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Fall 2004
Updated Spring 2007

Land Use Clinic
university of georgia
School of Law & College of Environment and Design

The **UGA Land Use Clinic** provides innovative legal tools and strategies to help preserve land, water and scenic beauty while promoting creation of communities responsive to human and environmental needs. The clinic helps local governments, state agencies, landowners, and non-profit organizations to develop quality land use and growth management policies and practices. The clinic also gives UGA law students an opportunity to develop practical skills and provides them with knowledge of land use law and policy.

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I. Introduction: The Rise of "Big Box"[1] Development

A. Background – The Rise of Sprawl

Since the end of World War II, America has witnessed the ever-increasing phenomenon of sprawl. Traditional neighborhoods were characterized as "mixed use, pedestrian friendly communities of varied population, either standing free as villages or grouped into towns and cities…."[2] But as suburbs spread further from the urban core in the years following the end of World War II, large tracts of land were cleared to build the suburban tract housing that is characteristic today. Suburban sprawl has become "the standard North American pattern of growth;"[3] and is "characterized as 'non-contiguous, automobile-dependent, scattered, new development on the fringe of settled areas….'"[4] In these fringe areas were built large retail developments, which have evolved into today's "big box" stores.[5]

The rise of big box retail is no accident. Following World War II, America experienced a boom that saw our economy "shift from a central city-based manufacturing economy to a suburban-based service and information economy."[6] At the same time, the "desire to be free of central city taxation and zoning… the availability of open land… [as] taxable assets; pressure from landowners to convert open land to more valuable suburban uses; and broad, judicially unreviewable and politically unaccountable grants of zoning authority from state legislatures to municipalities" also contributed to the rise of sprawl.[7] The result of this shift was that by 1990, "of the eighty percent of the American people who lived in metropolitan areas, two-thirds lived in suburbs—few of which even existed in 1910."[8] This environment helped set the stage for the success of big box retailers by providing new markets in outlying suburbs and the consumers needed to support the increasingly large retail stores.

B. What is Big Box Development?

Big box stores are built as part of "power centers"[9] or as freestanding stores and have grown increasingly larger in recent years. Today, big box retailers are said to account for over half of all new retail space built in America.[10] Underscoring the size and impact of these stores, *Fortune* recently reported that "Wal-Mart… [opens] almost 300 new stores a year… A Supercenter can be a $100 million-a-year business with up to 600 employees."[11] While big box stores boast convenient, one-stop shopping, they are criticized for their hidden costs.[12] These include:

> [T]raffic congestion; loss of trees, open space and farmland; displaced locally-

1 "Big Box" development refers to stores that range from 90,000 to 250,000 square feet, which are typically 20 to 50 times the size of typical downtown retailers. Leslie Tucker, "Retail Caps for Retail Glut: Smart Growth Tools for Main Street," *National Trust for Historical Preservation* 1 (2002), available at http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit_retailcaps.pdf.
2 Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* 5 (2000).
3 *Id.*
4 Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 Wake Forest L. Rev. 563, 565 (2000).
5 Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 Va. L. Rev. 447, 448 (2003).
6 Henry R. Richmond, *Sprawl and its Enemies: Why the Enemies are Losing*, 34 Conn. L. Rev. 539, 548 (2001).
7 *Id.* at 554.
8 *Id*. at 551.
9 Also called a super-community center, "power centers" differ from traditional malls in that they are not enclosed, have few amenities, and are composed of multiple anchor tenants. In addition, a small percentage of a center's leaseable area is devoted to smaller stores on a speculative basis after the center is developed. Raymond G. Truitt, *Fe Fi Fo Fum: Retail Giants Rule Power Centers*, 10 APR Prob. & Prop. 38, 39 (1996).
10 Tucker, *supra* note 1.
11 Cora Daniels, "Women vs. Wal-Mart," *Fortune*, July 7, 2003, available at http://www.fortune.com/fortune/careers/articles/0,15114,462970,00.html.
12 Tucker, *supra* note 1.

owned small businesses; substitution of jobs that support families with low-paying jobs that don't; air and water pollution; dying downtowns with vacant buildings; abandoned shopping centers and the creation of more retail space than the local economy can support; a degraded sense of community; placing large burdens on public infrastructure, such as sewers and road maintenance; discouraging new business development; and sprawl.[13]

Big box stores are often built to last for only short periods of time, with many of them leased from developers who build them on open land at the edge of town, where development costs are low.[14] This lack of investment by the store in the development project makes it easier for big box retailers to simply walk away when they find it fitting to do so. Indeed, communities "worry that a big box user may abandon a store as corporate restructuring and market analysis determine that a once desirable site has become less profitable."[15] A further problem is presented when the former retailer continues to lease the abandoned space to prevent a competitor from moving in, effectively prohibiting the center's redevelopment.[16]

II. The Law of Big Box Development

A. Underlying Zoning Principles and Law

Georgia's constitution provides that "[t]he governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning."[17] While this does not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power, this grant of power leaves the substance of planning and zoning laws up to the local municipality or county governing authority.[18] Thus the power to regulate the development of big box retail stores falls to the municipalities. The basic legal issue involved in limiting the size of big box superstores is whether the exclusion advances a legitimate zoning purpose, with the court normally ruling in favor of the city if it has a reasonable planning-based rationale for its action.[19] In Georgia, the burden is on the property owner challenging a zoning ordinance to establish by clear and convincing evidence that the owner "will suffer a significant detriment" under the ordinance and that the zoning "bears an insubstantial relationship to the public interest."[20]

B. Case Law on Big Box Development

The law on the use of retail caps to limit the size of big box retail stores in Georgia appears to be nonexistent, reflecting the relatively recent nature of the use of caps in this state. However, there is a small body of case law from other jurisdictions where retail facilities exceeding certain square footage requirements are prohibited from certain zoning districts. For example, the validity and constitutionality of a law that set caps on the size of big box retail stores was discussed in *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*.[21] After adopting a six-month moratorium on site plan approvals for retail stores exceeding a gross floor area of over 20,000 square feet, the city passed the Superstore Law, restricting the establishment of superstores and supermarkets except within the Central Business zoning district.[22] Prior to the passage of the law, A & P had applied for a site plan approval for a supermarket that would have been placed outside of the Central Business zoning district in a Neighborhood Business zoning district. Due to its expected size, 33,878 square foot area with a 15,000 square foot cellar,[23] the proposed supermarket was denied approval based on the passage of the Superstore Law.

13 Constance E. Beaumont & Leslie Tucker, "Big-Box Sprawl; (And How to Control It)," *Municipal Lawyer*, 7 (Mar./Apr. 2002).
14 "Fold Big-box Stores Before It's Too Late," *Atlanta Journal-Constitution*, Oct. 17, 2000, at A18.
15 Truitt, *supra* note 9, at 39.
16 "Fold Big-box Stores before It's Too Late" at A18.
17 Ga. Const., art. IX, § II, Para. IV (1983).
18 *Id.*
19 Tucker, *supra* note 1.
20 *Henry County v. Tim Jones Properties, Inc.*, 273 Ga. 190 (2000).
21 997 F.Supp. 340 (1998).
22 The Superstore Law defines a 'superstore' "as a retail store located within a building whose gross floor area equals or exceeds 10,000 square feet," and defines a 'supermarket' "as a superstore in which food and/or beverages constitute the predominate goods for sale." *Id.* at 345.
23 *Id.*

In arguing against the Superstore Law, A & P argued "that the size restrictions imposed by the Superstore Law were wholly arbitrary, not in the furtherance of any legitimate governmental purpose, do not bear a reasonable relationship either to the ends sought to be achieved by the law or to the public, health, safety, morals, or welfare."[24] Ultimately the constitutionality of the ordinance was not addressed by the court because the appeal was based on a motion to dismiss, which did not provide sufficient facts for such a determination.[25]

In *Home Depot U.S.A. v. Portland,* the city amended its zoning ordinance to make "retail facilities... [in excess of 60,000 square feet] non-permitted in certain 'industrial districts' where they previously had been conditionally permissible... [and] also made the uses only conditionally permissible in certain 'employment districts' where they previously were permitted outright."[26] The city based the law's purpose on the need to "'protect Portland's industrial sanctuaries, areas that generate a high percentage of family-wage jobs, from large scale retail and office uses and their negative impacts on traffic and land value.'"[27]

Home Depot argued that the amendments were either inconsistent with or not supported by findings to be consistent with a statewide planning goal that required local urban area plans "to provide 'for at least an adequate supply of sites of suitable size types, locations, and service levels for a variety of industrial and commercial uses[.]'"[28] The court rejected this argument, however, finding that the goal "requires planning and provision for 'a variety of industrial and commercial uses,' not a Herculean—or quixotic—planning and zoning effort whereby every community assures that there are available sites for every conceivable kind of business activity."[29] Instead of depleting the land supply for commercial and industrial uses, the court found that the amendments only changed "the conditions under which a particular kind of business activity may be approved within areas that remain zoned as business districts and remain available for business uses of various kinds."[30] Indeed, the court concluded its decision noting that, "When it is all said and done, petitioner's challenges to the city's finding and to the substance of its decision reflect a disagreement at the policy and planning level… This court of course is not the appropriate forum to resolve" these issues.[31] While such a case does not seem to have been brought in Georgia, relying on a policy-based justification could be an important defense if retail caps are challenged.

Big box control ordinances are also challenged as effecting a taking. Such was the case in *Loreto Development Co. v. Village of Chardon*, where the court considered the denial of a conditional use permit for a proposed 98,000 square foot Wal-Mart store.[32] While the trial court ruled the ordinance unconstitutional, the Court of Appeals noted that the appellee "failed to establish, beyond a fair debate, that the zoning restrictions deprived it of the use of its property."[33] The court noted that there was evidence that the owners could develop the site as zoned and had been offered more for a portion of the property than it had originally paid for it.[34]

The city's justification for the ordinance was crucial to this outcome. In answering whether the zoning ordinance advanced a legitimate governmental interest, the court found that the regulations "[are] intended to prevent traffic congestion, excessive noise, and 'other objectionable influences'" and that the preservation of "the residential, small town character of this part of town…was clearly a legitimate interest to be advanced by this zoning."[35] The appellee also argued that the floor size restriction "fails to advance the purported interests… because the total area of retail space is the same whether there are nine small stores or one large store, there is no difference in the noise and traffic generated by the larger store."[36] Yet the court found that even the

24 *Id.* at 345.
25 *Id.* at 348.
26 169 Or.App. 599, 601 (2000).
27 *Id.* at 601.
28 *Id.*
29 *Id.* at 602.
30 *Id.* at 603.
31 *Id.* at 604.
32 119 Ohio App.3d 524, 527 (1996).
33 *Id.* at 528.
34 *Id.*
35 *Id.*
36 *Id.* at 529.

evidence presented by the appellee supported the position that "such a large store would cause noise and traffic congestion and would destroy the existing character of the area."[37] Thus, the appellate court found the restrictions constitutional, since the "appellee failed to present competent, credible evidence that the local retail business restrictions both deprive it of any economically viable use of its property and failed to advance a legitimate governmental interest…."[38] This indicates that it is possible to uphold big box retail restrictions despite their impact on the use of property interests.

III. Controlling Big Box Development in Georgia

A. The Use of Retail Caps

In recent years, several devices have been used to guard against the blight that results from abandoned big box stores, many of which stand in the shadows of new, larger stores built or leased by their parent companies. Indeed, "[b]ig box retail is another growing commercial use problem. Municipalities may try to deal with it by limiting the size of stores in commercial districts."[39] This is exactly what many communities have done thorough the use of retail caps, which are limits on a retailer's sales volume, or limits on the size of big box stores.[40] These size limits can apply to either overall square footage or to the so-called "footprint"[41] of a store. The limitations on store footprints often allow large retail stores to be built larger by adding another story to the structure.[42]

It is important to note that the retail cap should be based on local planning efforts and should not simply be copied from another jurisdiction. While most of these caps have been set under 100,000 square feet, caps range from 30,000 to 80,000 square feet and more.[43]

37 *Id.*
38 *Id.* at 528-29.
39 Daniel R. Mandelker, *Land Use Law* §5.36 (5th ed. 2003).
40 Tucker, *supra* note 1, at 1.
41 Footprint is used to refer to stores that build multiple floors on top of one another, with only the first floor's square footage applying to the size of the store that can be built. *Id.*
42 *Id.*
43 Tucker, *supra* note 1, at 2-4.

B. Peachtree City

Peachtree City's big box ordinance represents one of the first attempts by a Georgia municipality to address the issues associated with big box blight. At the time the ordinance was passed city leaders expressed fears that there could be a string of big box stores built if the issue was not addressed.[44] This fear is reflected in the language of the ordinance itself. According to the ordinance, the intent of creating the general commercial district includes the desire to "avoid the development of 'strip' type business areas."[45]

Peachtree City's ordinance is designed primarily around the use of retail caps as part of an overall big box ordinance that seeks to limit the impact that these stores would have on the city. Under the city's general commercial district ordinance, retail businesses that sell merchandise "on an individual zoning lot where an individual tenant occupies more than 10,000 square feet"[46] are subject to the ordinance.[47] Maximum areas on any zoning lot are set at 150,000 square feet for general retail space and 50,000 square feet for theater and restaurant space.[48] The ordinance's key requirement is that "[n]o single commercial tenant shall occupy more than 32,000 square feet [of] floor area."[49]

Peachtree City officials also designed the ordinance as a tool to help landlords market their property after retailers leave to occupy newer, larger spaces nearby.[50] The surrounding business owners and community are often hurt by the continued leasing of the empty space by the previous big box tenant. Peachtree City's ordinance requires that empty stores be maintained

44 Sonja Lewis, "Peachtree City May Limit New Big-stores Size: Proposal is Designed to Protect Against the Possibility of Unsightly Abandoned Buildings," *Atlanta Journal-Constitution*, Aug. 24, 2000, available at 2000 WL 5472338.
45 Peachtree City, Ga., Code of Ordinances § 1006.1 (2000) [hereinafter *Peachtree City*].
46 *Peachtree City*, *supra* note 46, at § 1006.3.
47 *Id*. at § 1006.3(a).
48 *Id.* at § 1006.3(a)(1).
49 *Id.* at § 1006.3(a)(2). The 32,000-sq. ft. restriction in the ordinance was based on the size of big box stores in Peachtree City at the time the ordinance was proposed. Telephone Interview with Jim Williams, former Development Services Director, Peachtree City, Georgia (June 10, 2003).
50 *Id.*

as if they are occupied, including such activities as cleaning the windows regularly. This is an incentive for old tenants to give up their lease on the empty property.[51]

Also, the ordinance requires that leases for big box stores contain a clause forbidding the tenant from continuing to lease the space after vacating it. Under the law, tenants occupying more than 10,000 square feet are required to

> [P]rovide the city attorney with a copy of the rental agreement between the tenant and its landlord which contains a contract provision prohibiting the tenant from voluntarily vacating such premises or otherwise ceasing to conduct its retail business on such premises while simultaneously preventing the landlord, by continuing to pay rent or otherwise, from leasing the premises to another person or company who will operate a permitted business on the premises.[52]

This requirement raises possible Contract Clause issues because of the city's involvement in the contracting process between lessor and lessee. The U.S. Constitution states: "no state shall pass any... Law impairing the Obligation of Contracts..."[53] Yet "[t]he contract clause is not an absolute bar to a land use regulation that impairs a contract."[54] Accordingly, a court must first determine that there has been an impairment of a contact, but this impairment can be found valid if it is justified by a legitimate governmental purpose.[55] "Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's '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.'"[56] It is important to note that, when addressing requirements upon private party contracts,[57] a court should show deference to the legislative judgment as to the "necessity and reasonableness of a particular measure."[58]

Some cases arise where ordinances are claimed to be cases of restrictive commercial zoning, which could be a violation of the rule that control of competition is not a proper zoning purpose,[59] while others claim that it is it an attempt to use "zoning to control market demand."[60] And while "zoning may not be used to control competition... Some courts... uphold zoning that affect competition if control of competition is not its primary purpose and if it implements other legitimate zoning objectives."[61] Even if a claim of competition interference were to be raised, the fact that the ordinance is based on the comprehensive plan further insulates it from being overturned because "commercial zoning may not be invalid as an improper control of competition if it is based on a comprehensive plan."[62]

There has been one lawsuit filed against Peachtree City based on this ordinance. The case primarily turned on whether a Target store had a right, pre-existing the ordinance, to build on a particular site. The case was settled and so the overall validity of the ordinance was not litigated. However, prior to the settlement, Target was planning to argue that the ordinance was unconstitutional because it singled out retail for restriction over other land uses.[63]

C. Fayetteville

In April 1996, Fayetteville amended its zoning rules to create a category for stores in excess of 75,000 square feet. The ordinance also requires that big box stores be built on sites that have access to two state highways.[64] This followed an attempt by Wal-Mart to

51 *Id.*
52 *Peachtree City*, *supra* note 46, at § 1006.3(6).
53 U.S. Const., art. I, § 10, cl. 1.
54 Mandelker, *supra* note 40, at §2.52.
55 *Id.*
56 *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470, 505 (1987).
57 As opposed to contracts in which the state is a party.
58 *Id.*
59 Mandelker, *supra* note 40, at § 5.33.
60 *Id.* at § 5.44.
61 *Id.*
62 *Id*. at § 5.47.
63 Kevin Duffy, "Accord paves way for Target," *Atlanta Journal-Constitution*, March 27, 2004.
64 Rick Minter, "'Big-box' stores must have access to 2 highways," *Atlanta Journal-Constitution*, Apr. 18, 1996, M11, available at 1996 WL 8202027.

build a 200,000 square feet store next to a subdivision on Georgia Highway 85, which led the city to pass a moratorium on new big box stores in order to effect the zoning changes.[65] Fayetteville regulates big box stores as high intensity commercial and requires that commercial centers and single tenant retail stores over 75,000 square feet be planned unit developments (PUDs) only.[66] The C-4 zoning designation for these stores also allows any use permitted in the C-3 zoning district, including single tenant retail business and service stores with a maximum gross floor area of 50,000 to 75,000 square feet,[67] planned commercial centers with 50,000 to 75,000 square feet for any single tenant and 100,000 square feet per planned center;[68] and building supply sales that have up to 75,000 square feet, excluding outside storage.[69]

D. City of Roswell

The City of Roswell adapted a big box ordinance in February of 2003, and amended the ordinance in May of 2004.[70] The amended ordinance defines big box commercial retail structures as retail businesses on an individual lot that occupy more than 10,000 square feet.[71] No single commercial retail occupant can occupy more than 65,000 square feet.[72]

Due to the recent annexation of land containing many existing large retail sites, the amended City of Roswell ordinance also provides for the redevelopment of existing big box sites above and beyond the square footage limitations for new structures.[73] In contrast to the 2003 ordinance, which only allowed for the reuse of existing big box structures, the amended ordinance allows for the demolition or rehabilitation of existing big box buildings in order to encourage and accommodate reuse of existing sites. However, regardless of the size of the original structure, no redevelopment proposal can exceed 65,000 square feet.

Additionally, the City of Roswell ordinance prohibits large expanses of blank walls.[74] This requirement can be met through a variety of design options, which are to be reviewed and approved by the Roswell Design Review Board or the Historic Preservation Commission. The City of Roswell has had no threatened or actual litigation regarding its big box statutes.[75]

E. City of College Park

In December of 2003, the City of College Park amended its zoning rules to create a category for "especially large buildings".[76] This big box ordinance applies to new structures over 30,000 square feet, as well as to non-conforming existing structures over 15,000 square feet which are left vacant for at least six months. Additionally, the ordinance sets a retail cap on new structures over 60,000 square feet.[77] The College Park ordinance is notable because it is the first ordinance in Georgia to specify strict design and pedestrian scale requirements for big box development. Also, it provides for the analysis of local noise and visual impacts, as well as regional traffic impacts.

The College Park ordinance requires that the façade and exterior walls be designed to include projections and recessions, so as to reduce the massive scale and uniform appearance of traditional big box development.[78] Similarly, street frontage must be designed to include windows, arcades, or awnings for at least 60% of the façade.[79] Additional specifications address the number and variation in

65 *Id.*
66 City of Fayetteville, Ga., Code of Ordinances § 94-168(3) (1997). Under a planned unit development, "the city can incorporate controls into the plan, such as, for example, requiring buffer zones. The PUD plan is then recorded, thereby protecting the city and the public as well as the purchasers in the development." *Mayor and Aldermen of the City of Savannah v. Rauers*, 253 Ga. 675, 676 (1985).
67 *Id.* at § 94-167(2).
68 *Id.* at § 94-167(3).
69 *Id.* at § 94-167(14).
70 City of Roswell, Georgia Ordinance to Amend the Zoning Ordinance Regarding Big Box Structures § 10.9 (2004) [hereinafter *City of Roswell*].
71 *City of Roswell* § 10.9 (3).
72 *Id*. at § 10.9 (a).
73 *Id.* at § 10.9 (1)(3).
74 I*d.* at § 10.9 (b).
75 Telephone interview with Jean Marshall, paralegal, City of Roswell, Georgia (October 12, 2004).
76 City of College Park, Georgia Code of Ordinances 2003-39(13) (2003).
77 *Id.* at § 2003-39(13)(a)(1)&(2).
78 *Id.* at § 2003-39 (13)(b).
79 *Id.* at § 2003-39 (13)(c).

rooflines, appropriate building materials and colors, the clear indication of entryways, and the inclusion of pedestrian scale amenities and spaces.[80] Machinery equipment, outdoor sales, trash collection areas, and parking structure façades must be screened in a manner consistent with the overall design of the building and landscaping.[81] Delivery and loading areas must be designed so as to minimize visual and noise impacts.[82] Submission of a noise mitigation plan is required.[83]

A landscape buffer, which includes canopy trees, is required for all sites that adjoin residential uses or zones.[84] Street access is limited to major arterial roads as specified by a master plan.[85] Additional requirements specify that parking areas should be distributed around large buildings in an attempt to shorten the distance to other surrounding buildings, public sidewalks, and transit stops.[86] Sidewalks must be provided along the full length of any building where it adjoins a parking lot. Sidewalks must also connect store entrances to transit stops, and to nearby neighborhoods.[87] All applicants must also submit a traffic impact study and an outdoor lighting report which provides information on how outdoor lighting will be accomplished to minimize the impacts on adjacent properties.[88]

The College Park ordinance addresses the risk of future abandonment by requiring the submission to the city of a performance bond equal to 110% of the estimated cost of removal of the structure.[89] Such a bond could be utilized to demolish the structure if 70% of floor area of the structure remains unoccupied for more than six months. The City of College Park has had no threatened or actual litigation regarding its big box ordinance.[90]

80 *Id.* at § 2003-39 (13)(d),(e)&(f).
81 *Id.* at § 2003-39 (13)(h),(k),(m)&(n)(1).
82 *Id.* at § 2003-39 (13)(q).
83 *Id.* at § 2003-39(13)(u).
84 *Id.* at § 2003-39(13)(j).
85 *Id.* at § 2003-39(13)(i).
86 *Id.* at § 2003-39(13)(n)(1).
87 *Id.* at § 2003-39(13)(o).
88 *Id.* at § 2003-39(13)(r)&(s).
89 *Id.* at § 2003-39(13)(w).
90 Telephone interview with Winston Denmark, attorney, City of College Park (October 13, 2004)

IV. Local Bans and Statewide Controls – The Case of California

California has experience with both statewide planning efforts and local municipal efforts to control big box development. The state's size and population make it attractive for big box retail. A recent article noted that California represents "the last frontier for Wal-Mart's Supercenters."[91] Wal-Mart plans to build 40 such centers in California over the next 4 years, with an average size of 187,000 square feet each.[92] Reacting to this proliferation, Contra Costa County recently banned the Superstore concept altogether.[93] County Supervisor John Gioia, the ban's author, believed that the Supercenter would not be able to generate sufficient revenue to cover the burdens that the store would place on county roads.[94] As a result, the ban prohibits stores that cover more than 90,000 square feet and devote more than 5% of the space to nontaxable items, such as groceries, from being located in the unincorporated areas of the county. Big membership warehouses that sell groceries, such as Sam's and Costco, are exempt. That exemption is based upon the expectation that fewer trips would be made by shoppers who buy in bulk.[95] However, Wal-Mart is leading a campaign to challenge the Contra Costa County ordinance. Although Wal-Mart claims to have no current plans to build in the area covered by the ordinance, the company spent over $100,000

91 "Wal-Mart Supercenters Face Resistance," *The Desert Sun*, July 22, 2003, available at http://www.thedesertsun.com/news/stories2003/business/20030722023945.shtml [hereinafter *Wal-Mart Supercenters*]; see also Sandy Kleffman, "County Supervisors Target 'Super-sized' Retail Stores," *Contra Costa Times*, June 4, 2003, available at http://www.bayarea.com/mld/cctimes/news/local/states/california/counties/contra_costa_county/6010221.htm.
92 *Id.*
93 *Id.*
94 In passing its ordinance, Contra Costa County Board of Supervisors relied on a study conducted by the San Diego County Taxpayers Association (SDCTA) to support its argument that the Supercenter would harm the community. The SDCTA study "found that an influx of big-box stores into San Diego would result in an annual decline in wages and benefits between $105 million and $221 million, and an increase of $9 million in public health costs… [and] that the region would lose pensions and retirement benefits valued between $89 million and $170 million per year…." *Id.*
95 *Id.*

collecting signatures on a petition for a referendum regarding the ban.[96] In July of 2003, Contra Costa County Election officials announced that the petition was filed with enough signatures to force a county-wide referendum. In March of 2003 residents voted down the Contra Costa County big box ordinance by a 6% margin of victory. Despite the overturn, Wal-Mart has no plans to build a superstore in Contra Costa County.[97]

The State of California seeks to address the proliferation of big box[98] retail stores through restrictions on financial assistance to retail stores when they seek to relocate. Unless the legislative body of the local agency (*i.e.* local government) to which the relocation will occur offers to the local agency from which the relocation is occurring a contract for apportionment of the sales tax generated from the retailer or dealership,[99] local agencies are prohibited from providing financial assistance to car dealerships, big box retailers, or landlords of either if the tenant is "relocating from the territorial jurisdiction of one local agency to… another local agency *but within the same market area*."[100] If the relocation is occurring within the same market area, the receiving agency "shall notify the community from which the relocation is occurring of its intent to give financial assistance."[101] They must then send a contract "that apportions the sales tax generated from the automobile dealership or big box retailer after the relocation between the two local agencies."[102] This is an effort to address cases where big box retailers leave one area for another close by, having negative consequences for the community and nearby businesses left behind. This situation seriously undermines the efforts of those who seek to control the costs of big box development, and makes regional planning that much more difficult.[103]

V. Additional Case Studies of Controlling Big Box Retail

A. Moratorium and Design Regulations– Fort Collins, Colorado

Temporary development controls are an effective way for communities "to maintain the status quo while they review and strengthen their planning and zoning laws."[104] Development moratoria provide a good illustration of such a temporary development control device. These moratoria "allow communities to place a temporary halt on new development so that local officials can examine the impact of proposed development and put measures in place to manage it."[105] This land use tool allows local planners time to assess the benefits and costs of big box developments, which include traffic, loss of community character and the displacement of local businesses.[106]

In Fort Collins, Colorado, this approach was used after several developers announced plans to simultaneously develop big box stores in an area the city wished to protect from sprawl.[107] To allow the city planners time to "study the community impacts of the 'superstore' phenomenon in more detail and to provide the community with clear and enforceable policies to mitigate those impacts,"[108] the city enacted a six-month moratorium on all big box developments.

96 *Id.*
97 Josh Dubow, "Wal-Mart Has Mixed Results in California Votes*," USA Today,* 3 March 2004.
98 California defines a big box retail store as any store that is "greater than 75,000 square feet of gross buildable area…." Cal. Gov't Code § 53084(f)(1)(West 2003).
99 *Id.* at § 53084(a).
100 Market area is defined as a "geographical area that is described in independent and recognized commercial trade literature, recognized and established business or manufacturing policies or practices, or publications of recognized independent research organizations as being an area that is large enough to support the location of the specific automobile dealership or the specific big box retailer that is relocating. For automobile dealerships, this area shall not extend more that 40 miles and for a big box retailer, the area shall not extend more than 25 miles. *Id*. at § 53084(f)(4)(A).
101 *Id.* at § 53084(c)(1).
102 *Id.*
103 Richmond, *supra* note 6, at 563-564.
104 Leslie Tucker, "Temporary Development Controls: Smart Growth Tools for Main Street," *National Trust for Historic Preservation*, 1 (2002), available at http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit_moratoria.pdf.
105 *Id.*
106 *Id.*
107 *Id.*
108 City of Fort Collins, Colorado, *Design Standards and Guidelines for Large Retail Establishments* (1995), available at http://www.fcgov.com/advanceplanning/pdf/large-retail-doc.pdf.

The city argued that "the bulk, size, and scale of such superstores present unusual land-use concerns for the City…. The development of superstores, in the absence of appropriate regulatory guidelines, may have an irreversible negative impact upon the City."[109] The guidelines the city subsequently adopted in early 1995 "require a basic level of architectural variety, compatible scale, pedestrian and bicycle access, and mitigation of negative impacts."[110] These included rules that prohibited long blank walls that discourage pedestrian activity,[111] required display windows, awnings, and other features to add visual impact to the store,[112] and required that sidewalks must link stores to streets, transit stops, building entrances, etc.[113] The ordinance applies to all stores over 80,000 square feet, though those with preliminary or final approval were exempted.[114]

A square footage retail cap was considered by a citizen advisory committee, but this idea was abandoned in favor of allowing the market to determine store size.[115] Today, Ft. Collins has a Home Depot store measuring 130,000 square feet and a Super Wal-Mart store that measures 208,000 square feet.[116]

B. Renovation and Reuse

Opponents of big box stores often point out that reusing older store sites provides new retailers with lower construction costs, as well as a shorter construction time than building new stores. Many planners advocate reusing these abandoned stores for other uses "ranging from additional classroom space for fast-growing suburban schools to an indoor go-kart track for off-site business retreats."[117] Some in the commercial real estate business have also added their support to this idea, due to the fact that "[y]ou've got a clean space that lends itself to a single user or a multi-user," and because "they are easily convertible to not only retail users but alternatives, whether it be offices or call centers."[118] It is hoped that the opportunity to move into established developments would help reduce the continued expansion of stand-alone or big box retail development. While it is expected that the most likely reuse of big boxes is "in strong retail areas because retailers pay higher rent than other tenants," other opportunities are available, limited only by the imagination of the community.[119]

Some big boxes have already been successfully reused for non-retail purposes. The City of Ontario, California converted a big box for use as a police station, spending half of the cost of a new building and taking a potential blight off of the market.[120] Pomona, another California city, leased Plaza Azteca Mall to be used by The Pomona Valley Educational Foundation for classroom space, teacher housing, and other facilities.[121] Mosaica Education Inc. has adapted big boxes for use as charter schools, including a K-Mart in Charlotte and a JC Penney in Michigan.[122] In 1998, the Burnsville-Eagan-Savage School District near Minneapolis-St. Paul began to use part of an empty mall near Burnsville High School as a campus for seniors. The city and school district own the entire property and use the rest of the space for community education, a senior center, and early childhood family education. By buying and renovating the mall, the school district spent twenty million dollars less than the cost of a new school.[123] Also in the Twin Cities area, a building left behind by a closed K-Mart is being used as an indoor go-kart track.[124] And an empty big box in Cincinnati has been turned into a video game center and ice and roller-skating rink.[125]

109 *Id.*
110 Tucker, *supra* note 83.
111 City of Fort Collins, Colorado Code of Ordinances § 3.5.4(C)(1)(a)1 (1995).
112 *Id*. at § 3.5.4(C)(1)(a)2.
113 *Id*. at § 3.2.2(C)(5)(a).
114 *Id.*
115 E-mail from Ted Shepard, City of Fort Collins, Colorado, to Matt Roberts, 3L, University of Georgia School of Law (July 10, 2003, 08:52:20)(on file with author).
116 *Id*.
117 Larry Werner, "A Dying Breed?", *Star Tribune*, Mar. 17, 2002, available at 2002 WL 5371087.
118 *Id.*
119 *Id.*
120 Packy Moran, "Filling Vacant Big Box Space May Take More than Change of Perspective," *E.S.P.*, Oct. 2001, available at http://www.specialtyretail.net/issues/october01/bigbox.htm.
121 *Id.*
122 Amanda Hurley, "Empty Boxes," *Online Preservation*, Mar. 15, 2002, available at http://www.nationaltrust.org/magazine/archives/arch_story/031502.htm.
123 Werner, *supra* note 98.
124 *Id.*
125 Drew Bracken, "Big Empty Spaces Require Large Volume of Creativity," *Business First*, May 6, 2002, available at http://columbus.bizjournals.com/columbus/stories/2002/05/06/focus12.html.

VI. Conclusion

The rise of big box retail presents a number of serious challenges that can be addressed by both state legislatures and local governments. While big box stores offer discount prices and a level of variety that few stores can match, they also are known to have negative impacts on the communities in which they are built. This in turn has driven an increasing number of local governments to adopt controls on the development of these types of retail stores. Retail caps are emerging as a common restriction placed on big box stores, for they allow local governments to limit the size of the stores. This can have a tremendous impact on things such infrastructure costs and the sustainability of local businesses. As should be evident by the use of planning moratoria and renovation requirements, other tools are emerging to address the wide range of impacts that big box stores can have. The practical effect of these tools is that they allow each local government to adopt requirements as they are needed depending on the goals and purposes set out by each city.

The use of big box control devices in Georgia should be expected to continue, especially as many cities are experiencing a problem of "big box blight" in an increasing number of abandoned and underutilized former big box sites.

Note: This paper is an on-going student project of the Land Use Clinic, supervised by clinical professor Jamie Baker Roskie. Students who have contributed include; Matt Roberts, Brian White, Elizabeth Simpson, Lauren Giles, and Anna Hauser. While this is not meant to be an exhaustive survey of all types of big box regulations in all communities, we do try to stay abreast of developments in Georgia. If you know of community efforts and regulations that should be included, please contact the clinic at (706) 583-0373 or jroskie@uga.edu.

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