

WAL-MART IN VERMONT—THE CASE AGAINST SPRAWL

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INTRODUCTION

Large-scale suburban retail development has been occurring throughout the United States for well over thirty years. A relative newcomer to this pattern of growth is the big-box retailer, or mega-store. These stores are usually single story buildings ranging in size from 90,000 to 200,000 square feet. They are typically surrounded by acres of parking, whether standing alone or anchoring a shopping center, and are located outside of downtowns along major highways and at interchanges. Mega-stores are most often part of national chains bent on capturing a large portion of the local market for their products. The best known example of the big-box retailers is Wal-Mart, the nation's largest retailer.

Communities across the United States have struggled with big-box retail development, and Vermont is no exception. Mega-stores generate large volumes of traffic, attract numerous stores and businesses to the surrounding area, and cause loss of sales in nearby retail centers. There are numerous planning and regulatory tools available to address the issues that these stores raise. However, communities and regions are still learning about the impacts of the huge developments and how to apply the tools available to them.

This Article focuses on the Vermont experience with mega-stores under the state's land use and development control law, known as Act 250.² Specifically, it will focus on two of Act 250's criteria for development—9(A) Impact of Growth³ and 9(H) Costs of Scattered Development⁴—in the context of a proposed Wal-Mart store in the Town of St. Albans in Franklin County, Vermont. This case has been adjudicated up through the Vermont Supreme Court.⁵ The Article will explore planning principles that relate to projects of the type and scale of the typical Wal-Mart.

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2. VT. STAT. ANN. tit. 10, § 6086 (1997).

3. *Id.* § 6086(a)(9)(A).

4. *Id.* § 6086(a)(9)(H).

5. *See In re Wal-Mart Stores, Inc.*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997).

I. BACKGROUND

Act 250 was passed in 1970 at a time when Vermont was becoming inundated with ski area and vacation home development. Governor Dean Davis and the Legislature acted to protect Vermont's rural character and high environmental quality, concerned with environmental degradation of pristine lands and small towns faced with huge costs for roads, schools, and water supply.⁶ Among the many steps the state took to address these problems was the passage of Act 250.

Act 250 establishes ten criteria a developer must satisfy to receive a permit.⁷ These criteria cover such technical environmental issues as stormwater runoff, erosion, and air pollution.⁸ They also address broad issues, such as impacts on schools, wildlife habitat, aesthetics, loss of prime agricultural lands, and the protection of the fiscal integrity of municipalities.⁹

Permit approvals or rejections, issued by one of eight District Environmental Commissions, can be appealed to the statewide Environmental Board, the highest administrative body administering Act 250.¹⁰ Over the years, the Environmental Board has rendered many decisions which provide a body of precedential law governing the issuance or denial of Act 250 permits.

In 1973, Act 250 was significantly amended when the state-mandated capability and development plan was presented to the Legislature.¹¹ In response to this plan, the Legislature voted new criteria into law.¹² Many of these criteria dealt with growth management issues, including fiscal impacts, secondary development impacts, impacts on facilities and services, and public investments.¹³ These new provisions equipped Vermont with the means to address large scale, commercial, retail, and industrial projects.

In the late 1970s, Vermont began to receive proposals for large suburban retailing projects. In 1977, the District Environmental Commission covering Chittenden County, Vermont's most populated area, received an application for a 440,000 square foot regional shopping mall, called Pyramid Mall, in the Town of Williston. Williston is six miles from downtown Burlington, the state's largest retail center. The District Environmental Commission denied

6. See 1970 Vt. Acts & Resolves 250 § 1.

7. See *id.* § 12(a).

8. See generally *id.*

9. See *id.*

10. See 1970 Vt. Acts & Resolves 250 § 14(a).

11. See 1973 Vt. Acts & Resolves 85 § 7(a).

12. See *id.*

13. See *id.* §10.

the application in a landmark case, and an appeal was later dropped.¹⁴ Proposals for regional malls in the Towns of Berlin, Rutland, and South Burlington followed the Pyramid Mall proposal. All of these projects were approved.

In 1993, the St. Albans Group and Wal-Mart Stores, Inc. submitted an Act 250 application for a 120,000-150,000 square foot store to be located on a farm field near an interstate interchange in the Town of St. Albans, Vermont.¹⁵ The St. Albans proposal was the second Act 250 permit application for a Wal-Mart store in Vermont. The first Wal-Mart application was for the Town of Williston (near the site of the ill-fated Pyramid Mall proposal) within a commercial park that had already received an Act 250 permit.¹⁶ Due to the nature of this permit, the store only had to meet a few of Act 250's ten criteria and was subsequently approved after protracted legal battles.¹⁷ The store opened in January, 1997. In 1996, an application was approved for a Wal-Mart store in downtown Rutland.¹⁸ This store also opened in January, 1997.

The undeveloped site for the Wal-Mart store proposed in the Town of St. Albans was approximately two miles outside of downtown St. Albans, located near scattered strip commercial developments.¹⁹ The City of St. Albans contains a historic downtown with a classic Vermont character—a mixed use, compact center of historic buildings focused on a common green. The city, which had a population of 7,596 in 1995, is the regional center of Franklin County, whose population was 42,588 in 1995.²⁰ The population of the Town of St. Albans was 5,467 in 1995.²¹

After several hearings involving the developers, the Town of St. Albans, the State of Vermont, the Northeastern Vermont Regional Planning Commission, and Franklin County Citizens for Downtown Preservation, the District Environmental Commission issued a permit for the store.²² The

14. See *In re Pyramid Co. of Burlington*, #4C0281 (Vt. Dist. Env'tl Comm., Oct. 13, 1978).

15. This project was later reduced to 100,000 square feet. See *Wal-Mart*, 8 Vt. L. Wk. at 233, 702 A.2d at 400.

16. See Taft Corner Assoc., Inc., No. 4C0696 (July 31, 1987).

17. See Taft Corners Assoc., Inc., No. 4C0696-11-EBC (Revised) (May 5, 1995).

18. Local permit applications were also filed for stores in Bennington and St. Johnsbury, Vermont. The Bennington store, to be located in an abandoned Woolworth's building close to the downtown, did not require state review and was approved locally. See Matt Sutkoski, *Bennington Opens Arms to Wal-Mart*, BURLINGTON FREE PRESS, Sept. 10, 1995, at 1A, 4A. Wal-Mart pulled out of St. Johnsbury during a trial on a zoning appeal brought by a local citizens group. See Matt Sutkoski, *Wal-Mart Withdraws State Plans*, BURLINGTON FREE PRESS, June 6, 1996, at 1B, 8B.

19. See St. Albans Group and Wal-Mart Stores, Inc., No. 6F0471-EB, 1995 WL 404828, at *1 (Vt. Env. Bd. June 27, 1995).

20. See Vermont Dep't of Health, *Population Estimates, 1995* (on file with author).

21. See *id.*

22. See *St. Albans*, 1995 WL 404828, at *2.

Vermont Natural Resources Council and the Citizens for Downtown Preservation appealed the decision to the Vermont Environmental Board.²³ Pursuant to the de novo process, the Environmental Board held hearings and received voluminous testimony and documentary evidence. The hearings focused on whether the Wal-Mart application satisfied Act 250 criteria 9(A), entitled "Impact of Growth," and 9(H), entitled "Costs of Scattered Development."²⁴

The Board eventually denied the permit, finding that the public cost of the Wal-Mart store would outweigh the public benefits by 2.5 to 1.0, thereby violating criteria 9(A) and 9(H).²⁵ The Board also held that the store would not be contiguous to an existing settlement and, therefore, in conjunction with the established, negative financial consequences, the proposed store violated criterion 9(H).²⁶ Wal-Mart appealed the denial to the Vermont Supreme Court who upheld the Environmental Board's decision on August 29, 1997.²⁷ Wal-Mart subsequently announced it was abandoning its plans for a store in the Town of St. Albans.

This Article will analyze the Environmental Board and Vermont Supreme Court decisions, and the supporting legal and planning principles. The authors note that while this Article is organized into separate parts based on the different criteria of Act 250, there are certain principles, precedents, and arguments which relate to more than one criterion. For example, much of the fiscal impact analysis contained below in the part discussing 9(A) is equally relevant to 9(H). However, to avoid repetition, the authors have only set forth the arguments and law in one part.

II. CRITERION 9(A): IMPACT OF GROWTH

The Board's review under 9(A) revolved around four issues: legislative intent, the type of growth impacts included within the analysis, the definition of growth, and secondary growth impacts.²⁸ Each issue is addressed separately below.

23. *See id.*

24. VT. STAT. ANN. tit. 10, §6086(a)(9)(A), (H).

25. *See St. Albans Group*, 1995 WL 404828, at *33.

26. *See id.* at *29.

27. *See Wal-Mart*, 8 Vt. L. Wk. at 237, 702 A.2d at 405.

28. *See St. Albans*, 1995 WL 404828, at *20-24.

A. The History of Criterion 9

While the Vermont Supreme Court relied on the legislative history of Act 250, it did not explore the history in any great depth.²⁹ The authors believe a full review is beneficial and, therefore, present a more complete analysis below.

Prior to 1973, criterion 9 stated in its entirety, “[B]efore granting a permit the board or district [environmental] commission shall find that the subdivision or development . . . [i]s in conformance with a duly adopted development plan, land use plan or land capability plan.”³⁰ In 1973 the Vermont General Assembly greatly expanded the wording of criterion 9 to include requirements that the fiscal impacts associated with a development be anticipated and addressed.³¹ The one sentence criterion was changed to an elaborate, eleven section criterion. Section 9(A) now reads as follows,

(A) Impact of growth. In considering an application, the district commission or the board shall take into consideration 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 otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated 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, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.³²

The changes in text are striking. Clearly, the Legislature was intent on giving the district commissions and the Board a comprehensive tool for

29. See generally *Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397.

30. 1970 Vt. Acts & Resolves 250 § 12(a).

31. See VT. STAT. ANN. tit. 10, § 6086(a); 1970 Vt. Acts & Resolves 85 § 10(a)(9)(A).

32. VT. STAT. ANN. tit. 10, §6086(a)(9)(A).

analyzing and addressing wide ranging and far reaching impacts of development. In presenting the proposed changes to the Senate Committee, Mr. Jonathan Brownell, a principal drafter, reiterated the significance of these provisions: "These are sections which attempt to control or at least give towns the ability to speak to the control of development which will have a substantial adverse impact on all the other taxpayers in the town."³³ Brownell added, "The point here is that the impact of growth question is in effect an addition, a subsequent broadening of 250. It is what, indeed, 250 was looking towards."³⁴

At the same time the Legislature amended criterion 9, it enacted explanatory findings under title 10, section 6042 of the Vermont State Code which state in part:

Increased demands for and costs of public services, such as schools; road maintenance, and fire and police protection must be considered in relation to available tax revenues and reasonable public and private capital investment. The location and rate of development must be considered, so that the revenue and capital resources of the town, region or state are not diverted from necessary and reasonably anticipated increased governmental services.³⁵

Consideration must be given to the consequences of growth and development for the region and the state as well as for the community in which it takes place. An activity or project that imposes burdens or deprivations on other communities or the state as a whole cannot be justified on the basis of local benefit alone.³⁶

Strip development along highways and scattered residential development not related to community centers cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center.³⁷

33. John Brownell, before Senate Natural Resources Comm., at 3-4 (Vt.) (Minutes of Mar. 29, 1973 Senate Natural Resources Committee Hearing).

34. John Brownell, before Senate Natural Resources Comm., at 17 (Vt.) (Minutes of March 29, 1973 Senate Natural Resources Committee hearing) (discussing H.326, the Land Capability and Development Plan).

35. 1973 Vt. Acts & Resolves 85 §7(a)(3)(A) (available in history section of VT. STAT. ANN. tit. 10, § 6042 (1997)).

36. 1973 Vt. Acts & Resolves 85 §7(a)(3)(B) (available in history section of VT. STAT. ANN. tit. 10, § 6042 (1997)).

37. 1973 Vt. Acts & Resolves 85 §7(a)(4)(A) (available in history section of VT. STAT. ANN. tit. 10, § 6042 (1997)).

Testimony explaining the addition of these Legislative Findings is strikingly similar to testimony describing the need to amend criterion 9:

A balance of investment, both in the public and private sector, under clearly defined rules will be the only way to avoid disconformities of tax burden and public service that we are meeting now. Planning for growth extends that concept to specific areas, stri[p] development in (a). In (b) the problems we are having now with the growth of commercial centers outside of town. The many town centers we used to have are now nothing but vacant second story windows when outside shopping center developments are booming causing substantial traffic and other problems. And (c) again is much the same type of direction towards the growth of our community in a way that will benefit the citizens and not put a burden on them.³⁸

During the 1973 amendment process, Senator Gibb (who was also the acting chair of the Board in the St. Albans Wal-Mart case) provides illumination on why the legislative findings were to be included in the statute: "The purpose [of the findings] of course is to give further assistance to the Board in establishing criteria. In other words, to expand by general objective the criteria sections."³⁹ Senator Smallwood (also sitting on the Committee) agreed, stating, "These findings, therefore, are sort of legislative statements of intent or policies with respect to findings . . . They are very important."⁴⁰

It is uncanny how the above 1973 legislative testimony relates to the 1993 Wal-Mart application. The legislative findings provide significant guidance to the Board in interpreting and implementing the capability and development plan.⁴¹ Thus, in analyzing criterion 9 it becomes important to establish the parameters of the capability and development plan. The legislative history establishes that the 1973 amendments, including both the expansion of criterion 9 and the findings, comprise the capability and development plan. In his introduction of House Bill 326 (which later became the 1973 amendments) to the Senate Natural Resources Committee, Mr. Jonathan Brownell noted that "[t]his act constitutes the capability and development plan. That is the entire act. The Legislative Findings together

38. See John Brownell, before Senate Natural Resources Comm., at 11 (Vt.) (Minutes of Mar. 22, 1973 Senate Natural Resources Committee Hearing) (on file with author).

39. See John Brownell, before Senate Natural Resources Comm., at 16 (Vt.) (Minutes of Mar. 28, 1973 Senate Natural Resources Committee Hearing) (on file with author).

40. See Senator Smallwood, before Senate Natural Resources Comm., at 2-3 (Vt.) (Minutes of Apr. 6, 1973 Senate Natural Resources Committee Hearing) (on file with author).

41. See VT. STAT. ANN. tit. 10, § 6042 (1973).

with the criteria, which are the second part of H326 [i.e., the new criterion 9].⁴²

Judge Oakes of the Second Circuit also characterizes these findings as the capability and development plan.⁴³ A comparison of the standards to be incorporated in the capability and development plan under section 6042, with the language added to criterion 9 in 1973, supports the conclusion that criterion 9 is a part of the capability and development plan. Therefore, these findings can and should be used to explain language in criterion 9.⁴⁴ Similarly, Judge Oakes undertakes an analysis of the intent of Act 250 (before interpreting another part of Act 250), and relies heavily on the findings at the beginning of the statute and in section 6042.⁴⁵

B. The Scope of Growth Impacts

As noted above, when Act 250 was amended to incorporate the capability and development plan, criterion 9 was significantly revised. The new criterion expanded the scope of Act 250 to include impacts of growth, including costs and revenues to towns from development of a project and from growth associated with the development.⁴⁶

Attempting to narrow the Supreme Court's review, Wal-Mart argued that Act 250 was concerned only with physical, environmental impact.⁴⁷ A straightforward reading of the statute demonstrates that while certain portions of Act 250 focus on physical, environmental impacts, criteria 9(A) and 9(H) explicitly require the Board to consider fiscal impacts resulting from development.⁴⁸ The Vermont Supreme Court endorsed this broader approach.⁴⁹

42. See John Brownell, before Senate Natural Resources Comm., at 3 (Vt.) (Minutes of Mar. 22, 1973 Senate Natural Resources Committee Hearing) (on file with author); see also Schuyler Jackson, Chairman of the Environmental Board, before Senate Natural Resources Comm., at 47 (Minutes of Apr. 11, 1973 Senate Natural Resources Committee Hearing) ("[Criterion] nine is the capability plan") (on file with author); Senator Gibb, before Senate Natural Resources Comm., at 4 (Minutes of Apr. 6, 1973 Senate Natural Resources Committee Hearing) (on file with author) (Senator Gibb stated that the Legislative Findings "constitute the capability plan").

43. See *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 89 (2d Cir. 1992).

44. See *In re Judy Ann's, Inc.*, 143 Vt. 228, 464 A.2d 752 (1983); *Swanton Village v. Town of Highgate*, 131 Vt. 318, 305 A.2d 596 (1973); *In re Preseault*, 130 Vt. 343, 292 A.2d 832 (1972).

45. See *Bongartz*, 980 F.2d at 89.

46. See *supra* notes 36-38 and accompanying text.

47. See *Wal-Mart*, 8 Vt. L. Wk. at 234, 702 A.2d at 401.

48. VT. STAT. ANN. tit. 10 § 6086(a)(9)(A), (H).

49. See *Wal-Mart*, 8 Vt. L. Wk. at 236, 702 A.2d at 404.

1. Background on Fiscal Impact Analysis in Environmental Proceedings

Physical, environmental impacts and economic impacts are indisputably interconnected. The construction of infrastructure to accommodate development will alter the environment. The economic decline of a downtown caused by peripheral retail development is likely to affect the urban environment through decay, abandonment, and reduction in services.⁵⁰

The fact that land developments often impose fiscal costs and benefits on communities is too logical to dispute. Norman Williams, a noted expert on land use issues, notes that "by now it is merely conventional wisdom that many land use statutes are in fact now administered with these [fiscal] considerations primarily in mind"⁵¹ Both criterion 9 and the legislative findings anticipate the need to review and control land use development to avoid adverse fiscal consequences to communities, regions, and the state. The control of, and, in some cases, limitations on, growth are necessary and accepted aspects of land use law.⁵² Regulation of land uses for the public good is a legitimate exercise of the state's police power.⁵³

Economic impact studies have been a part of federal and state regulations since the early 1970s. Economic, social, direct and indirect impacts of developments have been specifically cited as legitimate aspects of environmental impact assessment. Regulations implementing the National Environmental Policy Act of 1969 (NEPA) state that "[e]ffects (of development) includes ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."⁵⁴ This landmark

50. See Michael Fix, *Addressing the Issue of the Economic Impact of Regional Malls in Legal Proceedings*, 20 URB. L. ANN. 101 (1980). Fix states with regard to the National Environmental Policy Act requirement for Environmental Impact Statements,

In most instances, the physical aspects of growth cannot be separated from its fiscal aspects, namely, the changes in patterns of economic activity Growth in one area may increase tax revenues and service costs, and may lead to economic decline in nearby localities. Outlays for the construction of new infrastructure accompany shifts in the character of communities. These shifts result in the commitment of scarce local resources over extended periods of time. Accordingly, most courts and commentators recognize that the fiscal impacts of population growth, particularly the effect of proposed development on the cost and provision of utilities and services, are necessary components of many environmental impact statements.

Id. at 117 (citations omitted).

51. 5 NORMAN WILLIAMS, JR., *AMERICAN PLANNING LAW* §160.28, at 692-93 (1985).

52. See *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 295, 427 A.2d 365, 370 (1981); *DeWitt v. Town of Brattleboro Zoning Bd. of Adj.*, 128 Vt. 313, 319, 262 A.2d 472, 476 (1970).

53. See *Wal-Mart*, 8 Vt. L. Wk. at 234, 702 A.2d at 401; *Galanes v. Town of Brattleboro*, 136 Vt. 235, 240, 388 A.2d 406, 409 (1978).

54. 40 C.F.R. §1508.8 (1997).

national environmental law not only covers direct effects of development, but also indirect effects and economic effects.

Other states have adopted a similar approach. For example, the Florida Legislature adopted the Environmental Land and Water Management Act (ELWMA) in 1972.⁵⁵ Among the provisions in this law is a process for reviewing and deciding on applications for Developments of Regional Impact (DRI).⁵⁶ A DRI is "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."⁵⁷ Each DRI is reviewed to determine the extent to which it meets six criteria, including whether "[t]he development will have a favorable or unfavorable impact on state or regional resources."⁵⁸

In 1989, the Massachusetts Legislature passed an Act establishing the Cape Cod Commission.⁵⁹ The Act authorized the Commission to prepare standards and criteria for developments of regional impact (DRI).⁶⁰ In 1996, a Regional Policy Plan was adopted that contained standards and policies for review of developments.⁶¹ Among the principles, goals, and criteria in the Plan are the following; "[t]he rate of growth for any town should not exceed the ability of that town to provide the services necessary to support that growth."⁶² "Approval of development and redevelopment which increases the intensity of use shall be based on existing infrastructure and system capability or on a development's ability to provide for or contribute to the infrastructure and services necessary to support it."⁶³

Since 1974, when the Real Estate Research Corporation prepared a landmark study, *The Costs of Sprawl*, for several United States government agencies, communities have been grappling with the identification and mitigation of the costs of growth.⁶⁴ The report's introduction states, "Local government decision-makers must ascertain what differences in impact among alternative development patterns do, in fact, exist, and must effectively plan and control land use so as to minimize cost burdens and adverse

55. 1972 Fla. Laws ch. 72-317, §b (classified to FLA. STAT. ANN. §380.012 to 380.10 (1997)).

56. See FLA. STAT. ANN. § 380.06 (1997).

57. *Id.* § 380.06(1).

58. *Id.* § 380.06(12)(a)(1).

59. 1989 Mass. Acts 716 §1(b).

60. *Id.* § 12(a).

61. Final Cape Cod Regional Policy Plan, Approved by the Barnstable County Assembly of Delegates and County Commissioners, November, 1996, at 13, 82.

62. *Id.* at 13.

63. *Id.* at 82.

64. REAL ESTATE RESEARCH CORPORATION, COUNCIL ON ENVTL. QUALITY ET AL., *THE COSTS OF SPRAWL* (1974).

environmental effects.”⁶⁵ Some of the major conclusions in the report include, “[P]lanned development of all densities is less costly to create and operate than sprawl in terms of environmental costs, economic costs, personal costs, and energy consumption”⁶⁶ and “while planning results in cost savings, density is a much more influential cost determinant. Clearly, the greatest cost advantages occur when higher density planned developments are contrasted with low density sprawl.”⁶⁷

Numerous other studies have documented the connection between development and the rise in cost of town services. They have also weighed the tax revenues and other benefits of development with these costs to determine the net impact on municipalities.⁶⁸

More recently, renewed attention is being paid to the costs of sprawl. In California, Bank of America, among others, has decried the suburban sprawl in that state and its costs to residents and businesses.⁶⁹ According to their report, *Beyond Sprawl*:

Even as our economy and our society are being reinvented daily, we continue to abandon people and investments in older communities as development leapfrogs out to fringe areas to accommodate another generation of low-density living. Continued sprawl may seem inexpensive for a new home buyer or a growing business on the suburban fringe, but the ultimate cost—to those homeowners, to the government, and to society at large—is potentially crippling.⁷⁰

This report is not suggesting that growth be stopped. Rather, it calls for managing growth to minimize the costs of development, protect open spaces,

65. *Id.* at 3.

66. *Id.* at 7.

67. *Id.* at 21.

68. *See, e.g.*, WALTER ISARD & ROBERT COUGHLIN, BANK OF BOSTON & AMER. INST. OF PLANNERS, MUNICIPAL COSTS AND REVENUES RESULTING FROM COMMUNITY GROWTH 10-29 (1957); THOMAS MULLER, THE URBAN INST., FISCAL IMPACTS OF LAND DEVELOPMENT: A CRITIQUE OF METHODS AND REVIEW OF ISSUES (1975); THOMAS MULLER & GRACE DAWSON, THE URBAN INST., THE FISCAL IMPACT OF RESIDENTIAL AND COMMERCIAL DEVELOPMENT: A CASE STUDY (1972); GEORGE STERNLIEB, CENTER FOR URBAN POLICY RESEARCH, HOUSING DEVELOPMENT AND MUNICIPAL COSTS (1973). *See generally* ROBERT W. BIRCHELL & DAVID LISTOKIN, THE FISCAL IMPACT HANDBOOK: ESTIMATING LOCAL COSTS AND REVENUES OF LAND DEVELOPMENT (1978); Paul H. Gleye, Santa Fe Growth Impact Study (1973) (unpublished manuscript, on file with author); RAND URBAN POLICY ANALYSIS GROUP, ALTERNATIVE GROWTH STRATEGIES FOR SAN JOSE: INITIAL REPORT OF THE RAND URBAN POLICY ANALYSIS PROJECT (1971).

69. *See, e.g.*, CALIFORNIA RESOURCES AGENCY ET AL., BEYOND SPRAWL: NEW PATTERNS OF GROWTH TO FIT THE NEW CALIFORNIA I (1995).

70. *Id.* at 2.

and reestablish communities as centers for living.⁷¹ These objectives are entirely consistent with those of Act 250.

2. Fiscal Impact Findings in the St. Albans Wal-Mart Case

In the St. Albans Wal-Mart case, Wal-Mart submitted a fiscal impact analysis whose methodology, but not assumptions, paralleled that of the opponents of the store.⁷² Thus, even Wal-Mart acknowledged the need to present this information under the criteria of Act 250. The Board accepted the relevance of a fiscal impact study, as did the Vermont Supreme Court.⁷³

The Vermont Supreme Court recognized that Act 250 encompasses more than just the physical impacts of development.⁷⁴ Act 250 seeks to protect the integrity of a municipality and, “[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.”⁷⁵

The Vermont Environmental Board found that the proposed St. Albans Wal-Mart might have the following direct impacts: a net job loss for the Franklin County region and an adverse impact on the tax base of the affected municipalities due to competition with retail businesses.⁷⁶ In reaching its decision, the Environmental Board relied primarily on the evidence below. An increase in property tax revenues was projected from the construction of the new store and a higher assessed value of a previously unimproved site.⁷⁷ A property tax decrease was projected due to the store’s location outside downtown St. Albans, causing downtown stores to close or relocate and property values to fall.⁷⁸ In addition, other communities were projected to lose retail sales and, therefore, property values were also projected to decline due to the opening of the Wal-Mart store in the market area.⁷⁹

In the St. Albans case, the Board found that “the dollars available from Franklin County residents to support both a Wal-Mart and existing businesses are more scarce than elsewhere” and that the market was “undersized” for the store.⁸⁰ Wal-Mart’s sales were projected to be high—about \$43.8 million in 1998.⁸¹ To support its sales, the store was projected to recapture only a small

71. *See id.* at 9-11.

72. *St. Albans Group*, 1995 WL 404828, at *30-31.

73. *See id.* at *35; *Wal-Mart*, 8 Vt. L. Wk. at 235, 702 A.2d at 402.

74. *See Wal-Mart*, 8 Vt. L. Wk. at 236, 702 A.2d at 404.

75. *Id.* at 234, 702 A.2d at 401.

76. *St. Albans Group*, 1995 WL 404828, at *35.

77. *See id.* at *14.

78. *See id.*

79. *See id.* at *30-31.

80. *Id.* at *31.

81. *See* THOMAS MULLER & ELIZABETH HUMSTONE, VERMONT NATURAL RESOURCES COUNCIL,

number of resident sales that were taking place in other counties (\$3.6 million) and attract few additional sales from people outside the county (\$6.9 million).⁸² Given the limited market for both existing stores and the new store, it was projected that existing stores in Franklin County would lose substantial sales—\$33.3 million in 1998.⁸³

According to testimony, as a result of sales lost to existing businesses there would be a decline in both municipal tax bases and jobs.⁸⁴ Tax base declines would occur from vacancies in existing retail space that would either remain empty or become occupied by businesses paying lower rents.⁸⁵ With this loss of income, property owners would be unable to maintain their buildings and might appeal their tax assessments. If multiple property owners complained, or, if dictated by low prices for building sales, the whole area could be reassessed, thus lowering the property tax base. The Board found that Wal-Mart could cause approximately \$110,000 in lost property tax revenue to Franklin County communities.⁸⁶

The store was also projected to cause a decline in retail employment.⁸⁷ Contrary to the public perception that a new mega-store brings new jobs, these stores can have a negative impact on retail employment. Big-box retailers are very efficient and have fewer employees for comparable sales than smaller and older stores typically found in urban and village centers. In the St. Albans case, it was estimated that for every \$10 million in sales, 106 people were employed in a typical Franklin County business and 65 were employed at a Wal-Mart store.⁸⁸ The Board found that the project would “result in a net loss for the region of 50 jobs in 1995, growing to a loss of approximately 130 jobs in 2004.”⁸⁹ These job losses would in turn cause as much as \$50,000 in lost property tax revenue.⁹⁰

After considering the impact of Wal-Mart on property tax revenues, state aid to education, provision of municipal services, and public investments in the city’s downtown, the Board concluded that the public costs would outweigh the public benefits of the project by 2.5 to 1.0.⁹¹

ECONOMIC, FISCAL, AND LAND USE IMPACTS OF PROPOSED WAL-MART STORE ON FRANKLIN COUNTY COMMUNITIES 23 (1994) [hereinafter MULLER & HUMSTONE, LAND USE IMPACTS].

82. *See id.*

83. *See id.*

84. *See id.* at 28-37.

85. *See id.* at 35.

86. *See St. Albans Group*, 1995 WL 404828, at *14.

87. *See id.* at *33.

88. *See MULLER & HUMSTONE, LAND USE IMPACTS*, *supra* note 81, at 28.

89. *St. Albans Group*, 1995 WL 404828, at *14.

90. *See id.*

91. *See id.* at *33.

C. Definition of Growth

Wal-Mart argued that 9(A) concerned impacts associated only with resident population growth directly resulting from a development.⁹² The Board rejected this constricted reading:

First, the Board does not take such a limited view of the term "population." The language and intent of Criterion 9(A) are concerned with the financial capacity of the town and region to accommodate growth by providing necessary services. In this context, the only reasonable meaning of "population" is that the term refers to those people who will require such services as a result of the proposed project, whether they be residents, commuters, visiting shoppers, or owners for whom services must be provided, including the owners, operators, and users of those new developments which the proposed project is likely to attract to the area.

Second, Criterion 9(A) is not limited to population growth. While in one place the criterion uses the phrase "growth in population," the criterion is entitled simply "impact of growth," and throughout the remainder of the criterion the word growth is used without qualification. Moreover, the legislative findings which accompanied the 1973 Amendment, as quoted above, demonstrate that in enacting Criterion 9(A) the General Assembly was concerned with more kinds of growth than population growth.⁹³

The Vermont Supreme Court concurred with the Board's interpretation.⁹⁴ After reviewing the statute's statement of intent and the 1973 revisions, the court concluded, "[T]he Legislature intended the word 'growth,' as used in criterion 9(A), to apply to economic as well as population growth."⁹⁵

Clearly, if the Environmental Board had only considered resident population growth from the project, it would have failed to account for other significant growth impacts from the mega-store. It has long been recognized that secondary growth impacts can be more significant than primary growth impacts.⁹⁶ For example, in *City of Davis v. Coleman*, the Ninth Circuit Court of Appeals found that the secondary impacts of the construction of an

92. See *id.* at *23 n.5.

93. *Id.* at *23 (citations omitted).

94. *Wal-Mart*, 8 Vt. L. Wk. at 236, 702 A.2d at 404.

95. *Id.*

96. See generally Rosalie Caprio, *The Role of Secondary Impacts Under NEPA*, 6 ENVTL. AFFAIRS 127 (1977) (explaining the justification of consideration of secondary impacts in EIS's under NEPA).

interchange were sufficient to require the filing of an Environmental Impact Statement under NEPA, even though the primary impacts were not sufficient.⁹⁷ The court stated, “[t]he growth-inducing effects of the Kidwell Interchange project are its *raison d’être*, and with growth will come growth’s problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.”⁹⁸

If the definition of growth was confined to resident population, the assessment of regional impacts of the project would have been incomplete as well. Regional retail facilities, such as mega-stores, usually have impacts beyond the host community. The potential for regional impacts of major developments has been recognized by the adoption of Act 250 in Vermont, the Developments of Regional Impact provisions in Florida, and the Developments of Regional Impact provisions of the Cape Cod Commission in Massachusetts. Regional impacts are a significant focus of Act 250. Confining the analysis to the host community ignores regional dislocations that can be suffered due to a mega-store project. Local zoning regulations typically address only those impacts and benefits felt within the host town. A proposal the size of Wal-Mart’s, however, imposes impacts that are felt in numerous communities.

Due to the regional effects of shopping center developments, some have suggested that local municipalities require the consideration of regional impacts in their local zoning reviews.⁹⁹ In *Save a Valuable Environment (SAVE) v. City of Bothell*, the Washington Supreme Court invalidated a shopping center rezoning which would have “serious detrimental effects on areas outside Bothell’s jurisdiction.”¹⁰⁰ According to the court, a city “may not act in disregard of the effects outside its boundaries . . . [and] the zoning body must serve the welfare of the entire affected community.”¹⁰¹

This broader view of what growth entails becomes quite important in addressing an application by a mega-retailer such as Wal-Mart. Wal-Mart is a magnet for shoppers and other development. It is regional in scale. Thus, people come to the host community from places throughout the county and beyond. If one were to measure only the impact of resident population growth directly related to the store, such as growth from new employees moving to the area, one would be ignoring other substantial impacts. A large influx of

97. *City of Davis v. Coleman*, 521 F.2d 661, 680-81 (9th Cir. 1975).

98. *Id.* at 675.

99. Frederic A. Strom, *Effects of Zoning on Business Competition*, in ZONING & PLANNING LAW HANDBOOK 123, 145 (Frederick A. Strom ed., 1983).

100. *Save a Valuable Env’t v. City of Bothell*, 576 P.2d 401, 405 (Wash. 1978), *quoted in* Strom, *supra* note 99, at 145.

101. *Id.*

shoppers to a relatively undeveloped area can cause traffic problems, a change in rural character, a decline in existing retail centers, and have an impact on public facilities and services. The Vermont Supreme Court confirmed that failure to take all growth impacts into consideration would result in a violation of the goals of Act 250.¹⁰²

D. The Issue of Secondary Development and its Costs

While criterion 9(A) requires the Board to ascertain what economic benefits and costs the town and region will incur due to growth from development, it makes no distinction between direct or indirect costs.¹⁰³ Criterion 9(H) explicitly includes indirect costs.¹⁰⁴ While the Vermont Supreme Court limited its analysis of secondary growth to criterion 9(A), the court's discussion is relevant to criterion 9(H). For purposes of this Part, the authors look at both 9(A) and 9(H), although the more inclusive language of 9(H) is discussed separately below.

In the *St. Albans Wal-Mart* case, the Board endorsed the inclusion of indirect costs in an analysis conducted under both 9(A) and 9(H), when it stated:

Since the proposed project is likely to cause significant growth, the need for specific information concerning the rate of that growth is particularly acute. Only if the Board has this information can the Board determine what the anticipated costs will be with respect to the provision of services to this secondary growth such as road construction and maintenance, fire, police, etc. Without the information, the Board also cannot determine if the town and the region have and will have the financial capacity to accommodate, without undue burden, the growth that the project will cause.¹⁰⁵

The District Commission covering Chittenden County, in the highly regarded Pyramid Mall decision, looked closely at the wording of criterion 9(H) and stated:

Criterion 9(A) speaks of an "undue" burden on the town and region. Under 9(J) we must consider whether there will be an "excessive or uneconomic" demand on public facilities and services, and under 9(K) whether the development will

102. See *Wal-Mart*, 8 Vt. L. Wk. at 235, 702 A.2d at 402.

103. See VT. STAT. ANN. tit. 10, § 6086(a)(9)(A).

104. See *id.* § 6086(a)(9)(H).

105. *St. Albans Group*, 1995 WL 404828, at *22.

“unnecessarily or unreasonably” endanger the public investment in them. In the case of 9(H), however, the General Assembly determined that scattered developments must pass a stricter test than those which merely expand existing settlements, as is made clear in both the criterion and in Section 7(4)(A) of Act 85 of 1973. Accordingly, we have here considered all of the public costs which would be imposed by the mall, whether or not caused by its distance from an existing settlement, in balancing those costs with its public benefits as required by criterion 9(H).¹⁰⁶

From these two decisions it appears that the interpretation of criteria 9(A) and 9(H) is that “leapfrog” developments not contiguous to existing settlements, such as downtowns and villages, must be subject to greater scrutiny than development within or contiguous to these areas. This additional analysis should include an assessment of both direct and indirect costs.

The Board previously has required additional information where evidence suggests one development is a catalyst for other development,¹⁰⁷ and has also previously addressed secondary fiscal impact.¹⁰⁸ The Board in *Washington Electric* adhered to the specific language of direct and indirect costs associated with a development in 9(H), by ruling that they must look “beyond the immediate impacts of a project.”¹⁰⁹ The Chittenden Superior Court recognized that the impacts—costs and benefits—are dependent on the size of the development.¹¹⁰

1. Background on Secondary Development Impact Analysis

Examining the impacts of secondary development is not unique to Vermont’s Act 250. Indirect impacts of development have been a component of federal regulations adopted under the National Environmental Policy Act (NEPA).¹¹¹ An Environmental Impact Statement (EIS) must examine a project’s “indirect effects and their significance.”¹¹² The regulations define *indirect effects* as those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may

106. *In re Pyramid Co. of Burlington*, #4C0281 (Vt. Dist. Env’tl Comm., Oct. 13, 1978) at 43.

107. *See Washington Electric Cooperative, Inc.*, No. 5W1036-EB, 1990 WL 283196, at *5-7 (Vt. Env. Bd. Dec. 19, 1990).

108. *See Berlin Assoc. Ltd.*, No. 5W0584-1-EB, 1983 WL 25936, at *8, 12 (Vt. Env. Bd. April 13, 1983).

109. *Washington Electric*, 1990 WL 283196, at *5.

110. *See In re Pyramid*, #4C0281, at 43.

111. *See* 40 C.F.R. § 1502.16 (1997).

112. *See id.*

include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate."¹¹³

Since NEPA's adoption in 1974, other states have adopted so-called mini-NEPAs to account for both the direct and indirect impacts of development and mitigate them when they are expected to be adverse. New York, for example, adopted the State Environmental Quality Review Act (SEQRA) modeled after NEPA.¹¹⁴ The Town of North Elba, New York, utilized this Act in January 1996 to turn down a Wal-Mart store proposed outside of Lake Placid Village based on unacceptable aesthetic and economic effects, including secondary effects, that would alter the character of the area.¹¹⁵

Analyzing fiscal costs from secondary growth associated with a major development, often characterized as indirect costs, is a well recognized part of fiscal and environmental impact analysis.¹¹⁶ In 1975, Dr. Muller wrote, "from a community perspective, the following secondary growth effects . . . require consideration: changes in the value of surrounding land and structures; . . . increased demand for housing and services as a result of commercial development; [and] increased activity on the periphery of new development."¹¹⁷

Examining the secondary effects of retail development—particularly on downtown areas—is also standard practice. For example, the well-known Real Estate Research Corporation completed a study in 1980, *Community Impact Analysis, Proposed Ridgewood Mall, Hermantown, Minnesota*, which analyzed the impact of a mall on the closing of existing stores and on property values in a downtown area.¹¹⁸

2. Secondary Impacts and Indirect Costs of Mega-Stores

Wal-Mart stores and other big-box retailers have caused both direct and indirect fiscal, economic, and land use impacts on communities. Examples of direct impacts include retail sales increases or losses; property tax revenue

113. *Id.* § 1502.8.

114. N.Y. ENVTL. CONSERV. LAW, ch. 43-b, art. 8 (McKinney 1975).

115. *See Town of North Elba Planning Board Statement of Findings and Decision: Proposed Wal-Mart Store*, January 9, 1996 (on file with author).

116. *See, e.g.,* MULLER, *supra* note 68; PHILIP S. SCHAEFEN, THE URBAN INST., USING AN IMPACT MEASUREMENT SYSTEM TO EVALUATE LAND DEVELOPMENT (1976); Mark Eyerman, *Fiscal Impact Analysis*, MAINE TOWNSMAN, June 1995, at 22, 23. *See generally* Caprio, *supra* note 96; Fix, *supra* note 50.

117. MULLER, *supra* note 68, at 28.

118. *See* Real Estate Research Corporation, *Draft Community Impact Analysis: Proposed Ridgewood Mall, Hermantown Minnesota*, April 1980 (prepared for the Office of Community Planning and Development, U.S. Dep't of Housing and Urban Development) (on file with author).

increases or decreases; employment gains or losses; inefficient use of existing investments; and growth in demand for public utilities and services.

Secondary development typically occurs around the site of a mega-store and off-site in locations that the store is impacting, such as nearby downtowns and village centers. When located at a significant distance from an existing downtown and near a major intersection or interchange with available land for development, the opening of a mega-store will attract more growth in the outlying area, which may further erode existing retail centers.

Additional costs and benefits are likely to occur from the secondary development near the mega-store site. For example, new businesses will bring new property tax revenues to the host community, but also will impose new costs for traffic control and access, police and fire protection, and water and sewer service.

In the *St. Albans* case, Wal-Mart challenged the relevance of this secondary growth impact analysis but provided substantial evidence of this very phenomenon in its own consultant's study.¹¹⁹ Wal-Mart's study begins with the statement: "[I]n general the entry of Wal-Mart into a local community has often served to accelerate the commercial development (and sometimes redevelopment) particularly of abutting parcels or retail centers."¹²⁰ Wal-Mart later characterizes this secondary development as "additional, induced growth."¹²¹

The study then looks at the eleven different communities hosting a Wal-Mart. In Somersworth, New Hampshire, the report finds "during the period between 1991 and 1993 building permits at six commercial developments along this corridor were issued, most of which are a direct result of Wal-Mart entering the market."¹²² In Seabrook, New Hampshire, the study finds that "Wal-Mart's presence accelerated retail development . . . by as much as three to perhaps five years."¹²³ In Plaistow, New Hampshire, the report finds "[D]uring the period between 1991 and 1993 (the Wal-Mart was built in 1992) more than 80 building permits were issued along this corridor. Some of these were a direct result of Wal-Mart entering the market."¹²⁴ In Hooksett, New Hampshire, various new buildings were built "six months after Wal-Mart's permit was issued Based on market observations it is believed that this

119. See RKG ASSOCIATES, INC., COMPETITIVE IMPACT OF WAL-MART: ELEVEN CASE STUDIES IN NEW ENGLAND (1994), reprinted in Appellants' Appendix to Printed Case Volume I at 166, *Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997) (No. 95-398).

120. *Id.* at 177.

121. *Id.* at 178A.

122. *Id.* at 177A-178.

123. *Id.* at 179.

124. *Id.* at 180.

entire amount is attributed to Wal-Mart's presence."¹²⁵ In Hinsdale, New Hampshire, "Wal-Mart accelerated commercial expansion . . . by perhaps 5 to 10 years."¹²⁶ In Auburn, Maine, "the location of Wal-Mart into the Auburn market has been a catalyst for other new commercial developments."¹²⁷ In Scarborough, Maine, "the location of Wal-Mart appears to have accelerated commercial development by perhaps 3 to 5 years."¹²⁸ In Fairhaven, Massachusetts, subsequent construction activity surrounded the Wal-Mart site and the study concluded, "based on market observations it is believed this whole amount (of additional construction) is attributed to Wal-Mart's presence in the market."¹²⁹ In Bellingham, Massachusetts, the study once again concludes, "this suggests that Wal-Mart's presence accelerated the commercial expansion of this area."¹³⁰

Dr. Thomas Muller, a consultant for the Vermont Natural Resources Council, provided additional information on growth surrounding or accompanying the construction of a Wal-Mart:

The eleven case studies by RKG are consistent with our findings that Wal-Mart frequently creates new destination based shopping areas. As stated in the RKG report, related construction activity—primarily additional retail and fast-food operations—added almost as much in construction value (and presumably square feet) as Wal-Mart itself This secondary growth compounds our projected major shift in retail activity, exacerbating the impacts in smaller markets.¹³¹

In downtown retailing centers, vacancies, poorly maintained buildings, and the decline of shoppers due to competition with the mega-stores may adversely affect the physical environment of the urban area. In the North Elba, New York, Wal-Mart case the local planning board made the following finding:

The potential effect of chronic store vacancies could have a significant adverse impact on the overall ambiance and appeal of downtown Lake Placid and Saranac Lake to tourists. Such chronic

125. *Id.* at 181A-182.

126. *Id.* at 184A.

127. *Id.* at 185A.

128. *Id.* at 187A.

129. *Id.* at 188A.

130. *Id.* at 189A. See also Record at 247-48, *St. Albans Group*, 1995 WL 404828 (testimony of Mr. Gsottschneider).

131. Amicus VNRC's Appendix to Printed Case Volume IV at 32-33, *Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997) (testimony of Dr. Thomas Muller).

vacancies . . . would almost inevitably result in fewer tourists visiting the area, which would in turn result in less sales overall, resulting in a downward spiral in the psychological, visual and economic character and conditions of the Lake Placid and Saranac Lake downtown commercial areas.¹³²

These problems may be exacerbated by the further erosion of the downtown due to secondary development around the site of the store.

While both downtown areas and strip commercial developments may experience vacancies and gradual deterioration of buildings, historic downtowns, such as St. Albans, may require more reinvestment, often from state or federal sources, to maintain the historic structures. Thus, not only are local tax dollars lost, but also additional tax dollars are spent in preserving the downtown area. This effect has been documented in various case studies.¹³³ Public services and facilities in these areas may be neglected as scarce tax dollars go towards transportation, water, and sewer service improvements near the new retailing center.

3. Findings in the St. Albans Wal-Mart Case

In its findings, the Environmental Board stated that the Wal-Mart project "is likely to be a magnet for other development in the vicinity."¹³⁴ The Board "needs specific projections as to the total growth and rate of secondary growth to be caused by the proposed project and the anticipated public costs and benefits associated with such growth."¹³⁵ Under criterion 9(H), the applicants had the burden to provide this information, which they failed to do.¹³⁶ The Board stated that such a study was feasible and cited the Applicant's own consultant's study as evidence that such an analysis is possible.¹³⁷

The Vermont Supreme Court upheld the Board's requirement that Wal-Mart supply secondary growth studies.¹³⁸ "Thus, the plain language of the statute requires the Board to consider the growth caused by the project (secondary growth), the anticipated costs to the town and region, and the financial capacity of the town and region to accommodate growth."¹³⁹ As

132. *Town of North Elba Planning Board Statement*, *supra* note 115, at 14-15.

133. See MULLER & HUMSTONE, *supra* note 81; MULLER & HUMSTONE, WHAT HAPPENED WHEN WAL-MART CAME TO TOWN?, A REPORT ON THREE IOWA COMMUNITIES AND STATISTICAL ANALYSIS OF SEVEN IOWA COUNTIES (May 1996).

134. *St. Albans Group*, 1995 WL 404828, at *1.

135. *Id.* at *1.

136. See *id.* at *1, 29, 33.

137. See *id.* at *29.

138. See *Wal-Mart*, 8 Vt. L. Wk. at 233, 702 A.2d at 397.

139. *Id.* at 235, 702 A.2d at 402.

noted above, the court's language and reasoning is relevant to both criteria 9(A) and 9(H).

III. CRITERION 9(H)

The two primary issues presented in *Wal-Mart* under 9(H) were how to define an "existing settlement" and whether "indirect fiscal impacts" were adequately documented and appropriately considered.¹⁴⁰ Criterion 9(H) is relevant to an application when the proposed project is not physically contiguous to an existing settlement.¹⁴¹ Thus, the definition of an existing settlement is critical.

The Board found that the lack of an analysis by the applicant of secondary development impacts resulted in the lack of an analysis of indirect fiscal impacts under 9(H).¹⁴² The Board's findings on secondary impacts are discussed *supra* in Part II-D.

A. The Statute

In 1973, all of criterion 9 was significantly revised and expanded.¹⁴³ Criterion 9(H) now reads:

(H) Costs of scattered development. The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.¹⁴⁴

Criterion 9(H) requires an economic analysis that is similar to that imposed under 9(A); however, by compelling the Board to determine "the additional costs of public services and facilities caused directly or indirectly by the proposed development,"¹⁴⁵ criterion 9(H) arguably imposes a higher or

140. *St. Albans Group*, 1995 WL 404828, at *24, 29.

141. *See id.* at *29.

142. *See id.* at *29-33.

143. *See supra* notes 11-13, and accompanying text.

144. VT. STAT. ANN. tit. 10, § 6086(a)(9)(H).

145. *Id.*

broader standard than that found under 9(A). Unlike 9(A), the Board need not determine whether the costs impose an “undue burden;” instead, a negative or positive difference determines the outcome.¹⁴⁶ Criterion 9(H) specifically includes indirect costs of development.¹⁴⁷

It is also important to note that 9(H), in contrast to 9(A), does not require the imposition of conditions if the costs outweigh the benefits.¹⁴⁸ Instead, it enables outright denial. Why the difference from 9(A)? Unfortunately, the legislative history is silent on this issue. The authors believe 9(H) recognizes and specifically includes additional indirect costs because it also includes the possible indirect benefits of “increased employment opportunities or the provision of needed and balanced housing.”¹⁴⁹

Criterion 9(H) requires a weighing of costs and benefits, both direct and indirect.¹⁵⁰ As some costs and benefits are difficult to quantify, a balancing of a broad range of potential socio-economic and land use costs and benefits must be undertaken.

Through the specific inclusion of these indirect costs, criterion 9(H) calls for a broad socio-economic impact analysis that is not explicitly stated in 9(A).¹⁵¹ The ability to deny a permit under 9(H) recognizes that these impacts can be difficult to quantify, but nevertheless important to a community. The Legislature stated, “[S]trip development . . . not related to community centers cause[s] . . . economic or social decline in the traditional community center.”¹⁵² Once the land use and socio-economic pattern is changed—in this case from a downtown regional center to a neighboring town’s commercial strip—it is almost impossible to reverse.

The Board in its decision on Wal-Mart stated:

[T]he basic intent of Criterion 9(H) is to discourage scattered development beyond the boundaries of community centers if such development will damage the ability of the communities to maintain themselves. While the Board should not, and does not here, attempt specifically to guide development, it is fair to say that this criterion, which acts as a discouragement as cited above, is also an encouragement for large-scale development to locate within existing community centers. Although the legislature clearly expressed a preference that growth occur in the existing community centers, it

146. VT. STAT. ANN. tit. 10, § 6086(a)(9)(A).

147. *See id.* § 6086(a)(9)(H).

148. *See id.* § 6086(a)(9)(A), (H).

149. VT. STAT. ANN. tit. 10, § 6086(a)(9)(H).

150. *See id.*

151. *See* VT. STAT. ANN. tit. 10 § 6086(a)(9)(A), (H).

152. 1973 Vt. Acts & Resolves 85 § 7(a)(4)(A) (*available in history section of VT. STAT. ANN. tit. 10, § 6042*).

nonetheless did not seek to freeze or prohibit development outside of those centers. Rather, it sought to ensure that scattered development does not impose public costs which outweigh the public benefits.¹⁵³

The Board's denial of the Wal-Mart application was supported by the specific wording of 9(H).

B. Definition of an Existing Settlement

In its St. Albans application, Wal-Mart argued that the scattered highway retail area where they wanted to locate the new store constituted a settlement area.¹⁵⁴ The opponents argued that, given the regional nature of the Wal-Mart store, the only applicable existing settlement for the store was the region's center—the traditional Vermont center in the City of St. Albans.¹⁵⁵

Unfortunately, the Vermont Supreme Court opted not to provide a definition of an existing settlement since it had already upheld the Board's decision under 9(A).¹⁵⁶ Thus, in this section the authors review the Board's decision, which remains precedent on the issue.

The Board, after extensive review of precedent, legislation, and Vermont policy documents, stated:

[T]he Board concludes that the phrase "existing settlement" as used in that criterion means an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial highway-oriented uses commonly referred to as "strip development." Compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement in relation to a proposed project.¹⁵⁷

The precedent and history behind this definition is important and revealing. In *Waterbury Shopping Village, Inc.*, the Board faced a shopping

153. *St. Albans Group*, 1995 WL 404828, at *29.

154. *Id.*

155. *Id.* at *27.

156. *See Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997).

157. *St. Albans Group*, 1995 WL 404828, at *27 (footnote omitted).

center proposal that was “designed to have a regional impact” and which would be located 2,000 feet from the “closest existing settlement.”¹⁵⁸ The Board discussed the closest existing settlement, Waterbury Center, and found it was comprised of a mix emphasizing different types of businesses.¹⁵⁹ It also found these mixes to be in a relatively cohesive form with a distinct beginning and end. In defining a settlement, the Board stated:

In Vermont, development historically has been concentrated in small, compact centers surrounded by rural countryside. In these centers, retail shops are typically located near each other, within walking distance. Buildings in the centers often consist of multiple stories and have diverse uses. Offices and apartments are frequently on the second or third floors of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a diversity of uses and developments and are typically centrally located within the center. Street lighting is usually shared. The proximity of the buildings to each other often forces design and signage to be compatible Patterns of development are of great significance to the Vermont landscape By causing random, large scale development away from village centers which spread or sprawl out in linear fashion, strip development interferes with this important development pattern.¹⁶⁰

Throughout *Waterbury*, the Board recognized the importance of the Vermont landscape and character. It weighed the Waterbury development’s location against the important characteristics of compact centers and concluded that the project was not contiguous to an existing settlement, and was likely to cause strip development and sprawl.¹⁶¹ Similarly, the District Commission in *Pyramid Company* likened settlement areas to “community centers” and concluded that the proposed regional shopping mall was not adjacent to a community center.¹⁶²

In *Wal-Mart*, the Board used *Websters* and *The American Heritage College Dictionary* as a source for its definition of settlement.¹⁶³ This was a proper use of authority.¹⁶⁴ The Board elaborated on the definition as follows:

158. *Waterbury Shopping Village, Inc.*, No. 5W1068-EB, 1991 WL 177078, at *23 (Vt. Env. Bd. July 7, 1991).

159. *See id.* at *13.

160. *Id.* at *13.

161. *See id.* at *23-24.

162. *In re Pyramid Co. of Burlington*, #4C0281 (Vt. Dist. Envt’l Comm. Oct. 13, 1978), at 42.

163. *St. Albans Group*, 1995 WL 404828, at *25.

164. *See Vermont Agency of Natural Resources v. Handy Family Enterprises*, 163 Vt. 476, 484,

“In Vermont, development historically has been concentrated in small, compact centers surrounded by rural countryside.”¹⁶⁵ These centers typically involve a mix of diverse uses: residences, retail shops, services, offices, government, industry, and the like. These uses are typically located centrally, and on a scale which allows people to walk from one to the other. Buildings in the centers have mixed uses and front directly on public streets.

Offices and apartments are frequently on the second or third floors of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a diversity of uses and developments and are typically centrally located within the center. Street lighting is usually shared. The proximity of buildings to each other often forces design and signage to be compatible.¹⁶⁶

1. Vermont Documents Related to Existing Settlements and Growth Centers

As the Board recognized in the *Waterbury* and *Wal-Mart* decisions, Vermont’s planning documents, regulations, and laws consistently emphasize the importance of retaining the compact settlement area pattern. As early as 1968, Vermonters expressed concern about sprawl and its impact on their quality of life.¹⁶⁷ The Vermont Planning Council, whose Chairman was Governor Philip H. Hoff, prepared a document called *Vision and Choice*, expressing concern that “[w]ithout the benefit of an explicit policy determination to set a desirable pattern of physical development, Vermont will surely mimic the sprawl pattern found in virtually all urbanizing areas of this country Such a pattern can and must be avoided.”¹⁶⁸ To control sprawl, traditional commercial districts would be revitalized, older residential areas would be rehabilitated, and new, well-designed residential areas would be built.¹⁶⁹ New communities and expanded villages would be developed as satellites to larger regional centers. These satellites would offer housing, a full range of facilities, and employment opportunities for all income groups. The new communities would preserve the environmental values of Vermont. According to the plan, “[p]olicies must be adopted to encourage

660 A.2d 309, 313-14 (1995).

165. *St. Albans Group*, 1995 WL 404828, at *26; see also Appellants’ Appendix to Printed Case Volume III at 676-85, *Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997) (testimony of Elizabeth Humstone).

166. *Id.*

167. See THE VERMONT PLANNING COUNCIL, *VISION AND CHOICE: VERMONT’S FUTURE* (1968).

168. *Id.* at 41.

169. See *id.*

concentrations of settlement—commercial, residential, industrial—encompassed by open areas to which residents have access.”¹⁷⁰

In 1969, Governor Dean Davis issued an Executive Order establishing the Governor’s Commission on Environmental Control.¹⁷¹ Chaired by Senator Art Gibb, who later served as Chair of the Environmental Board in *Wal-Mart*, the Commission developed a comprehensive program of proposed environmental legislation.¹⁷² The Commission specifically addressed the problem of “large scale land development . . . and its resultant effect upon the resources of the State, both land and water.”¹⁷³ The Commission noted that “[l]arge scale development creates problems, not only ecological in nature, but also directly affecting local town government.”¹⁷⁴ The Commission outlined the legislation that was to become Act 250. The Commission recommended that the Act include a provision for the development of a state capability and development plan.¹⁷⁵

When Vermont passed Act 250 in 1970, it provided for three planning documents in addition to regulatory review procedures: the Interim Land Capability Plan,¹⁷⁶ the capability and development plan,¹⁷⁷ and the Land Use Plan.¹⁷⁸ The first two plans were prepared and submitted to the Legislature. However, after much controversy over a state land use plan presented in the early 1970s, the provision for the Land Use Plan was dropped.¹⁷⁹

The purpose of the 1972 Interim Land Capability Plan was to “describe the present use of the land and define in broad categories the capability of the land for development and use based on ecological considerations.”¹⁸⁰ The Plan addressed one of the underlying problems: “[a]s sprawl from settled centers coalesces with strip development elsewhere, the character of rural Vermont vanishes.”¹⁸¹

In 1973, the Vermont General Assembly adopted the Vermont Land Capability and Development Plan, which consisted of legislative findings and the criterion 9 sub-criteria.¹⁸² Among the Plan’s goals was the “reduc[ti]on]

170. *Id.* at 50.

171. GOVERNOR’S COMM’N ON ENVTL. CONTROL, REPORT TO THE GOVERNOR I (1970).

172. *See id.*

173. *Id.*

174. *Id.* at 3.

175. *See generally id.*

176. *See* VT. STAT. ANN. tit.10, § 6041 (1972).

177. *See* VT. STAT. ANN. tit.10, § 6042 (1973).

178. *See* VT. STAT. ANN. tit. 10, § 6043 (1973) (repealed 1983) (derived from 1969, No.250 (Adj. Sess.) § 20, and amended by 1973, No. 85 §4).

179. *See* VT. STAT. ANN. tit. 10 § 6043 (repealed).

180. VT. STAT. ANN. tit. 10, § 6041 (1972).

181. VERMONT STATE PLANNING OFFICE, VERMONT INTERIM LAND CAPABILITY PLAN 9 (1971).

182. *See* VT. STAT. ANN. tit. 10 § 6042.

[of] the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population."¹⁸³ The language of these sub-criteria reinforces the broad goal of compact settlements surrounded by rural countryside. The legislative findings of the Plan contain language very similar to the Act 200 goals supporting growth centers. For example, "[s]trip development along highways and scattered residential development not related to community centers cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center."¹⁸⁴

Shortly after the development of these plans, the State of Vermont implemented a public investment strategy that prioritized investments in growth centers. Recognizing that "Vermont's investment in public facilities is instrumental in determining land use patterns, resource management opportunities and private investment,"¹⁸⁵ Governor Thomas P. Salmon issued Executive Order no. 2 in 1975.¹⁸⁶ Executive Order no. 2 set up policies and procedures for reviewing state capital investments to insure that such actions complied with state policies and goals, including the principles and criteria of Act 250.¹⁸⁷ Executive Order no. 2 stated, "First priority will be given to public investment serving existing settlement and growth centers, to avoid the cost of attendant services associated with scattered settlement patterns."¹⁸⁸ The Executive Order expired upon the election of Richard Snelling as Governor in 1976.

In January 1988, after extensive public meetings and discussion throughout Vermont, the Governor's Commission on the Future of Vermont published a report entitled *Guidelines for Growth*.¹⁸⁹ The report stated that "[d]evelopment should be planned so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside."¹⁹⁰ The report also stated that "[e]conomic growth should be encouraged in designated growth areas, while . . . the expansion of economic opportunities [should be stressed] in regions with high unemployment and low per-capita income."¹⁹¹

183. VT. STAT. ANN. tit. 10, § 6042.

184. *Id.* § 6042(4)(a).

185. Vt. Exec. Order No. 2 (Jan. 14, 1975), *reprinted in* STATE PLANNING OFFICE, IMPLEMENTATION GUIDELINES, EXECUTIVE ORDER #2: PUBLIC CAPITAL INVESTMENT I-1 (1995).

186. *Id.*

187. *See id.*

188. *Id.* at II-2.

189. GOVERNOR'S COMMISSION ON VERMONT'S FUTURE, REPORT TO THE GOVERNOR, GUIDELINES FOR GROWTH (January 1988).

190. *Id.* at 16.

191. *Id.*

The report was followed by the adoption of Act 200, the State Growth Management Law, in 1988, and by the Act's amendment in 1990.¹⁹² The goals of the Act, as amended, include these, which are related to growth centers:

(1) To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.

(1)(A) Intensive residential development should be encouraged primarily in areas related to community centers, and strip development along highways should be discouraged.

(1)(B) Economic growth should be encouraged in locally designated growth areas, or employed to revitalize existing village and urban centers, or both.

(1)(C) Public investments, including the construction or expansion of infrastructure, should reinforce the general character and planned growth patterns of the area.¹⁹³

The term "growth centers," as used in Act 200 planning, refers to both traditional settled areas (villages and urban centers) and new areas designated by communities for economic growth under the Act 200 planning process.¹⁹⁴ Through its goals, the Act gives some guidance as to how new growth centers should be designated and planned.¹⁹⁵ Its goals make clear that growth center planning should not result in a pattern of strip development, that intensive residential development and affordable housing should go into growth centers, that growth centers should be supported by adequate public investments, including infrastructure, and that growth centers should not infringe on valuable natural resources.¹⁹⁶ According to the Act, the goals are to guide planning at the municipal, regional, and state levels.¹⁹⁷

When the Legislature passed Act 200, it called for a convening of a committee to "make recommendations on the use of the 'growth area' concept by regional planning commissions, include a definition of the term, describe how regional planning commissions would apply the term, and identify the effects of regional decisions on area municipalities."¹⁹⁸ The Committee concluded that the growth area concept must be implemented as "an integral

192. VT. STAT. ANN. tit. 24, § 4302(a) (1992).

193. *Id.* § 4302(c)(1)(C).

194. REPORT OF THE ACT 200 STUDY COMMITTEE (November 15, 1988), at 1, 11.

195. *See id.* at 3-9.

196. *See id.*

197. *See id.* at 2, 3-9.

198. 1988 Vt. Acts & Resolves 200 § 34.

part of the Act 200 planning process, and that the provision of appropriate public investment must be targeted toward achieving that implementation."¹⁹⁹

Pathways to Prosperity, published in 1989 by the Governor's Commission on the Economic Future of Vermont, offered a long-term strategic plan for Vermont.²⁰⁰ The keystone for the economic structure of this strategic plan was the concept of growth centers.²⁰¹ The plan's policy statements include a call "[t]o plan for a geographic distribution of enterprises that strengthens existing community centers, is compatible with regional strengths, and fosters renewal and re-direction of rural based enterprises."²⁰² The plan further states:

[t]he primary objective for this plan is to provide for retail trade growth that contributes to the well-being of the population centers, both urban and rural, and their residents, rather than drawing business and capital away from those centers and in the process blurring the distinction between commercial and non-commercial areas.²⁰³

The Vermont Partnership for Economic Progress (Partnership), later called the Vermont Economic Progress Council (Council), developed strategic plans in 1993 and 1994 for the State of Vermont called *A Plan for a Decade of Progress*.²⁰⁴ In their 1993 Report, the Partnership emphasized shifting land use away from "land-consumptive, inefficient sprawl and toward a more traditional pattern that encourages compact settlement surrounded by countryside."²⁰⁵ The Partnership recommended publishing a list of existing buildings in Vermont suitable for use or re-use as commercial and industrial space and that tax and regulatory incentives be created for their use.²⁰⁶

In the 1994 Report, the Council identified the dis-incentive to use of existing abandoned downtown buildings because of their hazardous materials.²⁰⁷ In order to ensure their re-use, the Council encouraged research

199. REPORT OF THE ACT 200 STUDY COMMITTEE (November 15, 1988), at 1.

200. THE GOVERNOR'S COMM'N ON THE ECON. FUTURE OF VT., *PATHWAYS TO PROSPERITY* 5 (1989).

201. *See id.* at 6, 16.

202. *Id.* at 6.

203. *Id.* at 10.

204. *See generally* A PLAN FOR A DECADE OF PROGRESS: ACTIONS FOR VERMONT'S ECONOMY (December 1993); A PLAN FOR A DECADE OF PROGRESS: ACTIONS FOR VERMONT'S ECONOMY (December 1994).

205. A PLAN FOR A DECADE OF PROGRESS: ACTIONS FOR VERMONT'S ECONOMY (December 1993), at 26.

206. *See id.*

207. *See* A PLAN FOR A DECADE OF PROGRESS: ACTIONS FOR VERMONT'S ECONOMY (December 1994), at 21.

into other states' success with reclamation.²⁰⁸ In 1995, the State passed legislation to reduce liability on hazardous waste sites proposed for redevelopment and expanded the state's Growth Center Demonstration Project.

Since 1968, all of these activities point to a strong desire on the part of Vermonters and state policy-makers to reinforce existing downtown and village centers as locations for development, to prevent strip development and sprawl, to protect the environment, and to preserve Vermont's rural heritage of compact centers surrounded by rural countryside.

The Chittenden Superior Court (which was sitting in an Environmental Board capacity and was, thus, precedent for the Board) recognized that the relevant settlement area must be defined in relation to "the size and use of the proposed development buildings."²⁰⁹ The court recognized that the proper delineation or identification of what constitutes a settlement area depends on the size and nature of the project.

With respect to the Wal-Mart application, the Town of St. Albans (the settlement area) qualifies as a regional center due to the regional scale of the project and the anticipated regional impacts of the store. For an application of smaller size or impact, the settlement area could be very different. The regulatory review must include flexibility to insure that the decision reflects the character of the proposed project.

2. Findings and Conclusions in the St. Albans Wal-Mart Case

The Environmental Board found that the site of the proposed Wal-Mart is not an existing settlement but rather is "an emerging commercial zone with highway-oriented development of the type commonly called 'strip.'"²¹⁰ The area is "not a community center in the manner of the traditional Vermont center. It is not a compact mixture of buildings with a largely pedestrian scale. It does not have a significant residential component."²¹¹ The Board found that the nearest existing settlement for the Wal-Mart store is the downtown of the City of St. Albans.²¹²

In its conclusions, the Board compared the multi-use, compact center of the downtown city and the isolated, single purpose Wal-Mart site.²¹³ The Board drew on testimony of Ms. Humstone:

208. *See id.*

209. *In re Pyramid Company of Burlington*, Chittenden Superior Court, Docket No. S59-78-CnM (October 14, 1980) at 6.

210. *St. Albans Group*, 1995 WL 404828, at *28.

211. *Id.* at *28.

212. *See id.*

213. *See id.* at *27.

In the downtown, in an area slightly larger than the Wal-Mart site (44 acres), there was found to be in 1981: 561,015 square feet of commercial space; 108,050 square feet to office/service space; 114,325 square feet of single family residential space; 338,900 square feet of multifamily space; 478,875 square feet of public and semi-public space; 77,175 square feet of vacant space; 22,750 square feet of industrial space; and 33,600 square feet of other space. Contrast these 1,731,690 square feet of mixed use space on about 44 acres in downtown St. Albans to one Wal-Mart store of 100,780 square feet on 44 acres.²¹⁴

IV. REQUIRING WAL-MART TO COME DOWNTOWN IS NOT ANTI-COMPETITIVE

The Board has previously addressed the impact on competition within the context of Act 250. In *Waterbury*, the Board found the shopping mall development located in the Town of Waterbury would have a direct, negative financial impact on the Village of Waterbury.²¹⁵ In language that set a clear precedent for its subsequent Wal-Mart decision, the Board stated as follows:

[T]he potential for competition between WSV and Waterbury Village would then be raised, since part of the rationale for no negative fiscal impacts on the Village is based on the presence of no anchor stores in the WSV In such a situation, Village businesses could suffer, with a consequent negative effect on the Village's tax base and therefore its ability to provide governmental services.²¹⁶

This approach is supported by other authority; "growth in one area may increase tax revenues and service costs, and may lead to economic decline in nearby localities."²¹⁷

The issue is not competition; it is maintaining the fiscal integrity of the existing communities. The Board has maintained this focus in *Waterbury*, *Zamias*, and *Berlin*. The Second Circuit Court of Appeals has found that "environmental effects" include the economic and physical deterioration of a city's downtown.²¹⁸ The District Commission in *Pyramid* stated:

214. Humstone Rebuttal Prefile, Supplemental PC, Appendix Vol. III, at 12; see also *St. Albans Group*, 1995 WL 404828, at *27.

215. See *Waterbury Shopping Village*, 1991 WL 177078, at *22.

216. *Id.*

217. Michael Fix, *Addressing the Issue of the Economic Impact of Regional Malls in Legal Proceedings*, 20 URB. L. ANN. 101, 117 (1980).

218. *City of Rochester v. United States Postal Service*, 541 F.2d 967, 973 (2d Cir. 1976).

There are, however, broader environmental concerns which we are charged to consider under Act 250. Webster defines environment as "the aggregate of social and cultural conditions that influence the life of an individual or community." It is in this sense that the economic impact of the proposed Pyramid development is so central to the matter before us.²¹⁹

The alleged restraint on competition is neither actionable nor inappropriate. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the United States Supreme Court upheld a municipality's right to regulate the size, spacing, and location of billboards even if the suppression of competition was a likely result.²²⁰ In *Van Sicklen v. Browne*, the California Court of Appeals approved a municipality's denial of a permit for a gas station because "further proliferation of service stations in the proposed area would be detrimental to the balanced development envisioned by the Master Plan."²²¹ The California court said:

Although cities may not use zoning powers to regulate economic competition, it is also recognized that land use and planning decisions cannot be made in any community without some impact on the economy of the community . . . [W]e perceive that planning and zoning ordinances traditionally seek to maintain property values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry and encourage conditions which make a community a pleasant place to live and work. Whether these be classified as "planning considerations" or "economic considerations," we hold that so long as the primary purpose of the zoning ordinance is not to regulate economic 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.²²²

The Vermont Supreme Court rejected Wal-Mart's anti-competition argument, recognizing that the costs to a municipality from a project are legitimately considered under criterion 9(A).²²³ "To the extent that a project's impact on

219. In re Pyramid Co. of Burlington, #4C0281 (Vt. Dist. Env'tl Comm. Oct. 13, 1978), at 8.

220. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 368, 384 (1991); see also Alan C. Weinstein, *How to Cope with—or without—"Big box" Retailers*, 17 ZONING & PLAN. L. REP. 49, 54 (1994).

221. *Van Sicklen v. Browne*, 92 Cal. Rptr. 786, 789 (Cal. Ct. App. 1971).

222. *Id.* at 789-90 (citations omitted); see also Clifford Weaver & Christopher J. Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977).

223. *Wal-Mart*, 8 Vt. L. Wk. at 234, 702 A.2d at 401.

existing retail stores negatively affects appraised property values, such impact is a factor that relates to the public health, safety, and welfare.”²²⁴

V. LESSONS FOR COMMUNITIES CONFRONTING MEGA-STORES

A. *Communities Beware: Assumptions are Slippery*

The methodologies employed by the various experts in their fiscal and economic analyses in the St. Albans case did not differ significantly; instead, it was the assumptions upon which they relied that led to different conclusions. The single biggest difference in assumptions in the St. Albans case was the projected sales per square foot for Wal-Mart.²²⁵ Wal-Mart's experts used sales per square foot figures from secondary sources instead of from their client.²²⁶ Upon cross-examination, Wal-Mart's experts admitted that they used this secondary information because Wal-Mart's head office would not provide them with actual sales information at the stores involved in the case studies.²²⁷ The opponents' witnesses, Dr. Muller and Ms. Humstone, instead used information found in Wal-Mart's own Annual Reports. This primary and direct information established sales per square foot substantially higher than Wal-Mart's experts' secondary and more speculative projections.²²⁸ Wal-Mart's experts could not explain why Wal-Mart would not release the actual sales figures, leading to the logical and un-rebutted conclusion that Wal-Mart would not release these numbers because they would show large, negative, fiscal impacts consistent with Dr. Muller's and Ms. Humstone's report.

The difference in assumptions between Muller and Humstone and Wal-Mart's experts led to a difference in sales at the proposed store of ten million dollars per year.²²⁹ The importance of this figure cannot be overstated. All the experts agreed that the amount of available dollars within the relevant market was finite.²³⁰ The additional ten million dollars of sales going to Wal-

224. *Id.*

225. See Amicus VNRC's Appendix to Printed Case Volume IV at 29, *Wal-Mart*, 8 Vt. L. Wk. 233, 702 A.2d 397 (1997) (testimony of Dr. Thomas Muller).

226. See Brief of Amici Curiae VNRC, Appeal from the Vermont Environmental Board, Re: Wal-Mart Stores, Inc. and the St. Albans Group, at 3 [hereinafter VNRC Brief].

227. See Record at 229, 233; *St. Albans Group*, 1995 WL 404828 (testimony of Mr. Gsottschneider).

228. See VNRC Brief, *supra* note 226, at 3.

229. See *id.* at 4.

230. See *id.*

Mart meant a thirty three percent greater negative impact on other merchants within the market.²³¹

Another major difference of opinion involved the projected draw from the Canadian market. Wal-Mart's experts assumed a draw on Canadian tourists about three times as high as the historical rate for the St. Albans region.²³² It also designated a market area within Canada from which it would draw; however, it failed to account for the two Wal-Mart stores already serving this same Canadian market.²³³ These faulty assumptions and oversights seriously tainted Wal-Mart's numbers and the Board rejected them.²³⁴

As a final example, Wal-Mart presented two land use experts to support its position under criterion 9(H). These experts argued that strip development was occurring all over the country and that Vermont simply had to accept this form of development.²³⁵ Cross-examination revealed that these experts based their opinions on virtually no Vermont authority.²³⁶ In contrast, Ms. Humstone and other witnesses, including John Mullin, a planning professor at the University of Massachusetts at Amherst, and Kennedy Smith, the Director of the National Main Street Center, based their conclusions on extensive Vermont authority.²³⁷

The pitfalls of Wal-Mart's generic approach cannot be over emphasized. Each store will produce different dynamics, and hosting and adjoining communities must make sure the information presented is relevant, accurate, and addresses the specifics of the proposed site.

B. Potential for Significant Regional Effects

As noted above, regional retail facilities, such as Wal-Mart, and regional shopping malls, have the potential for significant regional effects on the economy, the fiscal health of communities, and land use patterns. It is important that regions have solid information with which to understand the impact of these projects. Generic information is not useful, although case studies will illuminate the type of impacts that can be felt under certain conditions. Each market where these projects may be located is different and needs to be analyzed for its unique characteristics. It is insufficient to look simply at the host community to measure the effects. In the St. Albans Wal-

231. *See id.*

232. *See id.* at 4-5; *see also* MULLER & HUMSTONE, LAND USE IMPACTS, *supra* note 81, at 22.

233. *See* MULLER AND HUMSTONE, LAND USE IMPACTS, *supra* note 81, at 22-23.

234. *See St. Albans Group*, 1995 WL 404828, at *31; *see also* VNRC Brief, *supra* note 226, at 5..

235. *See* VNRC Brief, *supra* note 226, at 5.

236. *See id.*

237. *See id.*

Mart case, there were effects found not only in the host community, but also in the nearby downtown and other villages that were retail centers in the region.

C. Potential for Significant Secondary Effects

Wal-Mart's own consultants produced information on the amount of secondary development that can occur as a result of their stores. Secondary development can include additional commercial activity attracted to the area by the opening of the store, and a decline in activity in other locations as the center for retailing shifts in the region. These secondary developments have costs and benefits, usually referred to as indirect costs or benefits. Because it is unlikely that the development would happen in the absence of the project, these developments should be examined in the context of the proposed primary development. Examining secondary impacts from development has been standard in many environmental and land use reviews since the 1970s.

D. Potential for Significant Impacts on Settlement Patterns

The combination of the regional retailing project and its secondary development can have significant impacts on settlement patterns. For this reason, Vermont projects that are not contiguous to existing settlements undergo a stricter review process. The Environmental Board in the *St. Albans* case characterizes this development as "leapfrog" development.²³⁸ The Board says that "such development can greatly accelerate growth . . . can use up or exceed the available public facilities in the area and require extensions to the area of existing public facilities and utilities."²³⁹ Communities should apply a different standard of review for projects that are not within or contiguous to existing settlements and should carefully consider what constitutes an existing settlement in the context of each project.

CONCLUSION

Communities must think big when faced with a project the size of a typical Wal-Mart. Clearly, in today's economic climate, the big-box phenomenon is becoming a reality across the country. Communities must be prepared for this possibility or they will face development applications without hope of controlling the consequences. Simply trying to address the

238. *St. Alban's Group*, 1995 WL 404828, at *18.

239. *Id.*

likely scenario through traditional zoning regulations will prove insufficient, as locally based and focused regulations are usually incapable of addressing a project with large regional impacts. Fiscal impact analyses with solely a local focus will fail to account for regional impacts—impacts that can be devastating to both the hosting and surrounding communities.

Communities need to be clear about their overall community objectives for retail development—where projects should be located and at what scale—and have a well researched rationale for their choices. Regulations that carry out these objectives, consider the secondary effects, indirect costs, and regional effects of major retail development, and hold “leapfrog” development to a tougher standard of review would help to prepare communities for the big-box stores.

Act 250 provides a model of such forward looking regulations. Through the Act 250 process, communities may project what growth will occur without the development and measure this scenario against what growth will occur if the proposal is built. This presents the community with a clear choice, and when such analysis is done in advance of a project, better planning usually results.

Act 250 has resulted in consistent and strong messages from both the Environmental Board and the courts—if you are a planning a regional project and you want to come to our state, look first for a location in an existing settlement and plan for enhancing the viability and character of our state and its communities.

