

STAVING OFF THE PILLAGE OF THE  
VILLAGE: DOES *IN RE WAL-MART STORES,  
INC.* OFFER HOPE TO SMALL MERCHANTS  
STRUGGLING FOR ECONOMIC SURVIVAL  
AGAINST BOX RETAILERS?

Vermont's history speaks of rugged individualism: the state once operated as an independent republic, and generations of its residents have made their living through farming, despite adverse climate conditions. In the town of St. Albans, the spirit of hearty individualism has proven particularly strong. St. Albans has been attacked twice in the past 133 years.<sup>1</sup> The first invasion occurred during the Civil War when Confederate raiders crossed the Canadian border, vandalized the unsuspecting town, and robbed three of its banks.<sup>2</sup> The more recent attack was by Wal-Mart.<sup>3</sup> The battleground was a few miles north of St. Albans's historic downtown, on an abandoned dairy farm where the world's largest retailer sought to build a 126,000-square-foot discount store.<sup>4</sup> Vermonters opposed the building of this store,<sup>5</sup> and, in contrast to the Civil War skirmish, the

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1. See Tom Condon, *State Needs Law for Protection of Scenic Vistas*, HARTFORD COURANT, Sept. 9, 1997, at A3 (discussing the siege on St. Albans by 22 Confederate soldiers that occurred on October 19, 1864). Known mostly to Civil War aficionados, the "St. Albans Raid" was the northernmost encounter of the war. See *id.*

2. See *id.*

3. See *id.*

4. See Sally Johnson, *Vermonters are Up Against the Wal-Mart*, INSIGHT MAG., Jan. 10, 1994, at 12.

5. Well-organized opposition to a proposed Wal-Mart store is not unique to Vermont. Small merchants and community preservationists across the country, particularly in the northeast, have ardently protested the expansion of Wal-Mart into their communities. See, e.g., Jon Rutter, *Wal-Mart Prompts Protest*, LANCASTER NEW ERA, May 11, 1997, at B1; Mary

residents of St. Albans fought back fiercely<sup>6</sup> and won.<sup>7</sup>

In August 1997, the Supreme Court of Vermont unanimously upheld a decision invalidating a state land use permit for the proposed Wal-Mart store.<sup>8</sup> In *In re Wal-Mart Stores, Inc.*,<sup>9</sup> the court concluded that, in invalidating the permit, Vermont's Environmental Board had properly considered the store's potential adverse effects on existing competitors and the expected additional costs of municipal services resulting from urban sprawl.<sup>10</sup>

The court's conclusion that the Environmental Board properly considered Wal-Mart's projected impact on competition contradicts a well-established principal of zoning law: control of competition is not a proper zoning law purpose.<sup>11</sup> A zoning ordinance may not exclude a

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Ellen Godin, *Plainville Residents Rally Against Wal-Mart*, HARTFORD COURANT, Oct. 17, 1994, at B1; Ellen Goodman, *Sturbridge, Mass.: One Town's Fight Against Wal-Mart*, GREENSBORO NEWS & REC., Oct. 3, 1994, at A11; *Little Vermont a Big Adversary to Wal-Mart*, FIN. POST, Oct. 9, 1997, at 27 [hereinafter *Little Vermont*]. Many opponents believe that the opening of big-box discount stores like Wal-Mart will hasten the demise of downtown business districts as shoppers flock to the sprawling megastores on the edge of town. One media story aptly stated:

Wal-Mart is considered so threatening because it is so good at what it does. The company's modus operandi is to set up shop just outside a town, then undercut local retail prices. Often it acts as a magnet for satellite businesses—gas stations and fast-food restaurants, for instance—creating a new retail center that draws customers from downtown.

Johnson, *supra* note 4, at 14.

6. See *Little Vermont*, *supra* note 5. Until recently, Vermont was the only state in the nation without a Wal-Mart store. See *Wal-Mart Trims its Store to Gain Foothold in Vermont*, THE N.J. REC., Aug. 18, 1994, at D2 [hereinafter *Wal-Mart Trims*]. Compared with other states, Vermont has enjoyed relative success in containing the urban sprawl that has often accompanied the opening of new Wal-Mart stores. See Condon, *supra* note 1. For example, Wal-Mart stores in Bennington and Rutland, Vermont were built in buildings formerly occupied by department stores. See *id.* A Wal-Mart store in suburban Williston, Vermont won approval, despite local opposition, because the area had already been developed. See *id.*

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

8. See *id.*

9. See *id.*

10. See *id.* at 401-02. The court reasoned, in part, that a municipality's ability to provide essential services depends upon its tax base. See *id.* Therefore, the court concluded, if a proposed project will likely harm existing competitors so as to weaken the tax base, the local government may regulate that project in the interest of the general welfare of its citizens. See *id.* at 401.

11. See DANIEL R. MANDELKER, LAND USE LAW § 5.28 (4th ed. 1997). However, even if a state court holds a zoning restriction invalid because its primary purpose is to control competition, the local government still will probably be immune from federal antitrust liability.

particular land use merely because it will compete with an existing business.<sup>12</sup> However, if the exclusionary effect is merely incidental to an otherwise valid zoning purpose, the ordinance may not be invalid.<sup>13</sup>

A crucial aspect of the *In re Wal-Mart* case is that the Environmental Board's decision prohibiting construction of a new store near St. Albans was not based on a zoning ordinance. Instead, the Environmental Board based its decision on an interpretation of Act 250, Vermont's land use and development law.<sup>14</sup> Act 250 is unique among state growth-management statutes in that it provides for direct state-level control of new development by mandating case-by-case review of large building projects.<sup>15</sup> In contrast to Vermont, land use control in most other states is the prerogative of local

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See *id.* § 5.44. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade in interstate commerce. See 15 U.S.C. § 1 (1994). The Supreme Court, however, has adopted the position that states are absolutely immune from antitrust liability. See *Parker v. Brown*, 317 U.S. 341 (1943). This rule is known as the state action doctrine. In *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), the Court held that the state action doctrine protected a municipality from antitrust liability allegedly arising from a billboard zoning ordinance that benefited one advertiser while severely hindering its competitor. See *id.* at 372. The Court held that the city obtained state action immunity from its "unquestioned zoning power over the size, location, and spacing of billboards," authorized by the state's zoning-enabling act. See *id.*

12. See MANDELKER, *supra* note 11, § 5.28.

13. See *Forte v. Borough of Tenafly*, 255 A.2d 804, 806 (N.J. Super. Ct. App. Div. 1969) (holding that zoning ordinance restricting retail sales to a central business district is not invalid when the purpose is to revitalize the central business area rather than exclude or benefit any particular business); *Van Sicklen v. Browne*, 92 Cal. Rptr. 786 (Cal. Ct. App. 1971) (upholding a planning commission's denial of a special permit for a gas station where there was no demonstrated need for an additional station in the neighborhood). In *Van Sicklen*, the court stated that "so long as the primary purpose of the zoning ordinance is not to regulate competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition." *Id.* at 790.

14. See 702 A.2d at 400; VT. STAT. ANN. tit. 10, §§ 6001-6092 (1997) ("Act 250"). Land use decisions based on Act 250 may qualify as state action. See *Parker*, 317 U.S. 341. Regardless of whether decisions based on Act 250 qualify as strictly state action, the decisions are likely immune from antitrust liability. See *Omni*, 499 U.S. at 384 (recognizing state action immunity for municipalities enacting zoning regulations).

15. VT. STAT. ANN. tit. 10, §§ 6001(3), 6081(a). These sections require developers to obtain a permit for construction "involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes." *Id.* § 6001(3); see also *infra* Part II.A.

government.<sup>16</sup> In such other states, the majority of land use decisions are implemented through zoning statutes enacted in accordance with community-level land use plans.<sup>17</sup>

The Vermont Supreme Court's decision in *In re Wal-Mart Stores, Inc.*<sup>18</sup> has potentially far-reaching implications for commercial development throughout the nation. Because land use decisions in most other states are effectuated through zoning ordinances, the potential impact of this decision requires one to compare it to similar cases decided according to zoning law principles. One such decision is *Forte v. Borough of Tenaflly*,<sup>19</sup> which held that a municipality may zone to restrict retail sales to a central business district in an effort to revitalize the area, even though the incidental effect might be to grant the business district a virtual monopoly over retail business.<sup>20</sup> *Forte* suggests that, under appropriate circumstances, a court in another state could reach an outcome similar to that in *In re Wal-Mart*, albeit on different grounds.

A discussion of the *Wal-Mart* decision and its implications must begin with an understanding of Act 250 and how it differs from the dominant approaches to land use control in the United States. Part I of this Recent Development surveys Vermont's environmental and statutory history, which is essential to understanding the unique aspects of Act 250. Part II describes the significant provisions of Act 250 and how they were interpreted to prevent construction of a Wal-Mart store near St. Albans, Vermont. Part III compares the overall design of Act 250 to approaches to land use law in other states, focusing on the distinction between state and local control of land uses. Finally, Part IV compares the *In re Wal-Mart* and *Forte*

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16. See George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and a Synthesis*, 10-WTR NAT. RESOURCES & ENV'T 13 (1996). In 1922, the U.S. Department of Commerce published the Standard State Zoning Enabling Act, a model statute designed to encourage local zoning. See *id.* The United States Supreme Court upheld the validity of local zoning in 1926 in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nearly every state now has a zoning-enabling act that authorizes municipal governments to enact zoning ordinances. Presently, more than ten thousand local governments exercise zoning power. See Gay, *supra*, at 13.

17. See Gay, *supra* note 16, at 13.

18. 702 A.2d 397.

19. 255 A.2d 804.

20. See *id.* at 806.

decisions in an effort to anticipate the likelihood that a decision similar to *In re Wal-Mart* will occur in another jurisdiction.

### I. ENVIRONMENTAL AND HISTORICAL CONTEXT OF ACT 250

Vermont is a state known for extraordinary natural beauty. In the view of one scholar, Vermont's Act 250 is a reflection of the state's ecology:<sup>21</sup> "[B]ehind Act 250 is a shared cultural image of Vermont, a rugged pastoral ideal originally informed and shaped by farming and logging in a beautiful natural environment."<sup>22</sup> Vermont is a rural state without a major urban center. Its population lives in small towns, which are the basic units of local government.<sup>23</sup> In recent years, intense pressure for growth, particularly in the form of strip malls and shopping centers, has threatened the image of the traditional Vermont town.<sup>24</sup> The potential for urban sprawl even prompted the National Trust for Historic Preservation to include the entire state of Vermont on its list of America's Most Endangered Places.<sup>25</sup>

Concern over the sustainability of development in Vermont is not of recent origin. It first attracted political attention in the 1960s, when

21. See RICHARD O. BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250, ch. 2, at 1, 6. (1997). Vermont's climate is relatively cold and the growing season is short. Despite generally nutrient-poor soils, much of the state's land is devoted to farming. See *id.*

22. See *id.* at 1. Professor Brooks further contends that:

An understanding of this image, its components of myth and reality, and the actual natural environment which lies behind the image will not only provide a context for comprehending the discussions of specific provisions of Act 250 and the court and Environmental Board decisions. Such an understanding will also shed light upon the history and structure of Act 250 itself and its niche within Vermont.

*Id.*

23. Government in Vermont consists of the state, 250 towns and moderate-sized cities, and 50 incorporated villages. See *id.* Vermont towns are unlike incorporated municipalities in other states. Each town has authority over all of the land in its jurisdiction that falls outside of the organized cities. See David G. Heeter, *Almost Getting it Together in Vermont*, in DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 323, 325 (1976).

24. See Jessica E. Jay, Note, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 937 (1997). As one recent media article pointed out, of all the New England states, only Vermont remains known for what the entire region once symbolized: quiet villages clustered among rolling hills. See Jonathan Walters, *State of Grace: Vermont Makes its Stand against Suburban Sprawl*, USA TODAY, July 20, 1993, at 1D.

25. See Walters, *supra* note 24.

dramatic increases in population and development brought about by the completion of an interstate highway system began to take their toll on Vermont's physical environment.<sup>26</sup>

Rural towns in southern Vermont, which were most acutely affected by the new development, responded by exercising planning and zoning powers.<sup>27</sup> These initial efforts were rudimentary.<sup>28</sup> Vermont's state government began to act by authorizing local planning commissions and delegating a wide array of planning and zoning powers to local governments.<sup>29</sup>

At the same time, environmental activists throughout the country began to question whether local zoning controls could adequately address the myriad recurring environmental problems confronting the nation.<sup>30</sup> The federal government responded to the public's demand for change,<sup>31</sup> but citizens in several states, including Vermont, voiced concerns about the ineffectual federal leadership.<sup>32</sup>

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26. See Heeter, *supra* note 23, at 327 & n.6. Within ten years, Vermont's population increased by 14 percent, due in part to the growth of tourism, particularly in the ski industry. *See id.* at 326. Interstate highways, completed in the 1960s, made the small Vermont towns much more accessible to visitors. *See id.* The increase in permanent and seasonal populations created greater demand for land upon which to build houses. *See id.* at 326-27. Several large developments were either built or proposed in the mid-1960s. *See* 2 BROOKS, *supra* note 21, ch. 5, at 32. These developments placed tremendous burdens on the state's infrastructure, transforming once pristine streams into sewers. *See* Heeter, *supra* note 23, at 327.

27. *See* Heeter, *supra* note 23, at 327.

28. *See id.*

29. *See* VT. STAT. ANN. tit. 24, §§ 4301-4495 (1992).

30. *See* Gay, *supra* note 16, at 13. These problems included large-scale development that crossed municipal boundaries, urban sprawl, loss of open spaces, and degradation of significant natural resources such as wetlands, coastlines, and endangered and threatened species. *See id.*

31. *See id.* The federal government responded by conditioning aid grants for transportation and community development projects on metropolitan planning. *See id.* In addition, Congress passed the Clean Water Act and the Clean Air Act, which contained broad goals for alleviating regional pollution. *See id.*; *see also* 33 U.S.C. § 1251 (1994); 42 U.S.C. § 7401 (1994). Moreover, the National Environmental Policy Act required the preparation of an environmental impact statement for all major federal activities significantly affecting the environment. *See* 42 U.S.C. § 4332(c) (1994).

32. *See* Gay, *supra* note 16, at 14. The first state to adopt a land use control program was Hawaii in 1961. *See* DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 797 (3d ed. 1990). Between 1970 and 1974, several other states, including Vermont, enacted growth management statutes. *See* Vermont State Land Use and Development Act of 1970, 1969 Vt. Acts & Resolves 250 (codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-6108 (1996 & Supp. 1997)); Florida Environmental Land and Water Management Act of 1972, 1972 Fla. Laws ch. 317 (codified as amended at FLA. STAT. ch. 380 (1997)); Oregon State Land Use Act of 1973, 1973 Or. Laws 80 (codified as amended at OR.

State officials in Vermont began to see that a mounting developmental crisis confronted the entire state. In May 1969, Vermont's governor appointed a Commission on Environmental Control to investigate how the state could sustain economic growth without destroying the environment.<sup>33</sup> The Commission issued a report in January 1970 that took a broad view of Vermont's environmental problems. The report concluded that the state's ecological balance was fragile, particularly at elevations above 2,500 feet, and was in jeopardy from large-scale development.<sup>34</sup> The Commission's recommendations to the governor formed the basis of Act 250 as originally proposed in the legislature.<sup>35</sup>

## II. LAND USE AND DEVELOPMENT LAW IN VERMONT

The Vermont legislature adopted Act 250 in 1970 as part of a

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REV. STAT. § 197 (1991)); and the Colorado Land Use Act of 1974 (codified as amended at COLO. REV. STAT. ANN. §§ 24-65-101 to 24-65.1-502 (West 1990)). Two leading authors have referred to this wave of land use control programs as a "Quiet Revolution." See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

These initial state growth management programs were of two distinct types: Vermont's state level case-by-case review of development projects and Oregon's state level oversight of local development planning. See Gay, *supra* note 16, at 14.

33. See BROOKS, *supra* note 21, ch. 5, at 2. The Commission was headed by Rep. Arthur Gibb and consisted of Vermont's leading environmentalists, political leaders, and businessmen, who were advised by a large panel of citizens and environmentalists. See *id.* The Gibb Commission, as the group became known, appointed subcommittees to study the impact of large-scale development on the state's water supply, open spaces, waste disposal, power consumption, and pesticide use. See *id.* The Commission also reviewed reports on air pollution and herbicides. See *id.*

34. See *id.* at 2 (citing GOVERNOR'S COMM'N ON ENVIRONMENTAL CONTROL, REPORTS TO GOVERNOR 1, 2 (1970)). According to the report, large-scale housing developments, pesticide applications, industrial pollution, public waste disposal, the building of dams, and air pollution threatened the environment. See *id.*

35. See BROOKS, *supra* note 21, ch. 5, at 3 (citing GOVERNOR'S COMM'N ON ENVIRONMENTAL CONTROL). The Gibb Commission recommended the total reorganization of the state's management of environmental policy through the creation of an Agency of Environmental Conservation, as well as local environmental commissions. See *id.* (citing GOVERNOR'S COMM'N ON ENVIRONMENTAL CONTROL). The Commission also advised that the state immediately implement broad regulations to which large subdivisions and developments would be required to conform. See *id.* Finally, it recommended that the state prepare a comprehensive development plan and require large developments to comply with it. See *id.* The Gibb Commission's report was followed by the passage of nine major environmental initiatives in March and April 1970, including Act 250. See *id.*

wave of state laws intended to protect the environment.<sup>36</sup> Prior to the enactment of Act 250, land use regulation in Vermont was achieved primarily through municipal and regional land use decision-making and planning.<sup>37</sup> Act 250 did not supplant local control of land use decisions. Rather, it ensured a system of concurrent control, both at the state and municipal levels, by providing an overlay on local planning and zoning.<sup>38</sup>

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36. *See id.* at 1. The proposed Act 250 (H.417) was approved and signed by the governor of Vermont on April 4, 1970. *See id.* at 12 (citing JOURNAL OF THE HOUSE, State of Vermont, Adjourned Session, at 630-41 (1970)).

37. The enactment of local and regional land use laws in Vermont is authorized by the Vermont Municipal and Regional Planning and Development Act, also referred to as the Vermont Planning and Development Act. *See* VT. STAT. ANN. tit. 24, §§ 4301-4494 (1997). Both the Vermont Planning and Development Act and Act 250 contain provisions defining the complex relationship between state and local regulation of Vermont's land use decisions. *See* BROOKS, *supra* note 21, ch.12, at 1.

The Vermont Planning and Development Act was amended in 1988 by the Vermont Growth Management Act, which strengthened the state and regional planning process. *See* Theodore C. Taub, *Update on Local Growth Management*, C431 A.L.L.-A.B.A. 1097, 1099 (1989). The Vermont Planning and Development Act, as amended by Act 200, provides for the creation of regional planning commissions that must prepare regional development plans to guide and encourage appropriate economic development. *See* Brooks, *supra* note 21, ch. 12, at 3; *see also* VT. STAT. ANN. tit. 24 §§ 4341, 4345a, 4347, 4348. (1997). Participation in the Act 200 program by local governments is voluntary. However, if a local growth management plan is not approved under Act 200, only the regional plan, and not the local plan, will be considered during the Act 250 permit-review process. *See* DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* 867 (4th ed. 1995).

38. The state supreme court characterized the role of Act 250 in the following terms: "[Act 250 does] not purport to reach all land use changes within the state, . . . or interfere with local control of land use decisions, except where values of state concern are implicated through large scale changes in land utilization." *In re Agency of Admin.*, 444 A.2d 1349, 1352 (Vt. 1982) (*reprinted in* DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* 866 (4th ed. 1995)).

The Vermont Supreme Court considered the interaction between the Act 250 growth-management criteria, discussed *infra* Part II.B, and local zoning law in *In re Patch*, 437 A.2d 121 (Vt. 1981). In that case, an applicant sought permission to build a sanitary landfill dump. *See id.* at 122. The town's agencies refused to approve a site plan and conditional use permit. *See id.* The district commission, however, granted an Act 250 land use permit subject to conditions. *See id.* The applicant appealed and the case was removed to the Rutland Superior Court, which denied both the Act 250 permit and the local zoning approvals in a *de novo* proceeding. *See id.* at 123. The Supreme Court reversed with respect to the Act 250 permit, reasoning that the Act 250 criteria at issue would be satisfied. *See id.* at 126. However, the court affirmed the denial of the zoning permit on the ground that the zoning application raised a concern different from the Act 250 permit. *See id.* The zoning issue focused on the negative impact that the landfill likely would have on the value of adjoining property due to possible pollution. *See id.* at 128. The court concluded, "The trial court was well within the evidence in reaching the conclusion that property salability might well be adversely affected by a possible

### A. *The Form of Act 250*

Act 250 has undergone five major changes in the quarter-century since its adoption, but its basic form has remained intact.<sup>39</sup> The most distinguishing feature of Act 250, as originally adopted, was its requirement of a statewide land use plan that would enable centralized state development planning.<sup>40</sup> Despite the requirement in the statute that the legislature adopt a state land use plan, the land use plan never gained approval.<sup>41</sup> As a result, Act 250, which originally provided for comprehensive state-level planning, became a mechanism for more decentralized decision-making on an incremental, case-by-case basis.<sup>42</sup>

Act 250 was a legislative response to growing development pressures on Vermont's ecologically fragile environment. Accordingly, Act 250 regulates new large subdivisions and developments by means of a state permit program.<sup>43</sup> In general, subdivisions exceeding ten lots and developments involving ten or more acres of land require an Act 250 permit.<sup>44</sup> Act 250 created nine

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'cloud' on water supply." *Id.*

39. See BROOKS, *supra* note 21, ch. 5, at 1.

40. See *id.* at 8. The original bill provided for a series of three statewide plans: an "interim land capability plan," describing the current uses of the land and its capacity for development based on ecological factors (§6041); a "capability and development plan," which was to guide coordinated economic development of the state (§6042); and a "land use plan" consisting of a map that would set out broad categories of proper uses of the land based on the capability and development plan (§6043). See *id.*

41. See BROOKS, *supra* note 21, ch. 5, at 1. This failure was largely the result of an economic recession during the 1973-74 legislative session that caused a downturn in the real estate market and shifted public concern from environmental protection to unemployment. See *id.* In addition, in 1974, a new democratic governor, who originally opposed the adoption of Act 250, took office. See *id.* During the 1975 and 1976 sessions, state legislators made additional attempts to pass a state land use plan, but these efforts also failed. See Heeter, *supra* note 23, at 370. Eventually, the requirement was repealed. See BROOKS, *supra* note 21, ch. 5, at 17 (citing H.82, 57th Biennial Adj. Sess., 1984 Vt. Acts & Resolves 35 (Act No. 114), which deleted reference to the land use plan in § 6044).

In 1988, the Vermont legislature approved a new growth management statute, Act 200, which it intended to supplement legislation adopted in 1970, including Act 250. See Taub, *supra* note 37, at 1097, 1099.

42. See BROOKS, *supra* note 21, ch. 5, at 1.

43. See VT. STAT. ANN. tit. 10, § 6001(3) (1997).

44. See *id.* "Development" means any commercial or industrial development "involving more than 10 acres of land within a radius of five miles." *Id.* "Development" also means "the construction of housing projects . . . with 10 or more units, constructed or maintained on a tract

district environmental commissions throughout the state.<sup>45</sup> The power to issue permits is vested in the district commissions. Appeals from district commissions' decisions may be taken to the Vermont Environmental Board or to a trial court, and from there directly to the state supreme court.<sup>46</sup>

A developer seeking an Act 250 permit first must apply to the appropriate district commission. The commission must offer an opportunity for a fair hearing to all relevant parties and, after the hearing, decide whether to grant or deny the permit.<sup>47</sup> Complete denial of an Act 250 permit, as occurred in *In re Wal-Mart*, is exceedingly rare. In most instances, the district commission or the Environmental Board will issue a permit subject to certain conditions,<sup>48</sup> but will not stop the proposed development or subdivision from being built.

### *B. Specific Criteria of Act 250*

Act 250 originally included ten statutory criteria to be considered by the district commissions and the Environmental Board in deciding

or tracts of land, . . . within a radius of five miles" and the "construction of improvements" for municipal or state purposes on more than 10 acres of land. *Id.* Because Act 250 applies only to new large-scale developments, rather than to existing developments, the Wal-Mart stores in Williston and Rutland, Vermont, which occupy buildings once used by department stores, were not subject to Act 250 review. *See id.*

45. *See* BROOKS, *supra* note 21, ch. 5, at 6. The Act 250 districts roughly correspond to the various topographic features of the state. According to Professor Brooks, the decentralized commissions reflect Vermont's tradition of the town meeting form of government. *See id.* ch. 2, at 1. Each district commission consists of three citizens who are appointed by the governor and assisted by a staff. *See id.* ch. 5, at 4.

46. *See* VT. STAT. ANN. tit. 10, §§ 6081-6089 (1997). A party wishing to appeal a district commission decision must file a notice of appeal with the Environmental Board within 30 days of that decision. *See id.* § 6089(a)(4). A statement of the issues to be addressed in the appeal must accompany the notice of appeal, which will govern the scope of the appellate hearing before the Environmental Board. *See id.* § 6089(a)(2). The Board will conduct a *de novo* hearing on all findings requested by any party who files an appeal or cross appeal. *See id.* § 6089(a)(3). The Vermont Supreme Court may hear appeals of Environmental Board decisions, but the standard of appellate review is very deferential. "The [factual] findings of the board . . . , if supported by substantial evidence on the record as a whole, shall be conclusive." *Id.* § 6089(c)(d).

47. *See id.* § 6085. If a permit application is denied, the district commission or the Environmental Board must state the specific reasons for the denial. *See id.* § 6087(c).

48. *See id.* § 6086(c) ("A permit may contain such requirements and conditions as are allowable proper exercise of the police power.").

whether to grant a permit.<sup>49</sup> These criteria address pollution prevention, preservation of important natural resources, and the provision of adequate governmental and educational services.<sup>50</sup> The Act 250 criteria were derived in part from the common law of nuisance. However, the criteria go beyond the common law by broadening the kinds of harms to be regulated and by lessening the relevant burdens of proof.<sup>51</sup> The criteria also demand a higher standard of conduct among developers without regard to the cost-benefit analysis of private nuisance law.<sup>52</sup>

In addition to its ten original criteria, Act 250 also includes revised criteria that specifically address growth management concerns, including the impact of population growth and the costs of scattered development.<sup>53</sup> These criteria require the district

49. *See id.* § 6086(a). Section 6086(a) requires findings by the district commission or the Environmental Board that the subdivision or development:

- (1) Will not result in undue water or air pollution . . . .
- (2) Does have water available for the reasonably foreseeable needs of the subdivision or development.
- (3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.
- (4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.
- (5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.
- (6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.
- (7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.
- (8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.
- (9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted . . . .
- (10) Is in conformance with any duly adopted local or regional plan . . . .

*Id.*

50. *See id.* § 6086(a).

51. *See id.* § 6088. According to § 6088, the burden of proof is on the permit applicant with respect to criteria (1), (2), (3), (4), (9) and (10) of § 6086(a). *See id.* However, any party opposing the applicant has the burden of proof with regard to criteria (5) through (8) of § 6086(a). *See id.*

52. *See* 1 RICHARD O. BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 at 10-11 (1997) (citing Upper Valley Regional Landfill, Land Use Permit Application #3R0609-EB, 1991 WL 277851 (Vt. Envtl. Bd., Nov. 12, 1991)).

53. *See* § 6086(a)(9)(A), (H). These criteria were added to the statute in 1973. *See* Brooks,

commissions and the Environmental Board to consider as part of the application review process the anticipated additional costs of education, public services, and facilities associated with a proposed development.<sup>54</sup> The Environmental Board denied Wal-Mart's Act 250 permit for the proposed store near St. Albans based on Criteria 9(A), relating to the impact of growth, and 9(H) relating to the costs of scattered development.<sup>55</sup>

The Act 250 criteria were first tested twenty years ago in *In re Pyramid Mall Co.*,<sup>56</sup> a case that arose outside Burlington, Vermont. Although the Vermont Supreme Court did not rule on the merits of that case,<sup>57</sup> it is an important decision in the history of Act 250 because of the factual similarities it shares with *In re Wal-Mart*.

### C. The Pyramid Mall Case

The *Pyramid Mall* case concerned a developer's proposal to build a large suburban shopping mall on a 200-acre tract located six miles from the central business district of Burlington.<sup>58</sup> The site was located near an isolated strip development, close to the intersection of two interstate highways, in an otherwise rural area.<sup>59</sup> Before commencing

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*supra* 21, ch. 5, at 14.

54. See VT. STAT. ANN. tit. 10, § 6086(a)(9)(A) (1997). Criterion 9(A) concerns the impact of population growth. *See id.* It requires consideration of "the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth which would result from the development if approved." *Id.* Specifically, the district commission or the Environmental Board must evaluate the expected costs for "education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety, and welfare." *Id.*

55. Criterion 9(H) addresses the costs of scattered development. *See* § 6086(a)(9)(H). It provides that a permit will be granted for a development "which is not physically contiguous to an existing settlement whenever it is demonstrated that . . . the additional costs of public services and facilities caused directly or indirectly by the proposed development . . . do not outweigh the tax revenue and other public benefits of the development . . . such as increased employment . . ." *Id.*

56. Vt. Dist. Envtl. Comm'n No. 4, No 4C0281, 1978, *appeal dismissed*, *In re Pyramid Co.*, 449 A.2d 915 (Vt. 1982).

57. *See In re Pyramid*, 449 A.2d at 922.

58. *See id.* at 915. For a discussion of the history of the *Pyramid Mall* litigation, see MANDELKER ET AL., *supra* note 37, at 869.

59. *See* MANDELKER ET AL., *supra* note 37, at 869.

construction, the developer had to obtain an Act 250 permit.<sup>60</sup> According to studies submitted to the District Environmental Commission during the case, the mall would attract forty percent of the existing businesses in downtown Burlington.<sup>61</sup> The Commission found that such economic dislocation would negatively impact the city's financial condition and, accordingly, denied the permit application.<sup>62</sup> The Commission held that the developer failed to satisfy the scattered development criterion set forth in Act 250.<sup>63</sup>

Specifically, the Commission concluded that the scattered development criterion required consideration of the costs that the mall would impose on nearby Burlington and other municipalities as well as the costs it would impose at the site of the mall.<sup>64</sup> The Commission found that the relocation of businesses from Burlington would shrink the city's property tax base and create tax revenue losses that would ultimately require higher taxes or a reduction in city services.<sup>65</sup> The Commission further found that other municipalities would also suffer tax losses.<sup>66</sup> The most noteworthy aspect of the Commission's decision was its conclusion that economic impacts were cognizable under Act 250.<sup>67</sup>

In response to the Commission's findings, the developer appealed to a trial court and moved for summary judgment, contending that the Commission's interpretation of Act 250 was erroneous.<sup>68</sup> The trial court denied the motion for summary judgment but granted leave to seek an interlocutory appeal.<sup>69</sup> The Vermont Supreme Court dismissed the appeal for lack of standing and thereby declined to rule on whether Act 250 encompassed economic impacts of proposed development.<sup>70</sup>

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60. See *In re Pyramid*, 449 A.2d at 917.

61. See MANDELKER ET AL., *supra* note 37, at 814.

62. See *id.*

63. See *id.* For a discussion of the scattered development criterion, see *supra* note 55 and accompanying text.

64. See MANDELKER ET AL., *supra* note 37, at 869.

65. See *id.*

66. See *id.*

67. See *id.*

68. See *In re Pyramid*, 449 A.2d at 917.

69. See *id.*

70. See *id.* at 915. The court concluded that the issues were not ripe for appellate review in the context of an interlocutory appeal. See *id.* at 919-22. The court reasoned that the appeal

#### D. The St. Albans Wal-Mart Case

In *In re Wal-Mart*,<sup>71</sup> the Vermont Supreme Court conclusively determined that the economic impact of a development that is subject to Act 250 review may be a relevant factor in the decision to grant or deny a land use permit.<sup>72</sup> Specifically, the court concluded that the Environmental Board may consider a project's anticipated impact on market competition because "[t]o the extent that a project's impact on existing retail stores negatively affects appraised property values, such impact is a factor that relates to the public health, safety, and welfare."<sup>73</sup>

The proposed Wal-Mart store was to be erected on a site located about two miles north of St. Albans's historic downtown. Because the development would involve forty-four acres, more than the ten-acre threshold under Act 250, a permit was required.<sup>74</sup> In September 1993, Wal-Mart filed an application under Act 250 for a permit to build the store.<sup>75</sup> The District Six Commission granted a permit for the project finding that the application satisfied each of the Act 250 growth-management criteria.<sup>76</sup>

A local downtown preservation group and the Vermont Natural Resources Council appealed the decision to the Environmental Board.<sup>77</sup> The Environmental Board conducted a de novo review of

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order did not involve a "controlling question of law," there was not a "substantial ground for difference of opinion" as to the correctness of the order, and the appeal would not "materially advance the termination of the litigation." *See id.* The court explained that even if the questions certified for appellate review were resolved in the appellant's favor, the development still would be required to satisfy all of the criteria under Act 250, many of which were not before the Court for review, before a permit would be granted. *See id.* at 920. Accordingly, "[a] complex trial involving numerous issues would still be necessary to resolve this case." *See id.*

71. 702 A.2d 397 (Vt. 1997).

72. *See id.* at 401.

73. *Id.*

74. *See* VT. STAT. ANN. tit. 10, §§ 6001(3), 6081(a).

75. *See In re Wal-Mart*, 702 A.2d at 400.

76. *See id.* Several parties participated in the proceedings before the District Six Commission and the Vermont Environmental Board. *See id.* The permit applicants were the St. Albans Group, which owned the land upon which the proposed store was to be built, and Wal-Mart Stores, Inc. (the "Applicants"). *See id.* The Applicants were opposed by the Franklin/Grand Isle County Citizens for Downtown Preservation (the "Citizens") and the Vermont Natural Resources Council ("VNRC"). *See id.*

77. *See id.* The Citizens challenged the District Commission's decision with respect to the following Act 250 criteria: 1 (water pollution), 1(B) (waste disposal), 1(E) (streams), 1(G)

the appealed criteria and rejected the permit application based on Criteria 9(A) (addressing the impact of growth) and 9(H) (addressing the costs of scattered development).<sup>78</sup>

The Environmental Board made findings of fact relevant to each of the appealed criteria. Notably, the Board found that although the proposed project, in and of itself, would cause little population growth, it would likely encourage and accelerate other highway-oriented development, or secondary growth, in the area of the proposed project.<sup>79</sup> Additionally, the Board found that such accelerated development could significantly increase the costs of providing municipal services.<sup>80</sup> The Board also found that competition from the proposed project would cause losses in property tax revenue due to changes in the tax base, and that such losses would adversely affect St. Albans's downtown, where most of the existing retail businesses were located.<sup>81</sup>

The Board concluded that the effect of the project on retail

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(wetlands), 4 (soil erosion), 5 (traffic), 6 (impact on schools), 7 (local government services), 8 (historic sites), 9(A) (impact of growth), 9(H) (costs of scattered development), and 10 (conformity with local plan). *See In re St. Albans Group*, 1994 WL 739724, at \*3 (Vt. Envtl. Bd. Dec. 23, 1994). The Commission granted the Citizens party status with respect to Criteria 7, 8, 9(A), 9(H), and 9(K) and denied them party status on the remainder. *See id.* The Citizens appealed the denial of party status. *See id.* The VNRC's challenge was more limited. It appealed the Commission's decision with respect to Criteria 8 (historic sites), 9(A), 9(H), 9(K), and 10. *See id.* VNRC sought, and was denied, party status with respect to these criteria and appealed that denial. *See id.* The Applicants cross-appealed, challenging the District Commission's grant of party status to the Citizens with regard to Criteria 7, 8, 9(A), 9(H), and 9(K). *See id.*

78. *See In re St. Albans Group*, 1994 WL 739724, at \*40. The Board also reviewed the St. Albans Wal-Mart project under several ecologically related criteria of Act 250, including those criteria addressing headwaters, waste disposal, streams, wetland rules, and soil erosion. *See id.* at \*5. The Board found that the project complied with all of the ecologically related criteria under review. *Id.* at \*7-\*11, \*41. The Board also found that the project complied with Criterion 9(K), concerning public investments and facilities. *See id.* at \*41; *see also* VT. STAT. ANN. tit. 10, § 6086(a) (1997).

79. *See In re St. Albans Group*, 1994 WL 739724, at \*12.

80. *See id.* at \*12-\*13. The Environmental Board also found that the Applicants failed to sustain their burden of proof with regard to Criterion 9(H), addressing the impact of growth. *See id.* According to the Board, the Applicants offered no credible evidence as to the total amount of commercial or residential development that was likely to occur as a result of the project or whether the public benefits would outweigh the public costs. *See id.*

81. *See id.* at \*13-\*14. In addition, the Environmental Board found that the proposed project would result in a net job loss for the region of approximately 130 jobs in 2004 and that such job loss would cause property tax revenues to decline by \$50,000, measured in 1995 dollars, in 2004. *See id.* at \*14.

competition was a common factor relevant to all the fiscal criteria on appeal before the Board.<sup>82</sup> The Board reasoned that to the extent a proposed development might have a substantial adverse economic impact on existing businesses, such development might weaken the tax base and, consequently, impinge upon the local government's ability to provide educational and other public services.<sup>83</sup> The Board concluded that the legislature had intended for it to consider any reduction in the tax base caused by a proposed development in its review under Act 250.<sup>84</sup> Accordingly, the Environmental Board voided Wal-Mart's Act 250 permit on December 23, 1994.<sup>85</sup> Wal-Mart filed a motion to modify the decision, which the Board denied before entering its final order on June 27, 1995.<sup>86</sup>

The Applicants appealed the Environmental Board's decision to the Vermont Supreme Court. The court affirmed the Board's interpretation of Act 250 based upon a deferential level of review.<sup>87</sup> According to the court, the language of Act 250 amply supported the Board's conclusion that a project's impact on market competition is a relevant consideration under the Act 250 criteria relating to growth, education, and municipal services.<sup>88</sup>

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82. *See id.* at \*18. The fiscal criteria on appeal were Criteria 6 (impact on schools), 7 (local governmental services), 9(A) (impact of growth), 9(H) (costs of scattered development), and 9(K) (public investments and facilities). *See id.* The Board stated that "impacts of the proposed project on existing retail competition are relevant to the extent that such impacts will in turn affect the finances of local, regional, or state government." *Id.*

83. *Id.* at \*19 (citing *In re Pyramid Co. of Burlington*, No. 4C0821, at 8 (Vt. Dist. Env'tl. Comm'n Oct. 12, 1978)).

84. *Id.* at \*18.

85. *See In re Wal-Mart*, 702 A.2d at 400. The Environmental Board also concluded that the proposed development failed to satisfy the Act 250 criteria concerning impact on education and impact on municipal services. *See id.* However, an Act 250 permit may not be denied solely on these grounds. *See* VT. STAT. ANN. tit. 10, § 6087(b) (1997).

86. *See In re Wal-Mart*, 702 A.2d at 400. Pursuant to Section 6087(c), the Board granted Wal-Mart permission for reconsideration, provided that Wal-Mart offer a credible study of secondary-growth impacts and recommend a permit condition to ensure that the public benefits of the project would outweigh the public costs to any affected municipality. *See id.* Wal-Mart declined this invitation, preferring to appeal to the Vermont Supreme Court. *See id.*

87. *See id.* at 400; *see also* VT. STAT. ANN. tit. 10, § 6089(c).

88. *See In re Wal-Mart*, 702 A.2d at 401. The court noted that § 6086(a)(9)(A) (impact of growth) specifically requires the Board to consider the "financial capacity" of the town and the region to accommodate growth. *See id.* Because the court affirmed the denial of the permit based on Wal-Mart's failure to meet its burden under Criterion 9(A), it did not reach the secondary growth issues raised by the Environmental Board under Criterion 9(H) (impact of scattered development). *See id.* at 400 n.2.

### III. THE DOMINANT APPROACH TO LAND USE CONTROL IN THE UNITED STATES

The most noteworthy aspect of the *In re Wal-Mart* decision is the court's conclusion that the Environmental Board properly considered the effects on market competition in denying Wal-Mart an Act 250 permit. This conclusion appears to offer hope to small communities across the country whose viability depends upon the economic strength of its small retailers. However, Vermont's Act 250 is unique among state land use laws, and anticipating the implications of this decision requires an understanding of how Act 250 differs from the approach to land use control adopted in most other states.

As previously described, Act 250 requires direct state-level review of development projects meeting minimum jurisdictional requirements.<sup>89</sup> In contrast to the Vermont model, the dominant approach to land use regulation in the United States is local control of land use through "Euclidian" zoning.<sup>90</sup> Zoning-enabling legislation, adopted in all 50 states, allows local governments to divide municipalities into zoning districts that regulate both the type and density of land use.<sup>91</sup> Typically, a zoning code will partition a municipality into residential, commercial, and industrial zones.<sup>92</sup> Restrictions must be uniform for each class or kind of building

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89. See *supra* Part II.A-B.

90. The term "Euclidean zoning" refers to the zoning model upheld by the Supreme Court against a due process challenge in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). For further discussion of the source of Euclidean zoning, see James Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994). Although local zoning remains the dominant model for land use regulation in the United States, several other states in addition to Vermont have adopted statutes requiring state oversight of local land use decision-making. One example is Oregon, which adopted the State Land Use Act in 1973. See OR. REV. STAT. § 197 (1997). In Oregon, local governments must submit comprehensive plans and land use regulations to a state agency that reviews them for compliance with state planning goals. See MANDELKER & CUNNINGHAM, *supra* note 32, at 872. Once a local plan receives state approval, the local government retains primary responsibility for day-to-day land use decisions. See Gay, *supra* note 16, at 16. In the late 1980s through 1993, Georgia, Maine, Maryland, New Jersey, Rhode Island, and Washington adopted programs similar to the Oregon model. See Wickersham, *supra*, at 490-91.

91. See Wickersham, *supra* note 90, at 493.

92. See *id.* In addition, the zoning code may further subdivide the municipality into zones for single or multifamily residential uses, small shops or office complex uses, and light or heavy industrial uses. See *id.*

throughout each zone, but may vary from one zone to another.<sup>93</sup> Subject to judicial review, a local board of adjustment may rule on requests for special exceptions to the terms of an ordinance and may also authorize variances from a zoning ordinance when, due to special conditions, literal enforcement of the ordinance would cause unnecessary hardship.<sup>94</sup> Standing in zoning cases is strictly limited to property owners, adjoining land owners, and other parties whose interests are immediately affected.<sup>95</sup>

#### IV. IMPLICATIONS OF STATE-LEVEL VERSUS LOCAL CONTROL OF LAND USE DECISIONS: *IN RE WAL-MART STORES, INC. AND FORTE V. BOROUGH OF TENAFLY*

The Vermont Supreme Court's conclusion that a project's effect on market competition may justify denial of an Act 250 permit contradicts a well-established zoning law norm: control of competition is not a proper zoning purpose.<sup>96</sup> Zoning laws must satisfy the substantive limitations imposed by the due process clause.<sup>97</sup> Therefore, zoning restrictions must "advance legitimate governmental objectives that serve the public health, safety, morals, and general welfare."<sup>98</sup> Courts generally will uphold a zoning restriction that incidentally affects competition if it achieves other legitimate zoning objectives.<sup>99</sup>

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93. See MANDELKER, *supra* note 11, § 4.17.

94. See *id.* § 4.19.

95. See Wickersham, *supra* note 90, at 493.

96. See MANDELKER, *supra* note 11, § 5.28.

97. See *id.* § 2.39.

98. *Id.*

99. See *id.* § 5.38. However, if a competitor attempts to use zoning law solely to shield its competitive position, a court is likely to hold that the competitor lacks standing to challenge the zoning restriction. See, e.g., *Circle Lounge & Grill, Inc. v. Board of Appeal*, 86 N.E.2d 920 (Mass. 1949). In *Circle Lounge & Grill, Inc. v. Board of Appeal*, Circle Lounge, which was located in a commercial zone, challenged a zoning variance granted to a restaurant in a residential zone across the street from Circle Lounge. See *id.* The *Circle Lounge* court held that the threat of competition from the restaurant did not confer standing upon Circle Lounge to challenge the variance. See *id.* at 922. The court found that, although homeowners in the residential district could object to a variance for commercial use in their district, Circle Lounge could not because it was located in a less restrictive commercial district across the street and, thus, was not a "person aggrieved." *Id.* at 924.

*Forte v. Borough of Tenafly*<sup>100</sup> is a decision in which a court, applying zoning law principles, found a legitimate governmental objective, even though the challenged zoning ordinance might have incidentally restrained competition.<sup>101</sup> It serves as a useful contrast to the *In re Wal-Mart* decision because it suggests how courts, applying zoning law principles, might rule on a case similar to *In re Wal-Mart* if it were to arise in another state. In *Forte*, the Superior Court of New Jersey, Appellate Division, upheld the constitutionality of a zoning amendment that restricted retail sales to a central business area where the purpose of the ordinance was to revitalize the business district.<sup>102</sup>

The plaintiffs in *Forte*, who were owners of a parcel of land situated outside of the central business area, sought to build a supermarket on their property and applied to the local planning board for the necessary permit and approvals.<sup>103</sup> At the time of the plaintiffs' application, the zoning district in which their property was located permitted such a use.<sup>104</sup> However, based on the recommendations of planning consultants and the planning board, the local governing body thereafter adopted a zoning amendment that created a new zoning district encompassing plaintiffs' property.<sup>105</sup> The amendment forbade construction within the new district of any commercial or wholesale establishment that would adversely affect the district's central business core.<sup>106</sup> The purpose of the amendment was to preserve the borough's downtown center by discouraging the spread of retail businesses to outlying areas.<sup>107</sup> The *Forte* plaintiffs immediately instituted an action to have the zoning amendment declared invalid.<sup>108</sup> Although the trial court initially invalidated the

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100. 255 A.2d 804 (N.J. Super. Ct. App. Div. 1969).

101. *See id.*

102. *See id.* at 807.

103. *See id.* at 805.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* The borough contended that the trial court should have dismissed the plaintiffs' action because the plaintiffs had failed to apply for a zoning variance. *See id.* On appeal, however, the court concluded that, given the circumstances, it would have been futile to apply for a variance, and, therefore, plaintiffs proceeded properly by bringing their action. *See id.*

amendment, the appellate court reversed the trial court, holding that the borough, in an effort to preserve and revitalize the central business area, could zone to restrict retail sales in the rest of the municipality.<sup>109</sup> The fact that the ordinance might have the incidental effect of conferring a virtual monopoly on the central business area did not invalidate it.<sup>110</sup> Moreover, the appellate court found that the amended zoning classification was not invalid as applied to the plaintiffs' property, even though it denied them the opportunity to operate a retail grocery store on their property. The plaintiffs' retained the right to use their property for any purpose permitted by the ordinance.<sup>111</sup>

*Forte* suggests that a decision similar to *In re Wal-Mart* could occur outside of Vermont, but that the case would arise differently. First, a municipality could not zone to prohibit construction of a Wal-Mart or other similar store because of its potentially harmful effects on existing businesses.<sup>112</sup> To survive substantive due process scrutiny, the ordinance must advance legitimate zoning purposes, namely the protection of the public health, safety and welfare.<sup>113</sup> Interestingly, the Vermont Supreme Court, in *In re Wal-Mart*, concluded that a proposed store's potentially harmful competition, which might threaten a municipality's tax base, provides a sufficient nexus with legitimate governmental interests for the government to regulate it.<sup>114</sup> However, based on *Forte*, this rationale probably will not suffice under zoning law principles. A municipality may not zone to exclude a particular store merely because it will compete with existing businesses.<sup>115</sup> The zoning restriction must further a legitimate zoning purpose such as revitalizing a downtown business district.<sup>116</sup>

Moreover, standing to challenge a zoning ordinance that would permit construction of a Wal-Mart or similar store in a particular

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109. *See id.* at 807.

110. *See id.*

111. *See id.*

112. *See* MANDELKER, *supra* note 11, § 5.28.

113. *See id.* § 2.39.

114. *See In re Wal-Mart*, 702 A.2d 397.

115. *See* MANDELKER, *supra* note 11, § 5.28.

116. *See id.* § 2.39.

district would be strictly limited. Only abutting property owners, or others whose interests are immediately affected by the zoning decision, will likely be permitted to challenge it.<sup>117</sup> This latter category would include residents of the district who would be adversely impacted by the increased traffic caused by new commercial development, but probably not the owners of cross-town businesses whose customers may be drawn away by the new store.

#### V. CONCLUSION

The court's conclusion in *In re Wal-Mart* that it may be appropriate to consider a proposed project's effects on competition has implications for new commercial development beyond Vermont. Nevertheless, the impact of this decision will necessarily be limited by the fact that it interprets a unique state land use statute that specifically mandates review of the economic costs associated with new developments that satisfy minimum jurisdictional requirements.<sup>118</sup> Although *In re Wal-Mart* offers some hope to small towns struggling to withstand economic plunder from large discount retailers, that hope must be tempered with reality: zoning law probably does not offer the same assurances as Vermont's Act 250. It remains to be seen whether *In re Wal-Mart* is a foreshadowing of events to come or merely the most recent manifestation of Vermonters' hearty individualism.

*Sherry Keymer Dreisewerd\**

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117. See Wickersham, *supra* note 90, at 493.

118. See VT. STAT. ANN. tit. 10, §§ 6001-6092 (1997).

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