and setback regulations along suburban

A municipality with a ghostbox problem could implement all or a combination of these suggested zoning revisions. They will serve to better the physical appearance of the abandoned property, and will also increase the likelihood that it will be redeveloped or reused in a way that will further higher density, new urbanist redevelopment of suburban, sprawl-ridden areas.

*c. Direct Intervention: Acquiring Title*

Even if a municipality selects a goal and implements market-tweaking devices in pursuit of that solution, the market might not produce a new use for the space within a reasonable period of time. In that event, the municipality should have a plan in place to take control of the ghostbox and seek an alternative use.<sup>297</sup> To do so, it must first obtain title to the property.

In the event that the abandoned big box store has unpaid taxes, the municipality might be able to obtain title through the state tax foreclosure laws.<sup>298</sup> For example, some states have enabled local land banks to automatically gain title to properties that fail to sell at a tax foreclosure sale.<sup>299</sup> Many state tax foreclosure laws are outdated, so this process may take quite a long time.<sup>300</sup> States could also play a role by revising their tax laws to allow property owners to donate their abandoned big box (or other) stores to the municipality in

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arterials, new mixed-use buildings with sidewalk cafés appear cheek by jowl with older carpet-supply stores set behind large parking lots.”)

297. If a city is hesitant to take action, but the citizens within the community want to force the city to address harms caused by abandoned big box stores, those citizens might consider using the state initiative process to place such a requirement on the ballot.

298. See MALLACH, FACING, *supra* note 76, at 51; Accordino & Johnson, *supra* note 15, at 307–08 (noting that if property is tax delinquent for a certain amount of time, a city can initiate a tax sale).

299. See Alexander, *supra* note 180, at 150 (describing Louisville and St. Louis Land Banks). Ohio has gone a step further, empowering land banks to purchase properties that are delinquent even before a public auction takes place. OHIO REV. CODE ANN. §§ 323.78, 1724.02 (LexisNexis Supp. 2011). This reduces the risk of an absentee owner purchasing the property at a tax foreclosure sale. See La Croix, *supra* note 216, at 231–32.

300. MALLACH, FACING, *supra* note 76, at 51; see also TERESA GILLOTTI & DANIEL KILDEE, GENESEE INST., LAND BANKS AS REVITALIZATION TOOLS: THE EXAMPLE OF GENESEE COUNTY AND THE CITY OF FLINT, MICHIGAN 143 (describing the old system in Michigan where “abandoned properties were either transferred to private speculators through tax lien sales or became state-owned property through foreclosure,” which meant that *local* government officials could not intervene).

which they are located and receive a tax write-off or other benefit for that donation.

Depending on the physical state of the abandoned big box parcel, its level of blight, and its impact on the surrounding community, the local government could declare it to be a nuisance property. A nuisance determination might allow a locality to obtain civil penalties, appoint a receiver, or take physical possession of the property.<sup>301</sup> Cities also may use their power of eminent domain to acquire abandoned buildings, though this is costly—and now somewhat more difficult due to state legislation passed in the wake of *Kelo*.<sup>302</sup> Depending on the financial situation of the ghostbox owner, cities may also purchase dark big box stores at bargain prices.<sup>303</sup> This approach has the benefit of avoiding tax foreclosure proceedings. Finally, some vacant property ordinances impose daily fines for noncompliance, which may lead a property owner to turn its vacant property over to the city to avoid large fine payments.<sup>304</sup>

After acquisition, the local government must manage the property until it is reused or redeveloped. Because property management requires time and expertise, the local government

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301. Some cities arrive at a nuisance determination only after using their code enforcement process. See Accordino & Johnson, *supra* note 15, at 309 (noting that code enforcement can result in fines or demolition).

302. See, e.g., Accordino & Johnson, *supra* note 15, at 309 (describing use of eminent domain if a building is in a redevelopment area); Thomas J. Vicino, *The Quest to Confront Suburban Decline: Political Realities and Lessons*, 43 URB. AFF. REV. 553, 564 (2008) (“The county acquired, condemned, and demolished the Victory Villa Gardens Complex in the Glenmar neighborhood. In its place, [the] Office of Community Conservation Director . . . and [the] County Councilor . . . enticed . . . the region’s largest homebuilder, with \$20 million to redevelop the site.”). See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (discussing state legislative responses to *Kelo*).

303. For example, after a 600,000 square foot outdoor shopping mall went dark, the municipality in which it was located purchased the property for \$185,000 and a promise to forgive unpaid taxes. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 52; see also Alexander, *supra* note 180, at 154–55 (describing Atlanta Land Bank, which has the power to extinguish certain taxes). Of course, even at bargain prices, in this economy, many municipalities are unable to purchase anything. See Sara Behunek, *Three American Cities on the Brink of Broke*, CNN MONEY (May 28, 2010, 1:06 PM), [http://money.cnn.com/2010/05/28/news/economy/american\\_cities\\_broke.fortune/index.htm](http://money.cnn.com/2010/05/28/news/economy/american_cities_broke.fortune/index.htm).

304. See, e.g., BALTIMORE, MD., CODE art. 13 § 4-13 (2011); CHICAGO, ILL., CODE art. I, tit. 13, ch. 13-12, §13-12-125(d) (2010), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago\\_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il); see also Hirokawa & Gonzalez, *supra* note 56, at 632 n.22 (citing ordinances that impose fines).

should delegate this task. If the state or locality has already created a Land Bank Authority or Redevelopment Agency, that entity should be tasked with obtaining title to ghostboxes and managing their disposition.<sup>305</sup> Land banks, a relatively new phenomenon, exist expressly “to convert the vacant and abandoned land of our central cities to assets contributing to the health and vitality of a community,”<sup>306</sup> and they have the power to acquire, manage, and dispose of vacant and abandoned property.<sup>307</sup> For those without Land Banks, some cities have found success in partnering with Community Development Corporations (CDCs) to work on redevelopment projects.<sup>308</sup> CDCs are “community-based organizations that conduct revenue-generating business with the primary purpose of economic and social development of their community,” and thus are well suited to property acquisition, management, and disposition.<sup>309</sup>

## 2. Metrics: Which Solution for Which Community?

Once a municipality has determined that it will address its empty big box problem, it must decide which of the solutions discussed above to promote and which zoning changes to adopt. This Section proposes a set of metrics—criteria for choosing a

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305. SCHILLING, BLUEPRINT BUFFALO, *supra* note 224, at 154–55 (addressing why land banks can effectively manage the disposition of vacant property).

306. Alexander, *supra* note 180, at 141.

307. For example, Michigan recently adopted a new law, the “land bank fast track act,” MICH. COMP. LAWS §§ 124.75–124.774 (2004), the purpose of which is “to assemble or dispose of public property, including tax reverted property, in a coordinated manner to foster the development of that property and to promote economic growth in this state and local units of government,” *id.* § 124.752. The statute also gives power to a land bank authority “to acquire, assemble, dispose of, and quiet title to property.” *Id.* Under the statute, local governments are able to obtain control of vacant land more quickly, and they have more authority to do so than they did under the previous law. *See generally* GILLOTTI & KILDEE, *supra* note 300, at 143 (describing problems with previous law, including the tax foreclosure system).

308. *See generally* James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210 (2004) (describing benefits of community development corporations).

309. Note, *Community Development Corporations: Operations and Financing*, 83 HARV. L. REV. 1558, 1560 (1970). Although CDCs have traditionally focused on development of new housing as a route to revitalizing neighborhoods, they are finding new roles to play in revitalizing “shrinking cities.” *See* Alan Mallach, *Where Do We Fit in? CDCs and the Emerging Shrinking City Movement*, SHELTERFORCE, Spring 2011, at 40, 43, 45.

remedy—that a local government can use to determine which approach or proposed solution makes the most sense for its community.<sup>310</sup> These metrics are: economic state (including the municipality's financial concerns and market demand); ecological goals (including the municipality's commitment to sustainable development and new urbanist ideals); existing retail landscape (including the location and number of existing retail structures); and existing land development patterns (including not just buildings, but also open space, landfill space, parking structures, etc.).<sup>311</sup>

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310. Cf. SETH TULER ET. AL., ENVIRONMENTAL PERFORMANCE METRICS FOR OIL SPILL RESPONSE 7 (2006), available at [http://www.crrc.unh.edu/progress\\_reports/tuler/oilspillmetricslitreviewapr06.pdf](http://www.crrc.unh.edu/progress_reports/tuler/oilspillmetricslitreviewapr06.pdf). Tuler writes that:

[A]ny set of metrics is incomplete and may at best be considered only *representative* of the myriad of decision factors that could be brought to bear on the situation. For this reason, metrics are often referred to as *indicators* to emphasize the representational relationship these measures have to the state of complex systems. They are indicative – but not definitive – gauges, and consequently must be interpreted with their limitations in mind.

*Id.*

311. The matrix demonstrates the interaction between the metrics and the options for the second life of the ghostbox. The following Parts present each metric, and discuss how each metric would weigh in favor of or against each possible solution.

Table 1: Metrics for Selecting a Solution to the Problem of Empty Big Box Stores

| <i>Solutions</i>                          | <b>Straight Retail Reuse</b>   | <b>Adaptive Reuse</b>   | <b>Demolition and Redevelopment</b>   | <b>Demolition and Regreening</b>  |
|---|--|---|---|---|
| <i>Metrics</i>                            |  |   |   |   |
| <b>Economic State</b>                     | <p>City lacks funding for acquisition or redevelopment</p> <p>Low market demand for redevelopment projects</p> | <p>Demand for large-scale entertainment uses, schools, or municipal buildings</p> <p>Demand for community-serving retail use</p>                                | <p>Sufficient city or market-based funding available for acquisition and redevelopment</p> <p>Sufficient market demand to support redevelopment projects</p>            | <p>City or volunteer partners available to maintain greenspace</p> <p>Lack of market demand for new big box or redevelopment projects</p>   |
| <b>Ecological Goals</b>                   | <p>Decrease waste</p> <p>Reduce carbon footprint / energy consumption</p>                                      | <p>Decrease waste</p> <p>Reduce carbon footprint / energy consumption</p>   | <p>Comprehensive planning envisions high density / smart growth</p>   | <p>Reduce impervious cover</p> <p>Increase public open space</p> <p>Support locally produced foods</p>  |
| <b>Existing Retail Landscape</b>          | <p>No other big box shopping options</p> <p>No traditional downtown shopping district</p>                      | <p>Sufficient number of operational big box stores</p>  | <p>Sufficient number of operational big box stores</p> <p>Many ghostboxes</p>   | <p>Sufficient number of operational big box stores</p>  |
| <b>Existing Land Development Patterns</b> | <p>Ghostbox located in area not targeted for future development</p> <p>Limited landfill space</p>              | <p>Struggling traditional downtown with empty storefronts</p> <p>Ghostbox located in area not targeted for future development</p> <p>Limited landfill space</p> | <p>Struggling traditional downtown with empty storefronts</p> <p>Ghostbox is located on large parcel or is part of a larger vacant strip mall</p> <p>Shrinking City</p> | <p>Struggling traditional downtown with empty storefronts</p> <p>Ghostbox site surrounded by forested areas</p> <p>Lack of open space</p> <p>Food Deserts</p> <p>Shrinking City</p> |

*a. Economic State*

In determining which option to promote—and thus how to revise and structure its zoning ordinances to support that goal—the local government should begin by examining its economic state, including an analysis of its finances and market demand for retail and other uses.

Many local governments are in financial distress<sup>312</sup> and thus are unable to secure funding that would allow them to take ownership, or invest in redevelopment, of an empty big box store. From a financial perspective, localities would need to invest little money if their goal was straight reuse of the vacant big box. Similarly, straight retail reuse might be appropriate if market demand is so lacking that no private developer expresses an interest in constructing new development in the area. Assuming a new tenant could be located, straight reuse would bring the most immediate relief to the community and would require little to no expenditure on the part of the municipality.

In contrast, even in a locality with weak finances, there might be demand for large-scale entertainment uses (such as a bowling alley or roller rink), schools, or municipal building space. Suburban areas with strong immigrant communities might desire community-serving ethnic market space. In these situations, a municipality might choose to support a goal of adaptive reuse for its ghostboxes. By incentivizing adaptive reuse of these structures, the municipality can spur the market to find new uses for these spaces. Unless it decides to reinhabit the space with a public use, it need not expend much money in pursuit of adaptive reuse.

In order for a municipality to support a goal of demolition and redevelopment, it needs assurance that sufficient market demand exists to support the redevelopment project. In contrast, lack of market demand for development would suggest greening as an appropriate goal. Funding must also be considered; even if a private developer will demolish and redevelop the site, redevelopment projects often involve some public funding assistance.<sup>313</sup> Financing is also important if the end goal is greening. First, the municipality will need to acquire the property and demolish the ghostbox. Then, funding

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312. See *supra* note 303.

313. See *supra* note 117 and accompanying text.

or adequate community partnership, such as a non-profit or local business, would be needed to install or maintain the greenspace. Although property acquisition and demolition cost money, even financially distressed municipalities should keep in mind that the existence of the ghostbox is causing some of the financial distress, and thus its demolition and greening may make a positive economic contribution.

*b. Ecological Goals*

Though many local governments are most interested in fiscal balance and economic viability,<sup>314</sup> some are moving toward ecological goals such as sustainable development, carbon footprint reduction, and increased energy efficiency. Because reusing a big box store is more ecologically sound than demolishing it,<sup>315</sup> municipalities that are committed to ecological goals such as these should pursue a plan of straight or adaptive reuse over demolition.

However, demolition and redevelopment allow a community to reimagine itself and rebuild itself in a sustainable way, fostering ecological goals.<sup>316</sup> Demolition and greening can also contribute to ecological goals, especially in a community that has water quality concerns and wishes to decrease its impervious cover, or desires to create additional public open space. The general rule, however, is that reuse does more to further ecological goals than does demolition, no matter the end product.

*c. Existing Retail Landscape*

In examining its existing retail landscape, a municipality should consider the number of existing ghostboxes, the number of existing operational big box stores, and whether it has a

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314. ELLICKSON & BEEN, *supra* note 229, at 56–57, 57 tbl.2-1.

315. *See supra* notes 162–67 and accompanying text.

316. In the context of suburban redevelopment, commentators have asserted: [T]he focus for redevelopment should be those parts of the metropolis with the highest auto dependency and [vehicle miles traveled], highest per capita greenhouse gas emissions and per capita runoff, and least diverse social, housing, and transportation choices. By retrofitting unsustainable suburban properties into networks of more urban, compact, and connected places we can incrementally retrofit the sprawling region into a greener polycentric metropolis.

DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 230–31.

traditional downtown with operational community-serving retail uses. If the community lacks other shopping options—for example, if Kmart, the only large discount retailer within fifty miles, closed, and there is no traditional downtown—the town might desire that another large discount retailer move into the abandoned big box space to serve the public need. Straight reuse would be most appropriate in this situation.

In contrast, if the town has enough operational big box stores, but also has ghostboxes and a traditional downtown with empty storefronts, it should learn from its ghostbox legacy. Instead of supporting straight retail reuse, the town should make changes to encourage local, community-serving retail development in the traditional downtown and adaptive reuse of the ghostbox site.

Perhaps the ghostbox is in a “shrinking city”<sup>317</sup> that has enough operational retail uses to meet demand, but that also has a number of ghostboxes and dead malls, some of which are located in areas where the city wants to target new growth and development. Demolition and redevelopment of ghostboxes in the targeted growth areas might be appropriate. In contrast, if they were located in areas not targeted for new growth, demolition and regreening with conversion to public open space would make sense. Finally, in examining its existing retail landscape, a municipality should consider whether the parcel has been abandoned due to upsizing or lack of market demand. If it is the latter, it is possible that another retailer would not survive in the space, and thus regreening would make sense.

#### *d. Existing Land Development Patterns*

Finally, the local government should examine its comprehensive land use plan and the existing land development patterns in the community and consider where it wants to target future development. The status quo—reuse—makes the most sense if the ghostbox is located in an area that has not been targeted for future high-density development or growth; it would not make sense to demolish and rebuild on this land. Further, if the municipality lacks sufficient landfill space to accommodate the amount of demolition debris

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317. See La Croix, *supra* note 216, at 227 (defining shrinking cities as those with “long-term trends of significant population decline, associated with the loss or diminution of the industries that caused the cities to grow in the first place”).

generated from a demolished big box, reuse of the structure would be more appropriate.

A number of existing land development patterns suggest a regreening solution, including: sites containing forested areas that might link to other areas to maintain or improve species habitat and enhance migration; areas that lack open space; ghostboxes located close to high density residential development that lacks its own yards; and the existence of covered streams on the property that perhaps could be daylighted—liberated from a pipe or culvert—as part of a regreening project.<sup>318</sup> Municipalities should also incentivize regreening if the ghostbox is located in a food desert and people lack the ability to purchase or harvest fresh produce in the area.<sup>319</sup> Specifically, that space could be used for community gardens or farmers' markets.

In considering existing land use patterns, municipalities should also focus on the size and location of the abandoned parcel itself. A large-scale redevelopment project that aims to create a new center or downtown will typically only succeed if at least fifteen acres of land is available for redevelopment.<sup>320</sup> Further, many abandoned big box stores are located in undesirable areas that were drained of life when the store closed. Perhaps housing in the area has also fallen into disrepair. Because patterns of suburban development are often not part of any larger plan, the ghostbox site might not be in a location where people would want to live, work, or shop. Similarly, even if the surrounding area is still vibrant, it is likely surrounded by numerous other free-standing big boxes. It may be difficult to convince someone to move into a new development surrounded on all sides by big box strip centers, even if that new development itself contains a coffee shop, restaurant, and office space. Thus, both the condition of and the existing uses in the surrounding area should be considered before a redevelopment project is approved.

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318. See RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 6, 15.

319. One could also argue that a city with these land development patterns should encourage reuse of the space by a grocer.

320. See *supra* note 204.

### 3. Mechanics and Financing

All of these solutions further sustainable development goals because they provide for reuse of an existing building or infill development and redevelopment at a higher density and in a more urban fashion than traditional suburban sprawl development. The “green” characterization is important because there are a number of new funding opportunities being developed for cities that are moving toward sustainable development. Specifically, federal money has recently become available for sustainable development projects,<sup>321</sup> and state and regional funding may also be available.<sup>322</sup>

Cities could also use Tax Increment Financing (TIF)<sup>323</sup> to aid in the redevelopment of abandoned big box parcels.<sup>324</sup> The

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321. For example, in June 2009 the Obama administration launched the Partnership for Sustainable Communities to assist local governments in building more sustainable cities. Press Release, U.S. Dep’t of Hous. & Urban Dev., USDOT and HUD Launch Groundbreaking, Collaborative Effort to Create Sustainable, Livable Communities (June 21, 2010), *available at* [http://portal.hud.gov/portal/page/portal/HUD/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-131](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-131); *see also* MALLACH, *FACING*, *supra* note 76, at 27 (noting that money from the Sustainable Communities Initiative is to be used for Metropolitan Challenge Grants to create “sustainable communities”) (internal quotation marks omitted). Part of this program involves TIGER II (Transportation Investment Generating Economic Recovery) planning grants and Sustainable Community Challenge Grants. These are available to local governments that create projects linking transportation with affordable housing, mixed-use development, and building reuse. Press Release, U.S. Dep’t of Hous. & Urban Dev., *supra*; *see also* MALLACH, *FACING*, *supra* note 76.

322. *See, e.g.*, MD. CODE ANN., STATE FIN. & PROC. § 5-7B-01 to -03 (LexisNexis 2009) (providing for loans, grants, or tax credits to fund neighborhood revitalization projects); MINN. STAT. ANN. § 473.25 (West Supp. 2010) (establishing the Livable Communities Act, an incentive-based program that provides communities with development funds); Nolon, *supra* note 237, at 816–17 (noting that many towns receive grants from state agencies and nongovernmental organizations to get their smart growth programs started, hire staff, undertake studies, and develop plans for moving forward); *Livable Centers Initiative*, ATLANTA REGIONAL COMMISSION, <http://www.atlantaregional.com/land-use/livable-centers-initiative> (last visited Feb. 20, 2011). Unfortunately, these programs often make funds available only to projects that are located in areas that have been designated for growth or those that contain lands that the state wants to protect. *Cf.* Nolon, *supra* note 237, at 817 (noting that funds will be allocated to “designated growth areas that contain significant natural resources or fertile agricultural lands”). While such policies do much to further the objectives of smart growth, they may exclude suburban greyfield redevelopment unless a city has targeted its suburban commercial core for dense redevelopment.

323. A city establishes a TIF or redevelopment area and issues bonds to fund development in the area. The tax or assessment value of property within the TIF area is frozen at the time the bonds are issued, then redevelopment occurs and property taxes in the area increase. Any increase above the frozen level is diverted

idea behind TIF is, without the redevelopment within the TIF district, property values would have remained the same or even declined.<sup>325</sup> While TIF districts have been created to spur investment in communities throughout the United States, some commentators believe that it would be cumbersome to create a TIF for an individual parcel, such as a single abandoned big box store.<sup>326</sup>

States should also consider creative financing mechanisms, perhaps using Superfund as a model.<sup>327</sup> Superfund was originally funded in large part by a tax on crude oil, imported petroleum, and chemical industries based on the theory that those industries were partially responsible for hazardous waste cleanup problems and should thus collectively shoulder the burden of cleanup.<sup>328</sup> Perhaps a similar tax on big box or greenfield development could generate funds to assist municipalities in acquiring ghostboxes and implementing some of the solutions suggested in this Article.

Municipalities must keep in mind that the existence of a ghostbox in their community is an economic harm; high density, mixed-use development has been shown to provide more tax revenue per acre than big box development.<sup>329</sup> Because the proposals in this Article further goals of sustainable development and suburban renewal, there are numerous options for cities to fund and actually implement these proposals.

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to a special fund to pay off the bonds, while the frozen portion is paid into a general fund to pay off general obligation bonds that the city has issued. *Wolper v. City Council*, 336 S.E.2d 871, 874 (S.C. 1985).

324. This would be an ironic turn of events, as many communities used TIFs to lure big box construction into areas that are actually non-blighted, such as unbuilt greenfield space. See MITCHELL, *supra* note 10, at 168.

325. See ELLICKSON & BEEN, *supra* note 229, at 845.

326. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 77.

327. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006); EPA, *Basic Information, SUPERFUND*, <http://www.epa.gov/superfund/about.htm> (last updated Oct. 3, 2011).

328. 26 U.S.C. §§ 4611–4612, 4661–4662 (2006); see also Patricia L. Quentel, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 150 n.43.

329. Philip Langdon, *Best Bet for Tax Revenue: Mixed-Use Downtown Development*, NEW URB. NETWORK (Sept. 13, 2010), <http://newurbannetwork.com/article/best-bet-tax-revenue-mixed-use-downtown-development-13144> (describing a study by a real estate development firm showing that big box retail generates approximately \$8,350 per acre per year, while lifestyle center redevelopment—“two or three stories, with housing or offices over retail”—generates between \$70,000 to \$90,000 per acre per year) (quoting Peter Katz, Dir. of Smart Growth & Urban Planning, Sarasota Cnty., Fla.).

## CONCLUSION

As the ghostbox epidemic continues to expand across the country, local governments have two choices: they can sit back, do nothing, and let the market try to take care of the problem (which has thus far been unsuccessful on a large scale), or they can view the problem as an opportunity to reconsider their prior poor planning decisions. Local governments have begun taking the lead in implementing a variety of experimental sustainable development policies; there is no reason that those same policies should not be applied to ghostboxes. Big box abandonment is a nationwide problem that should be addressed at the local level. Although finding a way to fully fund this proposal will be challenging, local governments have the incentive, the responsibility, and an exciting opportunity to adopt new ordinances that will assist them in turning these blighted, empty parcels into community assets.

The matrix presented in this Article provides local governments with a number of potential solutions that will alleviate the problems caused by vacant and abandoned big box stores. There is no “one size fits all” solution. Suburban greyfields and ghostboxes present a new opportunity for municipalities to remake themselves. Some will be reused, retaining their boxy structure but delivering new vibrancy to the community; some will be demolished and the areas will be turned into dense, mixed-use villages, adding urban flavor to the suburbs;<sup>330</sup> and still others may become open space or solar energy generation facilities. The future of these ghostboxes is yet to be determined; local governments have the power to shape that future.

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330. CALTHORPE & FULTON, *supra* note 188, at 208 (addressing options for greyfields).