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## A GUIDE TO REGULATING BIG BOX STORES, FRANCHISE ARCHITECTURE, AND FORMULA BUSINESSES

Daniel A. Spitzer and Jill L. Yonkers

### Introduction

*Generations of travelers have marveled at the multi-hued wonders of the red rock country surrounding Sedona, Arizona. But a journey through Sedona does not include the stark reminder of one of America's most common travel symbols. That is because in Sedona, the trademark arches of McDonald's are teal green, not bright yellow, a concession made to local demand for a more aesthetic complement to the community's southwestern architecture.<sup>1</sup>*

The Sedona restriction is not unique. From a Starbucks in Cleveland, Ohio which resembles a lighthouse on nearby Lake Erie,<sup>2</sup> to an art-deco Wal-Mart in Baldwin Park, California,<sup>3</sup> communities across the country are requiring national corporations to drop signature-style motifs to accommodate local aesthetic tastes. Nor do these regulations stop with issues of appearance; more and more, communities are also limiting the size of so-called "big box" retailers and discount stores. Although allegedly enacted to counteract the environmental impacts that these large, 100,000 square-foot-plus stores create in terms of traffic, pollution, parking requirements, drainage, and loss of open space, in many instances the true goal is local economic protection. These neutralizing provisions, largely in response to the perceived negative impacts of Wal-Mart, have led to some communities prohibiting these businesses from certain districts or even from their entire community.

This article examines municipal efforts through local zoning and design standards to regulate big box retailers, "franchise architecture," where all stores have a similar look to create a nationally recognized brand, and "formula businesses," national or regional enterprises with similar building styles, appearances, product offerings, and/or modes of operation (think of McDonald's, Starbucks, or Subway). The three categories are not mutually exclusive, as often the objection to a Wal-Mart or K-Mart is to its aesthetics, not its size,

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while other efforts to control or eliminate big box retailers are specifically aimed at the large “super centers” or “power centers,” where discount retailers are combined with supermarkets. Similarly, concern over the proliferation of formula businesses is often at the neighborhood-sized level of McDonald’s and concerns both the architecture and impact on the local economy.

We will consider the reasons for these enactments, the tools available to New York municipalities for regulating these businesses, and the types of regulations used across the country. Finally, the legal validity of these laws will be examined, including the counter-attacks that these businesses have launched against the regulating communities. We offer no opinion on whether such regulations should be adopted; that debate would be almost endless given that for every study alleging harm from these businesses, there seems to be another showing the benefits. Our goal is to explain the issues and create the mechanism for educated decision-making and action by the community’s hand.

## Reasons for Regulation

Concern over competition from large retailers and their secondary impacts on the local landscape and economy is almost as old as department-type stores and chain stores themselves. As early as 1899, the City of Chicago—in an effort that presages current efforts to regulate super centers—enacted two ordinances against department stores, “the object of each is to prohibit the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold.”<sup>4</sup> Throughout the 1920s and 1930s, there was a strong anti-chain store movement in reaction to their explosive growth:

Chain stores were in the American consciousness, and for good reason. Led by the Great Atlantic and Pacific Tea Company (known throughout the country then and since as A&P), chain groceries, drug stores, cigar shops, gas stations, and variety stores revolutionized retailing in the first quarter of the twentieth century. During the 1920s, chains increased their share of overall national retail sales from 4% to 20%, and their total share of grocery sales to 40%. By 1930, A&P was the fifth largest industrial corporation in the United States, and was running more stores than any other chain store company had or has since.<sup>5</sup>

While earlier regulatory measures were motivated almost solely by economic protectionism, opposition today focuses on a wider range of values. To be sure, local economic pressures form the core values of significant opposition to Wal-Mart and other national chains. Many of the cases discussed in this article, for example, arise from Wal-Mart’s and its competitors’ expansions into grocery sales and the opposition from both supermarket chains and their unions.<sup>6</sup>

Although the constitutionality of land use controls, particularly zoning, has been recognized for over eighty years,<sup>7</sup> and its incidental impacts on commerce recognized and accepted, regulations and planning decisions constituting pure local economic protection will still be struck down.<sup>8</sup> Similarly, while ordinances discriminating against an unpopular company with no legitimate rationale for them will not stand, it remains the “fundamental rule that zoning” concerns land use, “not the person who owns or occupies it.”<sup>9</sup> Accordingly, we start our discussion with the recognition that all regulations must have a valid legislative purpose within the police powers granted to municipalities; our search thus starts with an exploration of the ills each of our targets allegedly present.

## 1. Big Box Retailers

Generally, when people hear the term “big box,” uniform visions of boxy, large-square-footage, plain-faced buildings with boastful, colorful signs come to mind, but the same consistency does not necessarily follow in the municipal codes. The result is a hodge-podge of rules attempting to define them, to restrict them by size, to trigger a heightened level of review, or to prevent them altogether.

There are a number of factors prompting municipalities to enact provisions regulating these businesses, and not all impacts are considered negative. Big box proponents tout the benefits of competitive or reduced prices, convenience, and variety,<sup>10</sup> with the economic benefits of increased employment and sales tax revenues.<sup>11</sup> Supporters also assert that the one-stop shopping super centers offer can actually reduce the number of car trips and therefore, related traffic impacts. In at least one case, a village used a new big box store as the centerpiece of its revitalization efforts.<sup>12</sup>

On the other hand, to some, they mar the landscape and defile the local viewshed with their large, featureless construction and acres of parking lots, eliminate longstanding “Mom and Pop” stores, are inaccessible to pedestrians, and generate increased traffic and related pollution while placing unacceptable demands on existing infrastructure.<sup>13</sup> Significant concerns have also been raised about the inability to reuse the large empty structures (and their parking lots) should the store close, or if an existing big box is abandoned as part of an upgrade to a super center. For the most part, residents advance regulation (if not prohibition) of these businesses to protect local economies, to ensure no negative impacts to home values, and to guard the community against increased traffic, visual, air, and water pollution, and other perceived or actual impacts. Many communities also oppose Wal-Mart, in particular, based on its supposed employment practices, lack of unions, and impact upon and attitude toward the proposed host community.

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## 2. Franchise Architecture

Franchise architecture is usually defined broadly as a building design that is trademarked or identified with a particular chain or corporation and is generic in nature. Complaints about franchise architecture range from the aesthetic impact of the featureless big boxes, to the garish colors and designs national and regional chains use to brand their product. As one planner explained the problem,

Architecture has traditionally reflected the unique culture, climate, and topography of different regions, as well as the aesthetic preferences of local inhabitants. Over the last fifty years, these regional differences have been steadily disappearing, as national and global franchises develop standardized architectural prototypes and replicate these buildings everywhere, with little regard for local variations. The impact of franchises on the character of the built environment should not be underestimated, as the market share of corporate chains continues to expand around the world at a rapid pace.

Architectural variety enriches communities and celebrates the distinctions between different people and places. The quality of the built environment influences the ability to attract and retain businesses, residents, and tourists. Increased architectural standardization leads to barren city landscapes and communities devoid of authenticity and charm.<sup>14</sup>

Other concerns with franchise architecture are:

- Large logos and/or colors used over large expanses of a building.
- Branded buildings are difficult to reuse if vacated by the primary business, promoting vacancies and blight.
- Buildings lack architectural elements and design consistent with the local community's architectural composition, character, vernacular, and historic context.<sup>15</sup>

Unlike big boxes, where the potential impacts touch upon many sources of municipal power, control over franchise architecture, as discussed below, is almost completely dependent on a community's ability to regulate on the basis of aesthetics.

## 3. Formula Businesses

If the big box stores raise wide issues of environmental and economic concern, while franchise architecture focuses on aesthetic impacts, formula businesses raise both sets of issues. Formula businesses include national and regional chains of retail stores, restaurants, and other establishments which employ standardized architecture, product lines, operating procedures, similar services, methods of operation, staff uniforms, architecture, and in some cases, even floor plans, so that each place of business is virtually identical to the company's other operations in other areas. Proponents of formula regulation are those who believe the proliferation of chains

as diverse as Starbucks, McDonald's, or Barnes & Noble have harmed the local environment and/or economy.

No matter which side of the issue your community falls, the general trend in New York towns, villages, and cities is to have at least some type of minimal regulations and approval process applicable to these types of businesses. We examine below the ways that a municipality may choose to govern these entities.

## The Tools of Regulation

### A. Statutory Authority for Regulations

It is now well accepted that that the State and its localities have "a legitimate interest in local neighborhood preservation, continuity, and stability."<sup>16</sup> Varying statutes provide authority for regulating these businesses, particularly the zoning enabling statutes;<sup>17</sup> in addition, the State Environmental Quality Review Act ("SEQRA") provides a mechanism for full review of specific proposals. Used together, the various statutes provide a full range of authority for local action.

Two different regulatory approaches have been utilized to deal with big boxes, franchise architecture, and formula businesses. The first calls for banning the offending structures and uses altogether from the community or parts of the community—i.e., specific districts. The second employs the use of special use permits and site plans to regulate their appearance and location, and to minimize impacts through the imposition of conditions.

While the favored approach to regulate these businesses is to use a municipality's zoning code or ordinance to define and limit them, it is recommended that the powers of the Municipal Home Rule Law be used rather than mere reliance on the zoning enabling statutes. The Municipal Home Rule Law stretches the community's powers to their maximum, even allowing supersession of state law in some land use contexts.<sup>18</sup> The Municipal Home Rule Law contains a very important direct grant of power, by authorizing local laws for the "protection and enhancement of its physical and visual environment;"<sup>19</sup> it provides a specific source for aesthetic-based regulations.

Similar authority is provided by General Municipal Law § 96-a's grant of power to "to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value . . . [including] appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both."<sup>20</sup>

In regard to banning facilities completely or certain uses from certain districts, the law has been settled since *Euclid* that communities have the right to segregate uses for the public benefit.<sup>21</sup> That power has been read to permit, when supported by the record, complete exclusion of certain uses from the community; in fact the New York Court of Appeals has rejected claims that New York law prohibits exclusionary zoning in the commercial context.<sup>22</sup>

There are some communities that take the step of attempting to define these businesses, or to specifically



regulate them. Others have a typical zoning code that allows commercial or retail uses within certain districts as-of-right, with little to no way to review or modify the proposal. The question for communities to consider is whether to specifically define them—which often leaves little or no room for flexibility for the next evolution of businesses and may even allow the regulation to be construed against them—or to create regulations to target size, perhaps precluding any structure over certain pre-set dimensions.

Within specific local statutes, defining big box stores can be difficult. A Columbia University study describes them as follows:

The exterior designs of the buildings are standardized so that every location looks the same and is easily recognizable, and acres of parking surround the entire structure. The above features lend to “big box” retail stores an anti-community feel. They cater to the auto-borne shopper and are usually located just off of highway exits or along major traffic corridors. They do not support pedestrian amenities nor do they attempt to make any connections with the neighboring community—they are large, isolated boxes in seas of parking lots.<sup>23</sup>

Most regulation has focused on store size, such as requiring special use permits for stores over 100,000 square feet, but with mixed results because of the different type of large retail operators. As noted in a California study:

There is no single definition of big box retail, but most definitions tend to focus on the square footage of retail outlets rather than the items sold inside the stores. For example, the state of California defines big box retail as a “store of greater than 75,000 square feet of gross buildable area that will generate sales or use tax.” The Maryland Department of Planning defines big box retail facilities as “large, industrial-style buildings or stores with footprints that generally range from 20,000 square feet to 200,000 square feet.” In October 2003, the City of Los Angeles commissioned a study to identify potential impacts of big box retailers in the city’s neighborhoods (“the Rodino report”). The Rodino report defined big box stores as “[a]ny large store format that is larger than a specified threshold of square footage in size. Generally this threshold ranges from as low as 60,000 sq. ft. to 130,000 sq. ft.”

The wide variance of size used to define big box stores is a reflection of the weakness of a size-based indicator itself. A Hawaii Legislative Reference Bureau study noted, “[b]ecause of product category, ‘big’ is relative. For example a book retailer occupying 25,000 square feet would qualify as a ‘big box.’ On the other hand, a ‘big box’ warehouse outlet like Costco may occupy 120,000 square feet or more.”<sup>24</sup>

In addition to these classifications, recent controversies have focused on “super centers,” where discount retailers also sell groceries. An example (and home to one of the most contentious disputes) is the zoning ordinance of Turlock, California.<sup>25</sup> Turlock prohibits discount su-

perstores that exceed 100,000 square feet of gross floor area and that devote at least five percent of the total sales floor area to the sale of non-taxable merchandise, such as groceries.<sup>26</sup> It describes further:

These stores usually offer a variety of customer services, centralized cashing, and a wide range of products. They usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual cooperation with a related or unrelated garden center or service station. Discount superstores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.<sup>27</sup>

Turlock’s code provision was recently upheld when challenged because the ban was a proper exercise of the city’s police power to control and organize development to serve the public welfare, since the city made a legitimate policy choice when it decided to organize development using neighborhood shopping centers dispersed throughout the area, and given that the ordinance was reasonably related to protecting that legitimate choice.<sup>28</sup>

San Diego, California apparently followed Turlock’s lead, enacting legislation that prohibits stores of more than 90,000 square feet that use ten percent of space for groceries and other merchandise that is not subject to sales tax.<sup>29</sup>

Not all big box regulation is aimed at megastores, however. The town of Guilford, Connecticut enacted regulations with a 25,000 square foot maximum limitation (although one 40,000 square foot facility could be allowed in the applicable zoning district, Service Center West, by special permit), effectively eliminating the prospects of big box stores in the town. Its regulations were upheld.<sup>30</sup>

After winning an expensive, five year battle with Wal-Mart over a Special Use Permit, the Town of North Elba amended its code to eliminate large stores by limiting single retail stores to 40,000 square feet and restricting shopping centers to 68,000 square feet:

(22) Retail Trade Uses; Group Retail Business Uses.

A. An individual Retail Trade use shall not exceed 40,000 square feet of floor area, whether in one building or more than one building.

B. A Grouped Retail Business Use shall not exceed a total of 68,000 square feet of floor area, in all buildings which constitute the use.

C. For the purpose of the size limits set forth in clauses A and B, floor area shall include floor area or floor space of any sort within a building as well as exterior space used for sale or storage of merchandise.<sup>31</sup>

That town’s goal was to scale all buildings in the area to match the historical patterns of development.<sup>32</sup>

Even more direct was the approach the Town of Amherst took in response to a specific proposal for a new Wal-Mart. Rather than amend its zoning to eliminate big boxes (of which it has many), it simply downzoned the target property to a district which did not permit such large stores.<sup>33</sup>

As to franchise architecture and formula businesses, each is easier to define within local statutes, but they may well prove more problematic to regulate. For franchise architecture, the power to regulate aesthetics is essential, and has not always been strong. The Supreme Court, in opining that protecting aesthetic values was within the police powers of a community, held in 1954 that it “is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>34</sup> While the New York Court of Appeals followed suit, it has also held that aesthetics are not as important as other police powers, cautioning that “always, the exercise of the police power must be reasonable.”<sup>35</sup>

A typical franchise architecture definition can be found in the City of Asheboro, North Carolina’s prohibition on such styles in its Central Business District:

(a) “Franchise architecture” - Franchise architecture shall not be allowed. For purposes of this section “franchise architecture” shall be defined as a distinct architectural building style and/or elements commonly employed by a fast food or other retail franchise, that serves to enhance or promote brand identity through visual recognition.

(1) No high intensity colors (such as yellow, red, orange, etc.) metallic colors, or fluorescent colors shall be allowed on any building or architectural element. The use of such colors shall be permitted on business identification signs, provided all other sign requirements of this Ordinance are adhered to.<sup>36</sup>

Formula business definitions focus on the requirement of standardization of each facility. The following definition of formula retail is used in a Coronado, California statute which survived a legal challenge to its regulation of formula businesses. Formula Retail means “a type of retail sales activity or retail sales establishment (other than a formula fast food restaurant) which is required by contractual or other arrangement to maintain any of the following: standardized (‘formula’) array of services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature.”<sup>37</sup>

Port Townsend, Washington enacted an ordinance targeting formula retail and restaurant establishments “to regulate the[ir] location and operation” particularly to “maintain the city’s unique Victorian seaport and surrounding rural character, the diversity and vitality of the community’s commercial districts, and the quality of life” of its residents.<sup>38</sup> Thus, it defines such businesses as:

a type of retail sales or rental activity and retail sales or rental establishment, including restaurants, hotels and motels, which, along with 14 or more other establishments, maintains two or more of the following features:

1. Standardized array of merchandise or standardized menu.
2. Standardized façade.
3. Standardized décor and color scheme.

4. Uniform apparel.
5. Standardized signage.
6. Trademark or service mark.<sup>39</sup>

Portland Maine uses different definitions for different districts, and also excludes certain chain operations:

“Formula Business” means:

(1) If it is located in the Formula Business Overlay Zone, a restaurant or retail establishment, other than those exempted under this subsection, that stands alone as a principal use or with another use as an accessory use, and which is required by contractual or other arrangements to maintain any one or more of the following standardized features, which causes it to be substantially identical to 30 or more other businesses located within the United States, regardless of the ownership of those businesses: name; if food is served, menu, ingredients, uniforms; trademark; logo; symbol; architectural design; signage; color scheme; or any other similar standardized features.

(2) If it is located in the Extended PAD Overlay Zone, a restaurant or retail establishment, other than those exempted under this subsection, that stands alone as a principal use or with another use as an accessory use, and which is required by contractual or other arrangements to maintain any one or more of the following standardized features, which causes it to be substantially identical to 10 or more other businesses located within the United States, regardless of the ownership of those businesses: name; if food is served, menu, ingredients, food preparation or presentation format; décor; employee uniforms; trademark; logo; symbol; architectural design; signage; color scheme; or any other similar standardized features.

“Formula business” does not include: grocery stores; drug stores and pharmacies; convenience stores; hardware stores; gas stations; and businesses primarily providing services rather than goods for sale, including but not limited to banks and credit unions, movie theaters, entertainment and recreation services, mailing services and vehicle and equipment rental.<sup>40</sup>

Similarly, in Port Jefferson, New York, the village enacted provisions banning fast food restaurants from its historic commercial and waterfront zoning districts. It defined “formula fast food establishment” as:

An establishment required by contractual or other arrangement to offer some or all of the following:

- (1) Standardized menus, ingredients, food preparation, décor, external façade and/or uniforms.
- (2) Preprepared food in a ready-to-consume state.
- (3) Sold over the counter in disposable containers and wrappers.
- (4) Selected from a limited menu.
- (5) For immediate consumption on or off the premises.
- (6) Where the customer pays before eating.<sup>41</sup>

And it prohibits such establishments altogether in its C-1 Central Commercial zoning district, its C-2 General Commercial zoning district, and in its Marina Waterfront (MW) district.<sup>42</sup>

Note that even as a total ban, a formula business law would not keep chains out. Rather, they “require that the incoming chain not look or operate like any other branch in the country. This has proved a significant deterrent to chains, which generally refuse to veer from their standardized, cookie-cutter approach.”<sup>43</sup>

## B. Use of Comprehensive Plans

As noted above, New York law permits exclusion or limits on particular uses, as long as the municipality “has rationally exercised its police power and determined that a change in the zoning was required for the well-being of the community.”<sup>44</sup> As with all legislative enactments, the law will be upheld if it “substantially advance[s] legitimate state interests.”<sup>45</sup> The comprehensive plan thus presents a mechanism to create a record demonstrating both the legitimate state interest and how a proposed ordinance will meet the community’s goal.

Indeed, local zoning must be in harmony with a community’s comprehensive plan.<sup>46</sup> These plans can develop from a single municipality’s effort, or that of multiple communities acting together. Comprehensive plans complement zoning codes, providing guidelines for the community’s development and future.<sup>47</sup> The zoning codes then give the applicable regulations, defining allowed uses and mapping out their geographic areas.

When a plan clearly expresses a policy dealing with big box franchises, for example by promoting small-town values, diversity of business, preventing blight resulting from vacant storefronts, limiting commercial impacts in downtown or historic areas, and discouraging corporate businesses from reducing aesthetic appeal of communities through their cookie-cutter designs, the municipal bodies can use the plan’s goals in their decision making. Plans often recommend preserving historic or specialty areas such as waterfronts, tourist areas, and parks, and sometimes advise prohibiting these big box uses as inconsistent in such areas entirely, or just in certain districts. Having a comprehensive plan in place is thus another important step in the consideration of formula businesses.

For instance, in Skaneateles, New York, the goal of the town and village in their Joint Comprehensive Plan is to preserve the retail center in the village, preserve the area for tourism, retain the historic character of the village center, and reduce the number of commercial entrance and exit drives on major traffic routes.<sup>48</sup> Similarly, Warwick, New York enacted a comprehensive plan that looks to “[s]upport small locally owned businesses and retail centers which are in character with the Town’s largely rural environment.”<sup>49</sup>

It is these types of distinct, identifiable districts that are most likely to support limits on franchise architecture or formula businesses. The Plan (or the EIS under SEQRA, see below) should unequivocally document the character of the community to be protected. But it must also demonstrate how the proposed limits will protect

that district or the whole community; i.e., that it will advance the stated purpose.

The typical types of problems identified with big boxes should be apparent in a properly prepared plan. For example, if traffic congestion is an issue in the community that would be exacerbated by additional large scale stores, the plan should detail those problems. If a downtown core has a diverse business base that would be negatively affected, or a unique historic or visual aspect, all should be detailed in the plan as a forerunner of protective legislation.

Proper documentation would support various nuanced approaches to regulation. Portland, Maine, for instance, limited formula businesses to 23 in total in its downtown core, while also adopting 2,000 per store square footage limits. It also adopted a “formula business overlay zone” including commercial areas adjacent to downtown, with 4,000 square feet size limits and a requirement that such businesses be at least 400 feet from other formula businesses.<sup>50</sup> Another city acted to limit fast food outlets by demonstrating that customers of such businesses were auto based, and thus contributed to increased traffic.<sup>51</sup>

New York courts have upheld reliance upon comprehensive plans as the basis for municipal decisions. For example, the Fourth Department has ruled that a special use permit was properly denied when the use (there, a mini-storage unit facility) was prohibited by the town’s comprehensive plan.<sup>52</sup> In that case, the master plan allowed commercial uses in the area, and the court agreed that a storage facility should be construed as an allowed commercial use there.<sup>53</sup> Nonetheless, the court held that since the master plan restricted commercial uses to newly created business park districts to avoid negative impacts upon existing residential areas, the special use permit was properly denied.<sup>54</sup> In general, as long as the plan is well-considered, is adopted for a legitimate governmental purpose, and there is a reasonable relation between the end sought to be achieved and the means used to achieve that end, it will be upheld.<sup>55</sup>

## C. SEQRA

SEQRA provides an additional mechanism for creating a record supporting regulatory measures. Through generic environmental reviews for comprehensive plans, local regulatory laws, or project specific investigations, SEQRA analysis will uncover the problems these businesses may cause, and provide valuable support for legislation. SEQRA may be especially useful for rural communities lacking zoning. Even municipalities without zoning have land use powers using the Municipal Home Rule Law, and SEQRA provides the vehicle for supporting regulatory measures.

SEQRA review of particular projects is, in many ways, like the completion of a mini-comprehensive plan. A proper “hard look” analysis focused on all impacts, including impacts on the character of the community, will delve into the issues of blight and local business dislocation often associated with big box retailers. As stated by the Court of Appeals,

It is clear from the express terms of the statute and the regulations that environment is broadly defined and expressly includes as physical condi-



tions such considerations as “existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.” Thus, the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment.<sup>56</sup>

The particular tool that SEQRA analysis may employ where appropriate is an economic impact analysis. In upholding North Elba’s denial of a permit for a Wal-Mart, for example, the Third Department stated “while the decision refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the over-all character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area—an entirely proper avenue of inquiry, even within SEQRA.”<sup>57</sup>

#### D. Special Use Permits

Special use permits are another method that municipalities can employ to regulate property development generally, and formula businesses, specifically. They permit a location to be developed in a way expressly allowed by a zoning code, but with specified conditions not generally applicable to the as-of-right uses.<sup>58</sup> The conditions are meant to ensure that the proposed use is compatible with the neighborhood or area, assuming the zoning requirements are met.<sup>59</sup>

Municipalities should be warned that regulating big box franchises through a special use permit may not, by itself, be the best tool, however. That is because special uses are allowed uses—their inclusion in a zoning code is equivalent to a legislative determination that they are proper for the zone.<sup>60</sup> Thus, generally speaking, a town cannot deny the application on the ground that it is not in harmony with the purpose and intent of its zoning.<sup>61</sup> The inclusion in the zoning code of a special use belies such a claim. A reviewing board is thus required to grant the permit “unless there are reasonable grounds for denying it.”<sup>62</sup> Where a record demonstrates that a particular use would have a significant negative impact, denials of a special use permit have been routinely upheld.<sup>63</sup>

Keep in mind that it is possible to approve big box establishments subject to conditions.<sup>64</sup> The key for imposing a reasonable condition or restriction is to make it 1) directly related to and incidental to the proposed use of the property and 2) aim to minimize the adverse impacts of

that use.<sup>65</sup> Generally, a municipality may not impose conditions that are unrelated to the land or that regulate the details of a business’s operation.<sup>66</sup> Planning boards should be especially mindful of their ability to condition uses, as they, unlike the primary municipal board (town board, village board, or city council) are circumscribed by statute to those factors expressly listed in the governing law.<sup>67</sup>

Conditions might include larger setbacks to increase the distance between the facility and neighboring residences, landscaping or other screening to block views of the building and parking, and preventing lighting from spilling onto neighboring properties by utilizing targeted light pole and lighting designs. Another condition municipalities have been increasingly likely to impose is a bond to deal with the demolition costs and/or vacancies after an establishment leaves. The concern here is the lack of recourse after-the-fact, when the municipality could be left with vacant boxes remaining empty, causing blight, and negatively affecting its community.

For example, due to its “small town atmosphere, its exceptional unique architectural characteristics and rural western community heritage,” which, according to that city, big box developments do not meet, Oakdale, California requires developers to have an “abandoned building surety bond.”<sup>68</sup> The bond must be kept in place for the life of the project in an amount sufficient to cover the cost of complete building demolition and maintenance of the vacant building site if the primary building is ever vacated or abandoned for more than twelve months.<sup>69</sup> Although not explicitly listed, when municipalities require bonds, it generally means the buildings and other structures, but it could also include the associated infrastructure, such as parking lots, private roadways, and utilities.

In contrast to bonds, some municipalities have attempted to prevent large abandoned boxes by insisting that vacant stores go on the market as soon as practicable following the vacancy, as in Peachtree City, Georgia,<sup>70</sup> or by mandating that the locations be designed for re-use, such as the ordinance in Bozeman, Montana.<sup>71</sup>

One of the driving forces behind the Peachtree City provision appears to be the practice of retailers continuing to pay rent on space, despite that their operations have moved elsewhere; they apparently do so to prevent competitors from assuming a prime business location. Peachtree City’s ordinance is designed to forestall that practice, allowing landlords to market retail properties as soon as they become vacant.

Of course, this tool has no real effect if the property is owned, rather than leased.<sup>72</sup> In addition, market forces outside the municipality’s control will determine whether or not there is a demand for such space.<sup>73</sup> These same considerations of property ownership and market demand play a part in determining whether or not reusing space upon vacancy is a feasible control mechanism.<sup>74</sup>

Such bonding and similar requirements could well-suit municipalities with existing special use permit regulations. For instance, in Asheville, North Carolina, the stage is already set for controlling formula businesses, as large retail structures meeting certain gross floor area proportions (more than 75,000 or 100,000 square feet) are considered conditional uses in certain zoning districts. They are required to meet supplemental devel-

opment standards that “[e]mploy high quality building design,” “[b]lend building design and layout with other site features,” “[a]void bland and monotonous building design,” and “[e]nsure that buildings contribute to the community character of the city.”<sup>75</sup> The City also has a design criteria points system, where it requires applicants to meet a certain number of design points to be entitled to a conditional use permit. Points are awarded for incorporating different design elements in accordance with a tally sheet.

Likewise, at least one New York municipality, Warwick, enacted code provisions limiting individual retail uses to 60,000 square feet of gross floor area and any group of retail businesses to 80,000 square feet of gross floor area, in all buildings on the lot, in its site plan and special use permit review procedures.<sup>76</sup> These regulations form a good basis to then impose bonding conditions.

In sum, special use permit review allows a town, city, or village a heightened level of review of an allowed use. Requiring a special use permit application can permit the municipality to impose restrictions or safeguards on proposals that may, especially when combined with SEQRA mitigation, further community values or mitigate detrimental impacts. Such proper regulations include lighting, air quality, safety, population density, traffic, property values, aesthetics, and environmental factors. One other note to keep in mind, however—once issued, the special use permit runs with the land.<sup>77</sup>

### E. Site Plan Review

Almost every development proposal in New York, even those that already meet zoning requirements, require submission of a site plan to the reviewing municipality. Reviewing an applicant’s site plan allows a community to look at the scale, dimensions, location, and other features of a project that may have an unanticipated impact upon the community’s planning goals. Municipalities have broad discretion to review projects in this manner.<sup>78</sup>

Thus, using site plan applications is another way to control big box businesses. Generally, municipalities exercise the right to have their planning boards review and analyze site plans.<sup>79</sup> The planning boards then review the arrangement, layout, and design of the proposed use, including factors such as parking, access (vehicle and pedestrian), screening, signs, landscaping, lighting, drainage, architectural features, location and dimension of buildings, adjacent uses, and physical features meant to protect the adjacent land uses.<sup>80</sup> Also note that municipalities can approve site plans, similar to special use permits, subject to reasonable conditions or restrictions that are directly related to and incidental to the site plan.<sup>81</sup>

Site plan review is an important step because under SEQRA, a planning board is required to review every element of a potential environmental impact that could result from the proposed site plan approval.<sup>82</sup> SEQRA mandates that communities investigate the environmental impacts of a proposed action before allowing that action; it instructs municipalities to evaluate potential environmental impacts at the earliest stage possible.<sup>83</sup> In essence, this results in a second level of review. A formula business could, therefore, meet the express elements of the municipal code, but still be denied a site

plan approval because of other environmental impacts or large secondary impacts.

There are several cases in New York that look at municipal site plan decisions with respect to big box stores. For example, in *Matter of Home Depot, USA, Inc. v. Town of Mount Pleasant*,<sup>84</sup> the Second Department upheld the town’s denial of a site plan for a new retail Home Depot store. The town reasoned that the proposed development was out of character with the surrounding area, which included a significantly smaller retail store with terraced parking areas.<sup>85</sup> Moreover, the town relied upon the developer’s admission that the building design was shoehorned to fit into the site, that it ignored the campus-style development that characterized much of the zoning district, that it involved the irretrievable loss of forested hillside, that it would leave areas of exposed bedrock, and that it involved construction of massive lengths of retaining walls up to 20 feet high on one side.<sup>86</sup> All of these factors led the appellate court to uphold the town’s site plan denial, primarily based on the noticeable change in the visual character of the area and the irreversible nature of the changes.<sup>87</sup> These same criteria can be used by municipalities that are reviewing site plans from other big box franchises, formula businesses, and franchises.

At least one court in New York has upheld the denial of a site plan (and conditional use permit) to a big box store due in part to its negative aesthetic impact upon the gateway of a resort community noted for its rustic nature and striking scenery.<sup>88</sup> Of particular importance to the court in that case was the fact that screening efforts to block the store’s and parking lot’s view from the road would nonetheless cause a noticeable change in the visual character of this resort and tourist community.<sup>89</sup> Thus, potential visual impact is another factor that municipalities should assess, particularly if stores are to be located in special, unique, or critical visual areas.<sup>90</sup>

Remember that courts reviewing site plan decisions will look to see if the decision was arbitrary and capricious or not supported with substantial evidence, but they largely defer to municipal decision-making when there is a proper record for a decision.<sup>91</sup>

### F. Other Design Review

Some communities see landmark districts, historic districts, architectural review boards, or conservation overlay zoning geared toward protecting important historical characteristics, natural features, or architectural designs and streetscapes as a viable means to regulate big box businesses. Such efforts are the most successful in areas where there has either been development controls in place early on, or in localities where there is a defined local identity. Otherwise, communities are left to attempt to create this distinctiveness, which is a much more difficult burden and increasingly susceptible to a successful challenge.<sup>92</sup> Most communities, however have some key feature or historic or aesthetic attribute that warrants protection and a heightened review. In New York, critical resources such as the Erie Canal, Adirondack Mountains, historic properties, and various lakes, rivers, and streams are strong frontrunners that easily lend themselves to heightened protection.



One tool that is not frequently used, but has found some success in striking a balance between protection and development is the National Trust For Historic Preservation's working cooperatively with municipalities and chain drugstores in their development, particularly where historically significant structures are involved. It has a collaborative approach for creating win-win situations with such establishments.<sup>93</sup> Through its efforts, four of the leading chain drugstores have agreed not to demolish sites individually listed on the National Register of Historic Places, and they have been generally receptive to overtures on plans that offend community values and architecture when the cookie-cutter design is utilized.<sup>94</sup> This same type of arrangement could be used with other big box franchises.

Other communities have created architectural or design review boards to take a targeted look at development proposals. Some have gone so far as to impose architectural or design standards that prohibit or limit corporate "prototypes." For example, to protect the character of its downtown area, the city of Hopkins, Minnesota prohibits franchise brands.<sup>95</sup> That city defines franchise architecture as a "building design that is trademarked or identified with a particular chain or corporation and is generic in nature."<sup>96</sup> Such chain businesses must instead create a unique building that is consistent with downtown.<sup>97</sup>

Some notable examples of design control come from the Sierra Business Council. It offers design guidelines to encourage development consistent with the historic character of the area for commercial and mixed-use districts containing community-level, site-level, and specific building level uses. Sample site design guidelines show the wide variety of possibilities:

- Encourage zero lot lines in all new buildings and have renovations contribute to the "outdoor public room" created by the row of historic buildings placed on the streetfront.
- Maintain pedestrian streetscape and historic character by moving parking to the rear where possible and off-site with shuttles.
- Integrate plaza areas on vacant sites with good solar exposure to create attractive public gathering spaces. Plan ahead for population increases that will require greater public space to accommodate civic events.
- Encourage outdoor restaurant space, retail areas, and pedestrian amenities such as benches and historic streetlights to bring life to the street.
- Create shared parking plans to manage retail parking during day and more restaurant/theater availability in evening.
- Provide service areas in the rear and/or consolidate among establishments so that services do not conflict with pedestrian use of the storefront.<sup>98</sup>

Another municipality, Georgetown, Colorado, was so concerned with national chain companies and their franchises, that it banned the "use of stock building plans or typical corporate or franchise operation designs" in its design guidelines.<sup>99</sup> It found the bright logo colors

used over large areas of a building contrast too strongly with the established Georgetown palette, considered the blank exterior walls of such businesses to be bland, out of scale, and too discouraging of pedestrian activity, and noticed that large areas of "featureless stucco" are out of character and not of human scale in its guidelines.<sup>100</sup>

The fear, of course, with particular definitions and regulations is that franchises will discover ways to develop around the definitions, which are construed against the municipality that enacts them. Thus, if a definition or provision is vague, the developer gets the benefit of the doubt. In addition, courts may be hard-pressed to make determinations on what is consistent with an area or out of character. They key, as always, is to have evidence in the record that supports your municipal decision making.

This is particularly true with respect to aesthetic determinations.<sup>101</sup> Overall, municipalities must consider whether a proposal may cause an impairment to the character or quality of important historical, archeological, architectural, or aesthetic resources in a neighborhood or community under SEQRA.<sup>102</sup> This includes the potential aesthetic impacts of a project.<sup>103</sup>

Although a targeted design review may be helpful to your community in reviewing big box projects, decisions made in compliance with SEQRA have a better chance of being upheld when they are properly supported. Also keep in mind that although these corporations flourish on standardization, in some areas they are increasingly mindful of the local customs, policies, and preferences in their siting and development. In fact, some have gone so far as to create regional model alternatives to satisfy community concerns.<sup>104</sup>

## Fighting Back

Targeted businesses have not, of course, gone quietly into the night. Many of the companies have worked with communities to achieve architectural and aesthetic compromises to meet the demands of the communities. Others have worked through the political process to overturn limiting regulations or decisions; indeed, it is fairly common for large stores to organize and financially support proponents for their proposed operations.<sup>105</sup> The regulated businesses have also turned to the courts for relief, particularly in California, mainly raising the constitutional issues of Substantive Due Process, Equal Protection, and violations of the Commerce Clause in seeking to overturn local regulations. These efforts, as detailed in this section, have largely been unsuccessful, suggesting that a properly implemented law and zoning decisions based on a documented record will be upheld.

## A. Constitutional Challenges

Constitutional challenges, usually brought as claims under 42 U.S.C. § 1983 for violation of civil rights, are not often successful in the land use context. As noted by the New York Court of Appeals, "federal courts dismissing section 1983 land-use claims have repeatedly noted that they do not function as zoning boards of appeal, or substitute for state courts interpreting land-use regulations. The point is simply that denial of a permit—even an arbitrary denial redressable by an article 78 or other state

law proceeding—is not tantamount to a constitutional violation under 42 U.S.C. § 1983; significantly more is required.<sup>106</sup> Nevertheless, violations are possible, although the record on big box and formula business regulation has so far favored the municipality.

### 1. Substantive Due Process

A Substantive Due Process Claim asserts that a statutory enactment is void as arbitrary and capricious because it has “substantial relation to the public health, safety, morals, or general welfare.”<sup>107</sup> Courts apply a two-part test for these claims: “First, claimants must establish a cognizable property interest, meaning a vested property interest, or ‘more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction.’ Second, claimants must show that the governmental action was wholly without legal justification.”<sup>108</sup>

For our discussion, the second part is relevant, and should be relatively straightforward to satisfy if the creation of the record discussed in the prior section has preceded the enactment of the statute or denial of the permit. As the Supreme Court has held, “only the most egregious official conduct can be said to be arbitrary in the constitutional sense.”<sup>109</sup> The issues spotlighted here—traffic, air pollution, blight prevention, preservation of historic properties, and protecting viewsheds—are all legitimate state interests. Thus, a statute or land use decision furthering these interests should survive due process attacks.

### 2. Equal Protection

The Equal Protection Clause argument arises when an ordinance would prohibit a particular type of business but permit other forms, usually competitors. The challenge is to the classification made by the community. The “Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated shall be treated alike.”<sup>110</sup> When we are talking about the regulation of a franchise or formula business, the local regulation involves social and economic policy, and does not target either a suspect class nor impinge on a fundamental right. Accordingly, the challenges under the Equal Protection Clause are reviewed according to the “rational basis” standard.<sup>111</sup> Under the rational basis test, a legislative classification will be upheld when the classification is rationally related to a legitimate state interest or, to put it another way, the legislative classification under rational basis review must be wholly irrational for an Equal Protection violation to occur.

Wal-Mart brought an Equal Protection challenge to a City of Turlock statute that contained very fine distinctions between discount super centers—which it totally banned from the community—and discount stores that are also often quite large boxes.<sup>112</sup> The City asserted the law was a valid, rational enactment designed (1) to maintain a neighborhood-level shopping area structure as set forth in the City Plan, including encouragement of pedestrian and bicycle traffic over automobile use; (2) to

avoid increased traffic and related air quality impact and (3) to prevent the blight that the City alleged—based on numerous studies—would occur if a discount superstore was permitted. Noting that each of these was a legitimate state interest, and based on the City Plan and the studies, the court found there was a rational basis for the City to believe the super center ban would advance those interests, and upheld the law, specifically rejecting what it called Wal-Mart’s efforts to have the court act as a “super-legislature” by evaluating the wisdom of the ban.<sup>113</sup>

Not discussed in the Turlock case, but of equal concern, is what would happen to efforts to regulate formula businesses such as McDonald’s under an Equal Protection claim? Is McDonald’s that different than a locally owned hamburger stand? If the record supports that distinction, the answer is yes. The Turlock case demonstrates that if the record underlying the law demonstrates any valid reason for treating different sized businesses differently, or on limits on certain architecture or formula businesses, it will be upheld. A California Appeals Court has, in fact, turned aside an Equal Protection challenge to a formula business regulation:

The Ordinance’s classifications (requiring only Formula Retail businesses to obtain special use permits and adhere to size limitations) are rationally related to a legitimate state interest. As discussed, Coronado has a legitimate interest in seeking to maintain the village ambiance of its commercial district and to ensure the long-term economic viability of the community. It was not irrational for the city council to decide that this objective could best be met by imposing a public permit process and frontage size limitation on “Formula Retail” businesses. The city council could reasonably conclude that this type of store requires special scrutiny because it is more likely to be inconsistent with Coronado’s land use goals than would a unique one-of-a-kind business and that such “formula” businesses - by their nature - have a greater potential to conflict with the village atmosphere of the community.<sup>114</sup>

The Coronado challenge was a facial challenge, i.e., asserting that the law was unconstitutional in any situation. Although it rejected this claim, the court warned that an as applied challenge might succeed, if, in fact, the law was used in a discriminatory fashion:

In asserting their equal protection arguments, Property Owners argue that an ordinance that wholly excludes a business from a local jurisdiction or that discriminates against nonresidents in the right to engage in business violates equal protection rights. However, the Ordinance, as written, does not restrict nonresident businesses in these ways. If the city’s planning commission and city council in fact implement the Ordinance to per se exclude all nonresident businesses from opening or expanding in Coronado, this would be subject to an as-applied constitutional challenge.<sup>115</sup>

Success in showing disparate treatment among similarly situated persons will not, however, win the day for an Equal Protection claim under the rulings of both the Second Circuit and the New York Court of Appeals. These courts have held that even where similarly situated per-

sons are treated differently, such improper treatment must have been based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or—and this is the typical claim in land use cases—malicious or bad faith intent to injure a person.<sup>116</sup>

In rejecting a big box store's equal protection claim, the Court of Appeals noted the community's "political" opposition to the high-traffic superstore at the City's border is not the equivalent of the "evil eye and an unequal hand" for constitutional Equal Protection purposes.<sup>117</sup> As stated by the Supreme Court, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."<sup>118</sup> Similarly, the Turlock federal court found allegations of collusion with local business interests irrelevant, because "an improper motive, without more, does not affect constitutional review of legislation."<sup>119</sup>

### 3. Dormant Commerce Clause Claims

Wal-Mart has also sought to upend big box regulation under the Commerce Clause,<sup>120</sup> specifically, the dormant or negative Commerce Clause, which "limits the power of the States to erect barriers against interstate trade" even where Congress has not acted.<sup>121</sup> Generally, under the dormant Commerce Clause, a two-part test is employed.<sup>122</sup> First, state or local regulations that discriminate on their face against out-of-state entities are almost always deemed *per se* unconstitutional.<sup>123</sup> Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."<sup>124</sup> The improper discrimination can take any of three different forms, first, the law may facially discriminate against interstate commerce, second, it may be facially neutral but have a discriminatory purpose, or third, it may be facially neutral but have a discriminatory effect.<sup>125</sup>

Unless the local ordinance is poorly drafted to favor in-state or locally based companies over out-of-state businesses, the ordinance should pass this part of the test.<sup>126</sup> For example, the fact that no big box stores could be built under a community-wide store size limit, thereby entirely eliminating companies like K-Mart or Lowes from the community, will not by itself constitute a violation, because in-state and out-of-state interests are treated equally, and the reasons for the law (prevention of traffic impacts, avoiding blight, etc.) are legitimate state interests. The "Commerce Clause protects the interstate market, not particular firms, from prohibitive or burdensome regulations."<sup>127</sup>

Under the second prong of the test, an ordinance will be evaluated to determine if the burdens it imposes on interstate trade that are "clearly excessive in relation to the putative local benefits."<sup>128</sup> In Turlock, the federal court ruled that since all interests were treated equally, there was little impact on interstate commerce, while providing significant local benefits. Thus, the balance clearly favored the local statute.

The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in Turlock, with any employees or managers, offering any products, except in the legislatively defined discount superstore format.

There is no constitutional right to do business in a retailer's optimally profitable store configuration, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality. There is no suggestion any out-of-state retailer cannot successfully do business marketing out-of-state goods in Turlock if it is not permitted to do so as a discount superstore.<sup>129</sup>

The key to the Turlock holding is that all the entities were treated equally and there were legitimate state interests in minimizing traffic and related noise and air pollution impacts, as well as prevention of blight. But what about a Commerce Clause challenge not to a big box prohibition, but to a limit on franchise architecture, where the state interest is more focused on aesthetic concerns, or a total ban on formula businesses in certain areas? The Coronado court also rejected an interstate commerce clause claim, and for the same reason—the law did not discriminate against interstate businesses and, in fact, had little impact on interstate commerce while providing significant local benefits.<sup>130</sup>

### 4. First Amendment and Lanham Act Claims

Restrictions on franchise architecture, particularly on limits on signs, have been upheld by the Courts against First Amendment challenges. In Connecticut, a federal district court denied a preliminary injunction that would have restrained a zoning board from enforcing certain zoning regulations on a Gateway computers sign.<sup>131</sup> The decision was based on a Lanham Act<sup>132</sup> case brought by a Blockbuster video store in Tempe, Arizona. The Act prohibits states or municipalities from requiring alteration of a registered mark. The Ninth Circuit upheld local restrictions prohibiting the mark altogether, but not a requirement to change the colors of the trademark, stating:

[A] zoning ordinance may not require a change in a registered mark. A zoning ordinance may, however, preclude the display of a mark, as Tempe did when it precluded Blockbuster from constructing its awning on the exterior of its leased building in the shopping center. Precluding display of a mark for zoning purposes is permissible; requiring alteration of a mark is not.<sup>133</sup>

The Connecticut court, applying an intermediate level of scrutiny because it involved restrictions on commercial speech, denied the injunction. It stated that the regulation was based on aesthetic interests, and while aesthetics were not a compelling state interest, it was still a valid state interest, and therefore sufficient to survive First Amendment review. The lesson here is to be aware of limits based solely on objections to trademarked signs. The McDonald's in Sedona (which is located in the Ninth Circuit) may well have prevailed in litigation rather than compromised the color scheme if the community had no other valid reasons for turning it away.

On the Lanham Act issue, the Second Circuit has been more favorable toward municipal regulation than the Ninth. In *Lisa's Party City, Inc. v. Town of Henrietta*,<sup>134</sup> the Court upheld a statute requiring uniformity in sign colors within a shopping center, even though the plaintiff's registered sign had five colors.



Appellants urge a reading of the statute that broadly prohibits a state or local government from restricting or interfering with the display or reproduction of a trademark in any manner that alters its appearance as exhibited in the Certificate of Registration issued by the U.S. Patent and Trademark Office. It is far from clear that the statute sweeps so broadly. It is at least as consistent with the language of the statute to understand it as allowing a local government to restrict businesses in a narrowly circumscribed location from using exterior signs in any color other than red. Such regulation does not compel a businesses to alter their trademark, since they remain free to use their trademarks without alteration in every manifestation other than the exterior sign at the covered location - on letterhead, leaflets, billboards, magazines, newspapers, television and Internet advertising, point-of-sale displays inside the store, and external signs at other locations. Under this narrower construction of § 1121(b), a restriction on external signs in a narrowly circumscribed locality would not come within the statute's prohibition on requiring businesses to alter their trademarks.<sup>135</sup>

The Second Circuit noted that

appellant's position would leave localities powerless to control the color, design elements, or character of outdoor signs. It is difficult to imagine why Congress would have wished to require localities seeking to protect aesthetic harmony to employ such broad measures as forbidding signs altogether or drastically limiting their size, rather than narrower measures such as requiring color conformity or consistent design elements.<sup>136</sup>

## B. Other State Claims

**Donnelly Act.** A federal court has rejected a claim that a ban on large supermarkets allegedly made at the request of existing supermarkets violates New York's Donnelly Act, Section 340 of the New York State General Business Law.<sup>137</sup> Patterned after the federal anti-trust laws, the "Donnelly Act makes illegal and void any contract, arrangement or agreement that restrains competition in any business, or unlawfully interferes with the free exercise of any activity in the conduct of any business."<sup>138</sup> Although the plaintiff there asserted that the town had conspired with existing local retailers, the court held "plaintiff alleges no fact to suggest that the Superstore Law was the product of a conspiracy or reciprocal arrangement, as opposed to a unilateral act by the Town that may have inured to the benefit of existing retailers."<sup>139</sup>

## Conclusion

In these days of seeming endless sprawl and the inability to retain local identity, municipalities can take steps to regulate the size, shape, and appearance of those doing business in their community. If properly investigated, supported, and enacted, local regulations can deal with many of the potential negative impacts of these businesses while preserving the benefits.

## NOTES

1. Terry Schwartz, *Defending Regional Identity: Strategies for Reshaping Franchise Architecture* at 10 (May 26, 2004)(hereinafter "Schwartz, *Defending Regional Identity*" available at <[http://www.uic.edu/cuppa/city-futures/papers/webpapers/cityfuturespapers/session5\\_1/5\\_1defendingregional.pdf](http://www.uic.edu/cuppa/city-futures/papers/webpapers/cityfuturespapers/session5_1/5_1defendingregional.pdf)>).
2. Schwartz, *Defending Regional Identity*, at 18-19.
3. See <<http://www.walmartfacts.com/PhotoGallery/default.aspx?id=3>>.
4. *City of Chicago v. Netcher*, 183 Ill. 104, 108, 55 N.E. 707 (1899) (striking the ordinances both as a violation of the owner's constitutional rights and as beyond the legitimate police powers of the City).
5. Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 Iowa L. Rev. 1011, 1013 (2005) (internal citations omitted).
6. See, e.g., George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers*, 58 Ark. L. Rev. 833 (2006) (hereinafter "Lefcoe").
7. See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926). In New York, municipal power to enact zoning was upheld as early as 1920, *Lincoln Trust Co. v. Williams Bldg. Corporation*, 229 N.Y. 313, 128 N.E. 209 (1920). See Salkin, *1 New York Zoning Law and Practice*, §§ 5.02 to 5.08 (4th ed.).
8. Lefcoe, at 861-66.
9. *Dexter v. Town Bd. of Town of Gates*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 507, 324 N.E.2d 870 (1975).
10. *San Diego to Ban Wal-Mart Supercenters*, USA Today, Nov. 29, 2006, available at <[http://www.usatoday.com/money/industries/retail/2006-11-29-wal-mart-san-diego\\_x.htm](http://www.usatoday.com/money/industries/retail/2006-11-29-wal-mart-san-diego_x.htm)> ("Opponents said the mega-retailer provides jobs and low prices and that a ban would limit consumer choice.").
11. See, e.g., *Delhi, CA. City Officials Laying Groundwork for Wal-Mart Sprawl*, May 1, 2005, at <<http://www.sprawl-busters.com/search.php?readstory=1820>>, detailing an effort to place a Wal-Mart in the local community to recover sales tax revenue lost to other counties.
12. Public Law Research Institute at Hastings College of the Law, *California Responses to Supercenter Development: A Survey of Ordinances, Cases and Elections*, at 55-56, Spring 2004 (herinafter "California Supercenter Study"), citing, Larry Werner, *Big box paradox*, Star Tribune (Minneapolis), Mar. 2, 2003, available at <<http://www.startribune.com/stories/418/3725697.html>>.
13. See, e.g., *Wal-Mart Stores Inc. v. Planning Bd. of Town of North Elba*, 238 A.D.2d 93, 668 N.Y.S.2d 774, 776-777 (3d Dep't 1998) (describing studies showing increases in downtown vacancies if Wal-Mart was permitted); *East Coast Development Co. v. Kay*, 174 Misc. 2d 430, 667 N.Y.S.2d 182, 185-187 (Sup 1996) (discussing visual impact of Wal-Mart store and parking lot on State Park). See also, *Wal-Mart Stores, Inc. v. City of Turlock*, 2006 WL 1875446 (E.D. Cal. 2006) (listing a number of studies that show the traffic and related air pollution is greater from a discount superstore than the traffic impact of a supermarket, a discount club, or a discount store and

- that discount superstores cause blight through loss of business in other parts of the community).
14. Schwartz, *Defending Regional Identity*, at 3.
  15. Sumner, Wash., Substitute Ordinance No. 2088, § 8, at 8, amending City of Sumner Urban Design Concept Plan and Design and Development Guidelines.
  16. *Nordlinger v. Hahn*, 505 U.S. 1, 13, 112 S. Ct. 2326, 2333, 120 L. Ed. 2d 1 (1992).
  17. N.Y. Town Law Art. 16 (McKinney 2006); N.Y. Vill Law Art. 7 (McKinney 2006); N.Y. Gen. City Law § 20(25) (McKinney 2006).
  18. N.Y. Mun. Home Rule Law § 10 (McKinney 2006).
  19. N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11) (McKinney 2006).
  20. N.Y. Gen. Mun. Law § 96-a (McKinney 2006).
  21. *City of Chicago v. Netcher*, 183 Ill. 104, 108, 55 N.E. 707 (1899).
  22. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683-684, 642 N.Y.S.2d 164, 173, 664 N.E.2d 1226 (1996).
  23. Columbia University Graduate School of Architecture, Planning and Preservation, *A Vision for New Rochelle: Plan for Revitalizing the City Park Neighborhood*, at 47, May 2001, available at <<http://www.columbia.edu/itc/architecture/bass/newrochelle/report/index.html>>.
  24. California Supercenter Study, at 8 (citations omitted).
  25. Bob Egelko, *Top court turns down Wal-Mart -- cities can ban big-box stores. Justices decline to take up appeal of Turlock ordinance*, San Francisco Chronicle, July 13, 2006, at B-2, available at <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/13/BAG45JU7PR1.DTL>>. *Wal-Mart unsuccessfully sued Turlock in both federal and state courts, Wal-Mart Stores, Inc. v. City of Turlock*, 2006 WL 1875446 (E.D. Cal. 2006) (rejecting constitutional claims to ban of supercenters); *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420 (5th Dist. 2006), review denied, (July 12, 2006) (rejecting state environmental and police power claims).
  26. Turlock, Cal. Municipal Code, §§ 9-1-202(cd)(2) and 9-3-302.
  27. Turlock, Cal. Municipal Code, §§ 9-1-202(cd)(2).
  28. *Wal-Mart Stores, Inc.*, 41 Cal. Rptr.3d 420.
  29. *San Diego to Ban Wal-Mart Supercenters* (visited December 18, 2006)<[http://www.jonesreport.com/articles/291106\\_ban\\_wal\\_mart.html](http://www.jonesreport.com/articles/291106_ban_wal_mart.html)>. As of this writing, the ordinance was still going through the local review process and was subject to possible veto and, if vetoed, council override.
  30. *C&K Real Estate, LLC v. Guilford Planning and Zoning Com'n*, 2003 WL 21384646 (Conn. Super. Ct. 2003).
  31. *The Hometown Advantage, Retail Business Size Cap - North Elba, NY* (visited November 30, 2006)<<http://www.newrules.org/retail/elba.html>>.
  32. Thanks to James Morganson, Code Enforcement Officer for North Elba, for his input.
  33. Elmer Ploetz, *Wal-Mart Drops Millersport Plans*, *The Buffalo News*, available at <<http://www.buffalonews.com/editorial/20061216/1063924.asp?PFVer=Story>>.
  34. *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 102-3, 99 L. Ed. 27, 38 (1954).
  35. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 478, 402 N.Y.S.2d 359, 366, 373 N.E.2d 255 (1977). See also *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).
  36. Asheboro, N.C., Code art. 200a, Central City Planning Area, § 3.4 (2006), at 3, available at <[http://www.ci.asheboro.nc.us/Zoning/Article\\_200A\\_2\\_9\\_06.pdf](http://www.ci.asheboro.nc.us/Zoning/Article_200A_2_9_06.pdf)>.
  37. Coronado, Cal. Mun. Code, § 86.04.682.
  38. Port Townsend, Wash., § 17.54.010 (2005).
  39. Port Townsend, Wash., § 17.54.030(A) (2005).
  40. Portland Me., City Code ch. 14 (Land Use), art. 111, div. 19.7, (the "Portland Maine Code"), available at <<http://www.newrules.org/retail/portland.html>>.
  41. Port Jefferson, N.Y., § 250-9 (2000), available at <<http://www.e-codes.generalcode.com>>.
  42. Port Jefferson, N.Y., §§ 250-18(H), 250-19(B)(2), and 250-22(H) (2000).
  43. The New Rules Project Website, <http://www.newrules.org/retail/formula.html>.
  44. *Gernatt*, 87 N.Y.2d at 684, citing, *Khan v. Zoning Bd. of Appeals of Village of Irvington*, 87 N.Y.2d 344, 639 N.Y.S.2d 302, 662 N.E.2d 782 (1996); *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 121, 96 N.E.2d 731 (1951).
  45. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 724, 721 N.E.2d 971 (1999), quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980) (abrogated by, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).
  46. N.Y. Gen. City Law §§ 20(25), 28-a (McKinney 2006); N.Y. Town Law §§ 263, 272-a (McKinney 2006); N.Y. Village Law §§ 7-704, 7-722 (McKinney 2006).
  47. *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265 (1988) ("The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land.") (citation omitted).
  48. Skaneateles, N.Y., Town and Village of Skaneateles Joint Comprehensive Plan (July 11, 2005) (available at <<http://townofskaneateles.com/infoLibrary.shtml>>).
  49. Warwick, N.Y., Comprehensive Plan, 3.4 (1999), available at <<http://www.greenplan.org/id6.htm>>; see also, Warwick, N.Y., Zoning Code, § 164-11(L) (2002).
  50. Portland, Me. City Code.
  51. Winslow, Wash. [former name of Bainbridge] Ordinance No. 89-28 ("the City of Winslow, Washington, now finds that formula take-out food restaurants represent a type of business that is automobile-oriented . . . that expansion in number of such establishments should be disallowed entirely in order to establish at this time, an optimal mix of pedestrian-oriented and other kinds commercial and retail establishments"), available at <<http://www.newrules.org/retail/bainbridge.html>>. Similar arguments have been made to ban drive-thru establishments in village-type or pedestrian-friendly areas.
  52. Francis Development and Management Co., Inc. v. Town of Clarence, 306 A.D.2d 880, 761 N.Y.S.2d 760 (4th Dep't 2003).
  53. Francis Development and Management Co., 761 N.Y.S.2d at 761.

54. Francis Development and Management Co., 761 N.Y.S.2d at 761.
55. Asian Americans, 531 N.Y.S.2d at 787.
56. Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 503, 502 N.E.2d 176 (1986)(citations and footnotes omitted) (emphasis added).
57. Matter of Wal-Mart Stores, Inc., 668 N.Y.S.2d at 777.
58. North Shore Steak House, Inc. v. Board of Appeals of Incorporated Village of Thomaston, 30 N.Y.2d 238, 331 N.Y.S.2d 645, 649, 282 N.E.2d 606 (1972).
59. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006).
60. North Shore Steak House, Inc., 331 N.Y.S.2d at 649.
61. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006); North Shore Steakhouse, Inc., 331 N.Y.S.2d at 649.
62. Texaco Refining & Marketing, Inc. v. Valente, 174 A.D.2d 674, 571 N.Y.S.2d 328, 330 (2d Dep't 1991); see Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 226 N.Y.S.2d 374, 378, 181 N.E.2d 407 (1962).
63. See e.g., Penny Arcade, Inc. v. Town Bd. of Town of Oyster Bay, 75 A.D.2d 620, 427 N.Y.S.2d 52 (2d Dep't 1980); see also, Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535, 833 N.E.2d 1210 (2005) (upholding decision to not renew solid waste special use permit based on potential harmful effects).
64. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006).
65. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006); St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988).
66. St. Onge, 527 N.Y.S.2d at 724 (upholding condition regarding number of vehicles outside during working hours but striking condition requiring phase-out at different location; Town of Huntington v. Sudano, 42 A.D.2d 791, 346 N.Y.S.2d 582, 583-584 (2d Dep't 1973), order aff'd, 35 N.Y.2d 796, 362 N.Y.S.2d 459, 321 N.E.2d 549 (1974) (upholding limitation on number of dogs allowed in kennel but striking condition that limited dogs to those trained for use with the blind); Louhal Properties, Inc. v. Strada, 191 Misc. 2d 746, 743 N.Y.S.2d 810 (Sup 2002), aff'd and remanded, 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dep't 2003) (village could not use zoning law to regulate hours of operation).
67. N.Y. Gen. City Law § 27-b(2) (McKinney 2006); N.Y. Town Law § 274-b(2) (McKinney 2006); N.Y. Village Law § 7-725-b(2) (McKinney 2006).
68. Oakdale, Cal., City Codes § 36-23.35(R), available at <<http://www.ci.oakdale.ca.us>>; see also The Hometown Advantage, Preventing Vacant Boxes.
69. Oakdale, Cal., City Codes § 36-23.35(R); see also The Hometown Advantage, Preventing Vacant Boxes.
70. Peachtree, Ga., Code Of Ordinances; see also, The Hometown Advantage, Preventing Vacant Boxes.
71. Bozeman, Mont., Ordinances, available at <<http://www.bozeman.net/WebLink7/DocView.aspx?id+3760>>; see also The Hometown Advantage, Preventing Vacant Boxes.
72. Peachtree, Ga., Code Of Ordinances; see also, The Hometown Advantage, Preventing Vacant Boxes.
73. Peachtree, Ga., Code Of Ordinances, available at <<http://peachtree-city.org>>; see also, The Hometown Advantage, Preventing Vacant Boxes.
74. Bozeman, Mont., Ordinances, available at <<http://www.bozeman.net/WebLink7/DocView.aspx?id+3760>>; see also The Hometown Advantage, Preventing Vacant Boxes.
75. Asheville, N.C. City Ordinance, §§ 7-16-2(b)(10) and 7-16-2(d)(10)(a)(1-4).
76. Warwick, N.Y., Zoning Code, § 164-46(J)(48 and 49) (2002), available at <<http://www.e-codes.generalcode.com>>.
77. Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870 (1975).
78. N.Y. Gen. City Law § 27-a (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
79. N.Y. Gen. City Law § 27-a(2)(a) (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
80. N.Y. Gen. City Law § 27-a(2)(a) (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
81. N.Y. Gen. City Law § 27-a(4) (McKinney 2006); N.Y. Town Law § 274-a(4) (McKinney 2006); N.Y. Village Law § 7-725-a(4) (McKinney 2006).
82. Di Veronica v. Arsenault, 124 A.D.2d 442, 507 N.Y.S.2d 541, 543-44 (3d Dep't 1986) (holding that compliance with SEQRA is required before decision on site plan can be made).
83. N.Y. Evtl. Conserv. Law § 8-0109(4) (McKinney 2006).
84. Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 A.D.2d 677, 741 N.Y.S.2d 274 (2d Dep't 2002).
85. Home Depot, 741 N.Y.S.2d at 275.
86. Home Depot, 741 N.Y.S.2d at 275.
87. Home Depot, 741 N.Y.S.2d at 276.
88. Wal-Mart Stores, Inc., 668 N.Y.S.2d at 776-77.
89. Wal-Mart Stores, Inc., 668 N.Y.S.2d at 777.
90. See also, East Coast Development Co., 667 N.Y.S.2d at 185-87 (holding visual impact of Wal-Mart store and parking lot on State Park warranted denial of site plan application).
91. Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304-305, 494 N.E.2d 429 (1986).
92. Schwartz, Defending Regional Identity.
93. The National Trust for Historic Preservation (visited December 20, 2006) <<http://www.nationaltrust.org>>.
94. The National Trust for Historic Preservation.
95. Hopkins, Minn., Downtown Design Guidelines (2006), available at <<http://www.hopkinsmn.com/planning/design.html>>.
96. Hopkins, Minn., Downtown Design Guidelines (2006).
97. Hopkins, Minn., Downtown Design Guidelines (2006).
98. Sierra Business Council, Building Vibrant Sierra Communities: A Commercial And Mixed Use Handbook,



- Appendix A (2005), available at <<http://sbcouncil.org/documents/MixedUseHandbook/AppendixA.pdf>>.
99. Georgetown, Colo., Design Guidelines, Ch. 6(8) (2006), available at <<http://www.town.georgetown.co.us/drc/drcbk3ch6.html#corpfran>>.
  100. Georgetown, Colo., Design Guidelines, Ch. 6(8) (2006).
  101. See, e.g., *Greenlawn CVS, Inc. v. Planning Bd. of Town of Huntington*, 280 A.D.2d 601, 720 N.Y.S.2d 800, 801 (2d Dep't 2001) (overturning planning board's approval of a store limited to 6,000 square feet due to aesthetics based on lack of support in record).
  102. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.7(c)(v) (2006).
  103. See *Holmes v. Brookhaven Town Planning Bd.*, 137 A.D.2d 601, 524 N.Y.S.2d 492, 494 (2d Dep't 1988) (annulling and remitting matter back to municipality to review impacts of 25 acre shopping mall may have on air pollution, noise level, drainage and flooding, aesthetics and the existing community).
  104. Schwartz, *Defending Regional Identity*.
  105. In California, where referendums are permitted, voters in Contra Costa County overturned an ordinance limiting the size of big box retailers. Wal-Mart, for example, regularly funds election groups and officials supportive of its interests. California Supercenter Study at 38.
  106. *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 627, 781 N.Y.S.2d 240, 245, 814 N.E.2d 410 (2004).
  107. *Euclid*, 272 U.S. at 395.
  108. *Bower Associates*, 2 N.Y.3d at 627, quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996).
  109. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003).
  110. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).
  111. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).
  112. *Wal-Mart Stores, Inc.*, 2006 WL 1875446.
  113. *Wal-Mart Stores, Inc.*, 2006 WL 1875446.
  114. *Coronadans Organized for Retail Enhancement v. City Coronado*, 2003 WL 21363665 (Cal. App. 4th Dist. 2003), unpublished/noncitable.
  115. *Coronadans Organized for Retail Enhancement*, 2003 WL 21363665.
  116. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001); *Bower Associates*, 2 N.Y.3d 617.
  117. *Bower Associates*, 2 N.Y.3d at 632.
  118. *Beach Communications*, 508 U.S. 307.
  119. *Wal-Mart Stores, Inc.*, 2006 WL 1875446.
  120. U.S. Const. art I, § 8, cl. 3.
  121. *Dennis v. Higgins*, 498 U.S. 439, 446, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).
  122. Dormant Commerce Clause jurisprudence is not as clear cut as presented here for our limited purposes as it relates to land use restrictions. See concurring opinions of Justice Scalia, commenting on the "various tests from our wardrobe of ever-changing negative Commerce Clause fashions," and Justice Thomas, asserting "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute," in *American Trucking Associations, Inc. v. Michigan Public Service Com'n*, 545 U.S. 429, 439, 125 S. Ct. 2419, 2426, 162 L. Ed. 2d 407, 416-417 (2005) (internal citations omitted). On the history of the dormant Commerce Clause, see *Quill Corp. v. North Dakota* By and Through Heitkamp, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).
  123. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978) (striking ban on imports of out-of-state garbage).
  124. *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 128 L. Ed. 2d 113, 114 S. Ct. 1345 (1994).
  125. *Oregon Waste Systems, Inc.*, 511 U.S. 93. See also *Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992) (holding that a statute may be subject to strict scrutiny if it discriminates against interstate commerce in effect).
  126. Laws equally banning out-of-town interests as well as out-of-state entities are similarly deemed invalid, see *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 361, 112 S. Ct. 2019, 2024, 119 L. Ed. 2d 139, 148 (1992) ("a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself").
  127. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28, 98 S. Ct. 2207, 2214-15, 57 L. Ed. 2d 91 (1978).
  128. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).
  129. *Wal-Mart Stores, Inc.*, 2006 WL 1875446.
  130. *Coronadans Organized for Retail Enhancement*, 2003 WL 21363665.
  131. *Gateway 2000 Country Stores, Inc. v. Norwalk Zoning Bd. of Appeals*, 13 F. Supp. 2d 247 (D. Conn. 1998).
  132. 15 U.S.C. § 1121(b).
  133. *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1300 (9th Cir. 1998).
  134. *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999).
  135. *Lisa's Party City, Inc.*, 185 F.3d 12.
  136. *Lisa's Party City, Inc.*, 185 F.3d 12. See also Akila Sankar McConnell, Note, *Making Wal-Mart Pretty: Trademarks And Aesthetic Restrictions On Big-Box Retailers*, 53 Duke L.J. 1537 (2004); Jeffrey W. Strouse, Note, *Redefining Trademark Alteration Within the Context of Aesthetic-Based Zoning Laws: A Blockbuster Dilemma*, 53 Vand. L. Rev. 717 (2000); Roberta Rosenthal Kwall, *Regulating Trademarks on Exterior Signs: Should Local Law Trump the Lanham Act and the Constitution?*, 71 S. Cal. L. Rev. 1105, 1119 (1998).
  137. *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*, 997 F. Supp. 340 (E.D. N.Y. 1998).
  138. *Great Atlantic & Pacific Tea Co., Inc.*, 997 F. Supp. 340.
  139. *Great Atlantic & Pacific Tea Co., Inc.*, 997 F. Supp. 340.