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Dina Botwinick

Jennifer Effron

John Huang

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## SAVING MOM AND POP: ZONING AND LEGISLATING FOR SMALL AND LOCAL BUSINESS RETENTION

*Dina Botwinick, \*Jennifer Effron, \*\* and John Huang\*\*\**

### INTRODUCTION

Small and local businesses often contribute unique character to their municipalities, but advocates are concerned that large, national, chain retailers, who offer lower prices and one-stop shopping threaten the existence of smaller, specialized stores.<sup>1</sup> In response to these concerns, communities of varying size and demographics throughout the country are using zoning regulations and other legislative measures to assist small and local business.<sup>2</sup> Small and local businesses have always helped define what is unique, diverse, and special about New York City.<sup>3</sup> In order to help promote their retention, the City must also seek out innovative strategies that combine both regulations

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\* Admitted to practice law in the States of New York and New Jersey, 2009; Juris Doctor, Brooklyn Law School, 2008; Master of Forensic Psychology, John Jay College of Criminal Justice, 2002; Bachelor of Arts, University of Florida, 1998.

\*\* Juris Doctor, Brooklyn Law School, 2010; Master of Urban Planning, Hunter College 2010; Bachelor of Arts, Tulane University, 2003.

\*\*\* Juris Doctor, Brooklyn Law School, 2008; Bachelor of Arts, Michigan University, 2003.

<sup>1</sup> Institute for Local Self-Reliance, The New Rules Project, Retail, <http://www.newrules.org/retail> (last visited Mar. 10, 2010).

<sup>2</sup> See discussion *infra* Parts II and III.

<sup>3</sup> Press Release, Pratt Ctr. for Cmty. Dev., Saving Independent Retail: Policy Measures to Keep Neighborhoods Thriving (Aug. 2009), available at [http://prattcenter.net/sites/default/files/publications/PrattCenter\\_SavingIndependentRetail.pdf](http://prattcenter.net/sites/default/files/publications/PrattCenter_SavingIndependentRetail.pdf).

and incentives. This article reviews approaches employed by other municipalities and considers legal issues that might arise from them, with an eye toward small business retention in New York City. Part I discusses the state of small and local businesses in this economic crisis. Parts II and III provide an overview of several zoning regulations and other legislative measures enacted to aid small and local businesses in other municipalities and indicates where such initiatives have sparked lawsuits. Part IV considers potential legal challenges to these laws, concluding in Part V with a brief discussion of how New York City might consider moving forward.

#### I. SMALL AND LOCAL BUSINESSES IN TODAY'S ENVIRONMENT

Since the global financial crisis began in the last quarter of 2008, businesses of all sizes—from family-owned “mom and pop” stores to national chain retailers—have suffered serious economic hardships and many have been forced to close. However, the current recession has hit small businesses particularly hard, with 2009 arguably being the worst year since the Great Depression.<sup>4</sup> In November 2009, private sector employment decreased by 169,000 and small businesses (those with fewer than 50 employees) alone accounted for 68,000 of those jobs.<sup>5</sup> This, however, was the smallest decline since July of 2008 and economic activity is beginning to stabilize<sup>6</sup>—an indicator that employment will as well. Small businesses make important contributions to economic growth,<sup>7</sup> and often even

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<sup>4</sup> Ian Mount, *And 7 Businesses That Did Not Survive*, N.Y. TIMES, Dec. 31, 2009, [http://www.nytimes.com/2009/12/31/business/smallbusiness/31deaths.html?\\_r=1&scp=1&sq="businesses%20that%20did%20not%20survive"&st=cse](http://www.nytimes.com/2009/12/31/business/smallbusiness/31deaths.html?_r=1&scp=1&sq=).

<sup>5</sup> ADP, NATIONAL EMPLOYMENT REPORT 1 (2010), available at [http://www.adpemploymentreport.com/PDF/FINAL\\_Report\\_December\\_09.pdf](http://www.adpemploymentreport.com/PDF/FINAL_Report_December_09.pdf); see also Damien Cave, *Family Businesses Are Reeling in Recession*, N.Y. TIMES, July 14, 2009, at A12 (“Businesses with one to 19 employees, nearly all of them family run, lost 757,000 jobs from the second quarter of 2007 through the third quarter of 2008.”).

<sup>6</sup> ADP, *supra* note 5.

<sup>7</sup> Cave, *supra* note 5.

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more important contributions to the neighborhoods they serve.<sup>8</sup> As the country comes out of the recession it is important to look to future policies that aid small, locally owned businesses in order to assure that communities are more sustainable and resistant to national and international economic cycles. New York City relies on small businesses to provide job growth, tax revenues, and a sense of community.<sup>9</sup> It is especially important, during economic downturns, to help small businesses now and in the future.

## II. ZONING ORDINANCES

State and local governments often use zoning to control the size, use, and appearance of improvements to real property. In 1926 the Supreme Court upheld states' rights to control development through zoning, holding that zoning ordinances are a valid exercise of state police power so long as they bear a rational relation to the health, safety, and general welfare of the community.<sup>10</sup> State enabling laws generally allow local governments to assume most of this responsibility. The four commonly used zoning tools this Article examines are store size caps, community impact reviews, neighborhood serving zones, and formula business restrictions. Municipalities can combine several of these tools to offer greater protections for small and local businesses.

### *A. Store Size Caps*

Store size caps limit the physical size of retail stores by amending zoning ordinances, either for an entire city or for designated areas within a city.<sup>11</sup> Some municipalities put an outright ban on stores above a certain size, while others limit

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<sup>8</sup> Press Release, Pratt Ctr. for Cmty. Dev, *supra* note 3.

<sup>9</sup> Nicholas Jahr, *Maybe Beloved Shops Don't Have to Disappear*, CITY LIMITS, July 21, 2008.

<sup>10</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926).

<sup>11</sup> Institute for Local Self-Reliance, *Store Size Caps*, <http://newrules.org/retail/size.html> (last visited Mar. 10, 2010).

their development to specific areas and, still others require developers to obtain a conditional use permit from a town authority.<sup>12</sup> Since municipalities vary greatly in size, density, and existing zoning, actual allowable square footage will vary from place to place. Small towns and large cities across the United States are using store cap sizes to protect small and local businesses, decrease traffic congestion, lessen the burdens on infrastructure, regulate building design, and maintain pedestrian-friendly districts, among many other planning goals.<sup>13</sup> Fairfield, Connecticut, San Francisco, California and New Elba, New York offer examples of how store size caps are used.

### 1. *Fairfield, Connecticut*

Fairfield applies store size caps only in geographic areas designated in the zoning ordinance as “Neighborhood Designed Business Districts.”<sup>14</sup> The purpose of these twelve districts is “to provide local neighborhoods with needed and desirable convenience goods and services in a manner which will not be detrimental to the surrounding residential areas.”<sup>15</sup>

In July 2007 the Town Plan and Zoning Commission amended the local zoning regulations to require that stores, restaurants and banks in these designated areas not exceed 4,000 square feet in interior floor area.<sup>16</sup> These districts also prohibit drive-through restaurants and require a special permit for construction of a “formula business,” which is defined under the Fairfield Municipal Code, as a business

that includes, utilizes or incorporates any two or more of the following standardized items that cause it to be substantially identical to more than five other stores, restaurants, businesses, offices or institutions regardless of ownership or location: A standardized array of

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* FAIRFIELD, CONN., ZONING REGULATIONS § 12.5 (2009).

<sup>15</sup> *Id.* § 12.5.

<sup>16</sup> *Id.* §§ 12.5.1, 12.5.3, 12.5.15.

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products or merchandise, a standardized menu, uniform apparel, standardized architectural design, layout or façade, standardized décor or color scheme and/or standardized signs trademarks, service marks or logos.<sup>17</sup>

*2. San Francisco, California*

In 1987, San Francisco created Neighborhood Commercial Districts to establish a zoning system that could be tailored to the unique characteristics of specific areas.<sup>18</sup> The North Beach neighborhood is one of these special districts, which traditionally fostered small and locally owned businesses.<sup>19</sup> Non-residential uses in North Beach, 2,000 square feet or more, are permitted only as a conditional use, subject to approval by the planning commission in order to maintain a scale of development appropriate to the district.<sup>20</sup> A permit may only be issued after the developer proves that the use would serve the neighborhood needs and conform to the local architecture and style.<sup>21</sup> Additionally, non-residential uses in the North Beach neighborhood exceeding 4,000 square feet are prohibited outright.<sup>22</sup> These requirements are intended to ensure the

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<sup>17</sup> *Id.* § 31.2.41.

<sup>18</sup> S.F., CAL., PLANNING CODE § 701.1(b) (2009).

<sup>19</sup> *Id.* § 722.1. San Francisco amended this Article in 2008; however, the relevant store size cap still applies to this discussion. *Id.*

<sup>20</sup> *Id.* § 722.21. Section 303(c) sets out standards for reviewing uses that exceed allowable square footage in Neighborhood Commercial Districts: (i) large-scale use will not foreclose other needed neighborhood-serving uses; (ii) use will serve the neighborhood and requires larger size to function; and (iii) building design respects district scale. *Id.* § 303(c)(1)(A)(i)–(iii). Section 303(c)(2) requires that the use will not be detrimental to health, safety, convenience, and general welfare of nearby persons. *Id.* § 303(c)(2). Additionally, Section 303(j) requires the Commission to consider parking for large-scale retail uses as it affects street front usage, degree to which design encourages mixed-use, changes in traffic patterns, and increased demand on infrastructure. *Id.* § 303(j)(A).

<sup>21</sup> *Id.* § 121.2(a)(1)–(3).

<sup>22</sup> *Id.* § 121.2(b). The 4,000 foot restriction “shall not apply to a Movie Theatre use.” *Id.*

livability and attractiveness of North Beach by maintaining the existing scale of development, promoting a balanced mix of retail, services, and restaurants, and preserving the equilibrium of neighborhood-serving, city-wide specialty shopping and dining uses.<sup>23</sup> There are also many other San Francisco neighborhood commercial districts where conditional permits are required for non-residential uses from 2,500 square feet to 6,000 square feet.<sup>24</sup>

Beyond Neighborhood Commercial Districts, as a city-wide measure, San Francisco amended the municipal code in 2004 to require a conditional use permit for any single retail use over 50,000 gross square feet, except within downtown commercial districts,<sup>25</sup> which allow up to 90,000 gross square feet before a conditional use permit is required.<sup>26</sup> Further, single retail uses exceeding 120,000 gross square feet are prohibited outside of the downtown commercial districts.<sup>27</sup> Such use is also prohibited within the downtown commercial districts if the retail business sells groceries, contains more than 20,000 stock-keeping units (the lowest level of merchandise identification) and devotes more than five percent (5%) of its total sales floor area to the sale of non-taxable merchandise.<sup>28</sup> Outside of the downtown commercial districts these restrictions apply to new uses and the expansion of existing uses, but within the downtown commercial districts they apply only to new uses.<sup>29</sup>

A 2006 case decided by the United States District Court for the Eastern District of California supports San Francisco's zoning approach. *Wal-Mart Inc. v. City of Turlock* upheld a town ordinance that required a conditional use permit for certain large retail stores and prohibited discount superstores (which were defined as large-scale retail stores over 100,000 square feet that also devoted more than five percent of sales floor area to

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<sup>23</sup> *Id.* § 722.1.

<sup>24</sup> *Id.* § 121.2(a).

<sup>25</sup> *Id.* § 121.6(a).

<sup>26</sup> *Id.* § 121.6(b).

<sup>27</sup> *Id.* § 121.6(c).

<sup>28</sup> *Id.* § 121.6(d).

<sup>29</sup> *Id.* § 121.6.

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non-taxable items).<sup>30</sup> The court found that the ordinance did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because it was rationally related to the state and local interests of regulating traffic, air pollution, and urban blight.<sup>31</sup> The court also found that any indirect effect on interstate commerce caused by the ordinance was far outweighed by the presumed benefits to the city and therefore did not violate the Dormant Commerce Clause of the United States Constitution.<sup>32</sup>

*3. North Elba, New York*

In North Elba, New York, a lawsuit prompted the town to adopt a more stringent zoning ordinance. After being denied a conditional use permit, Wal-Mart unsuccessfully sued the town North Elba.<sup>33</sup> The Appellate Division upheld the town's denial in 1998, finding that its concern with the store's negative aesthetics was neither irrational nor arbitrary, and that it was not based on impermissible considerations such as public sentiment or community pressure.<sup>34</sup> Subsequently, the town amended its code to officially limit a single retail trade use to 40,000 square feet of total floor area, even if spread out over more than one building.<sup>35</sup> The code further capped shopping centers and other group retail business uses at 68,000 square feet.<sup>36</sup>

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<sup>30</sup> Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1022 (E.D. Cal. 2006).

<sup>31</sup> *Id.* at 1020.

<sup>32</sup> *Id.*

<sup>33</sup> Wal-Mart Stores, Inc. v. Planning. Bd. of N. Elba, 238 A.D.2d 93 (N.Y. App. Div. 1998).

<sup>34</sup> *Id.* at 97.

<sup>35</sup> NORTH ELBA, N.Y., TOWN LAND USE CODE § 4.17.1 (2009). This amendment was clearly targeted at large-scale retailers as the average square footage of the three main types of Wal-Mart stores, "Discount Stores," "Super Centers" and "Neighborhood Markets" were 107,000 square feet, 187,000 square feet and 42,000 square feet, respectively, as of August, 2007. See Walmart Corporate, Our Retail Divisions <http://walmartstores.com/pressroom/news/5038.aspx> (last visited Mar. 24, 2010).

<sup>36</sup> *Id.* § 4.17.2.



*B. Community Impact Review*

Some communities do not prohibit large stores outright, but require a community impact review prior to granting a conditional use permit for large stores. The community impact review requires developers to demonstrate that a proposed development will not negatively affect the local community or environment.<sup>37</sup> Large-scale retailers, whose presence may physically alter local character or may overburden the community's infrastructure, often trigger the community impact review, causing delay and possibly deterring the development altogether.<sup>38</sup> A number of communities in the United States employ this mechanism to provide a comprehensive review of the impact on the local economy and community in areas such as social services, tax revenues, downtown businesses, traffic congestion, and pollution.<sup>39</sup> Pursuant to state enabling statutes and local ordinances, a review committee (often the local planning commission), may authorize a conditional use if it finds the proposed project meets certain criteria to properly address the local community's needs and mitigate adverse impacts.<sup>40</sup> Brattleboro, Vermont and the State of Maine both use this zoning mechanism.

*1. Brattleboro, Vermont*

In October 2006, Brattleboro, Vermont adopted an amendment to its zoning ordinance to address large-scale retail use.<sup>41</sup> The amendment requires that "no single Retail Store,

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<sup>37</sup> Institute for Local Self-Reliance, Economic Impact Review, <http://www.newrules.org/retail/rules/economic-impact-review> (last visited Apr. 1, 2010) [hereinafter Economic Impact Review].

<sup>38</sup> Institute for Local Self-Reliance, Community Impact Review: Vermont <http://www.newrules.org/retail/rules/economic-impact-review> (last visited Apr. 1, 2010).

<sup>39</sup> See *id.* for a list of communities employing this type of review.

<sup>40</sup> Economic Impact Review, *supra* note 37.

<sup>41</sup> BRATTLEBORO, VT., MUN. CODE, ART. II, § 2337 (2007), available at <http://www.brattleboro.org/vertical/Sites/%7BF60A5D5E-AC5C-4F97-891A->

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Factory Retail Store or Supermarket shall have a Floor Area greater than 65,000 square feet,” without undergoing site plan and conditional use approval, as well as, satisfying additional criteria set out in the Vermont State Statute.<sup>42</sup> This ordinance was drafted by the town’s planning commission, in response to town concerns over big-box stores<sup>43</sup> and give the The Development Review Board (the “DRB”)<sup>44</sup> the power to grant conditional use permits to help monitor the influx of large-scale retail businesses.<sup>45</sup> In order to grant a conditional use permit, the DRB must hold a public hearing and make findings that the proposed use comports with general and specific standards set forth in the zoning ordinance.<sup>46</sup>

A community impact review requirement is also included in the amendment.<sup>47</sup> This mandates that the permit applicant work with a DRB approved consultant to analyze the project’s impact on employment, the costs of public and social services attributable to the development, the impact on property values (especially in the immediate area), the extent to which the project will affect other businesses in the area, and the amount

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<sup>42</sup> *Id.* § 2337(A).

<sup>43</sup> Institute for Local Self-Reliance, Community Impact Review: Brattleboro, VT, <http://www.newrules.org/retail/rules/economic-impact-review/community-impact-review-brattleboro-vt> (last visited Mar. 10, 2010).

<sup>44</sup> The DRB is established in accordance with a referenced state statute that authorizes such a board to be created and members to be appointed by the municipality’s legislative body. *Id.* § 1400.

<sup>45</sup> *Id.* § 1413.

<sup>46</sup> BRATTLEBORO, VT., ZONING ORDINANCE §§ 1413, 2337(A)(2)(a). General standards require the proposed use not adversely affect community facilities, traffic, area’s character, the by-laws in effect, and use of renewable energy resources. *Id.* § 1413(a). Specific standards may include requirements for lot size, parking spaces, landscaping, and fencing. *Id.* § 1413(b).

<sup>47</sup> *Id.* § 2337(A)(2)(b)(3). The other standards; (1) limit the location of large-scale projects; (2) require its construction to encourage public transportation, pedestrians, and cyclists; (3) require that the project comport with the nature and character of the town, and is consistent with the town’s growth plan; and (4) comply with enumerated aesthetic characteristics. *Id.* § 2337(A)(2)(b).

of project-generated revenue that will filter back to the community and region.<sup>48</sup> At the applicant's expense, the DRB may also conduct an independent technical review of areas of the application that are of "particular concern."<sup>49</sup>

## 2. *The State of Maine*

Through the lobbying efforts of over 180 small businesses, numerous municipal officials, and many labor, environmental, and community organizations,<sup>50</sup> Maine enacted a similar law called the Informed Growth Act (the "Act") in 2007.<sup>51</sup> The Act requires municipalities that have received permit applications for large-scale retail developments (defined as any single-use space 75,000 square feet or larger)<sup>52</sup> to determine whether such development would have an "undue adverse impact" upon the local economy and community.<sup>53</sup> "Undue adverse impact" is defined as development that negatively affects traffic, air and water quality, as well as economic impacts, such as those on other existing retail businesses, wages, municipal revenue, and employment.<sup>54</sup> A qualified preparer, selected from a pre-approved list and agreed upon by the applicant and the municipality is responsible for providing a "comprehensive economic impact study"<sup>55</sup> that addresses these factors.<sup>56</sup> After

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<sup>48</sup> *Id.* § 2337(A)(2)(b)(3).

<sup>49</sup> *Id.* § 2337(B).

<sup>50</sup> Institute for Local Self Reliance, Community Impact Review: Maine, <http://www.newrules.org/print/retail/rules/economic-impact-review/community-impact-review-maine> (last visited Mar. 10, 2010).

<sup>51</sup> ME. REV. STAT. ANN. tit. 30-A, § 4365 (2009).

<sup>52</sup> *Id.* § 4366(6). This also includes expansions that would cause a single space to be larger than 75,000 square feet unless the expansion is less than 20,000 square feet. *Id.*

<sup>53</sup> *Id.* § 4367.

<sup>54</sup> *Id.* § 4366(10).

<sup>55</sup> *Id.* § 4367(1). The comprehensive economic impact study is prepared at the applicant's expense.

<sup>56</sup> *Id.* § 4367(3). If the applicant and municipality cannot agree on the preparer within 15 days, the municipality may select the preparer. *Id.* § 4367(2). The applicant must pay \$40,000 to be deposited into a dedicated

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affording the public an opportunity to discuss the proposal,<sup>57</sup> the municipality's decision-making authority may only approve a permit if it finds that there is likely to be no undue adverse impact.<sup>58</sup> The Act applies to all municipalities in the state of Maine, except for those that have adopted their own impact studies for large-scale retail development, in accordance with the Act.<sup>59</sup>

*C. Neighborhood Serving Zones*

Neighborhood serving zones are another zoning tool aimed at helping to sustain small, local businesses by limiting the size and type of retail stores in certain districts. These regulations serve the everyday consumer needs of local residents and are not aimed at attracting tourists.<sup>60</sup> Palm Beach, Florida uses this type of zoning.

Palm Beach, Florida created the Worth Avenue Commercial District as a town-serving zone, where the size and type of stores is limited by zoning regulations.<sup>61</sup> The purpose of the district "is to preserve and enhance an area of unique quality and character oriented to pedestrian comparison shopping and providing a wide range of retail and service establishments, to be developed whether as a unit or as individual parcels, serving the short term and long term needs of "townpersons."<sup>62</sup> New retail stores in the district are permitted a maximum of 2,000 square feet of gross leasable area ("GLA").<sup>63</sup> The regulation

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revenue account, from which the expenses involving the application are taken. Unexpended funds are returned to the applicant. *Id.* § 4367(3).

<sup>57</sup> *Id.* § 4368(1).

<sup>58</sup> *Id.* § 4369.

<sup>59</sup> *Id.* § 4371(1).

<sup>60</sup> Institute for Local Self-Reliance, Neighborhood Serving Zones, <http://www.newrules.org/retail/rules/neighborhoodserving-zones> (last visited Mar. 10, 2010).

<sup>61</sup> PALM BEACH, FLA., MUNICIPAL CODE § 134-1156 (2010).

<sup>62</sup> *Id.* Townpersons are defined as full-time residents and visitors staying in accommodations and employees working in town. *Id.* § 134-2(b).

<sup>63</sup> *Id.* § 134-1157.

allows any existing use that exceeds this GLA to change to a similar type of commercial use without Palm Beach Town Council approval, but requires a store exceeding 2,000 square feet of GLA that wishes to change from one type of general commercial use to another to obtain permission from the city council.<sup>64</sup> Furthermore, a business within this district may not occupy an additional location within 1,500 feet of the original business location.<sup>65</sup> In order to obtain permission for construction of a single store in excess of 2,000 square feet of GLA, the regulation requires a showing that no less than 50% of their customers will be townpersons.<sup>66</sup>

The Florida Court of Appeals upheld this regulation in 1991.<sup>67</sup> In *Handelsman v. Town of Palm Beach*, a landlord claimed that Palm Beach violated his right to Due Process and Equal Protection under the United States Constitution when it denied a special exception to convert a restaurant that existed as a prior non-conforming use into an apparel store.<sup>68</sup> The Court found that the landlord retained his ability to use the property within permitted use and size requirements and that the ordinance was related to permissible public purposes.<sup>69</sup> The Court also found that the requirements as to the needs of the townpersons reflected the town's traffic and parking concerns and its interest in preserving establishments that serve local rather than regional needs.<sup>70</sup>

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<sup>64</sup> *Id.* § 134-1157(a)-(b). The code gives an example: If an already existing 8,000 square foot ladies apparel store desires to change to an antique store, it may do so without town council approval, but if the same store wants to switch to a bank or an office building, it would need a special exception from the town council. *Id.*

<sup>65</sup> *Id.* There is an exception to this limitation if the two locations together do not exceed 2,000 square feet of GLA. *Id.*

<sup>66</sup> *Id.* § 134-229(12).

<sup>67</sup> *Handelsman v. Town of Palm Beach*, 585 So. 2d. 1047 (Fla. Dist. Ct. App. 1991).

<sup>68</sup> *Id.* at 1049.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* It should be noted that neither the neighborhood-serving aspect of the ordinance nor the space limitation was challenged here.

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*D. Formula Business Restrictions*

Other municipalities protect local businesses by prohibiting or deterring formula businesses, such as retail stores, restaurants, hotels, and other establishments that adopt standardized services, decor, uniforms, architecture, or other features virtually identical to businesses located elsewhere.<sup>71</sup> The municipalities discussed below take different approaches to limiting formula businesses. While Arcata, California limits the number of formula businesses in certain neighborhoods,<sup>72</sup> Bristol Rhode Island limits the size,<sup>73</sup> and San Francisco, California requires conditional use permits in several districts and prohibits these establishments entirely in two districts.<sup>74</sup>

*1. Arcata, California*

In June 2002, Arcata, California (population 17,000), enacted an ordinance that limited the number of formula restaurants in the city to nine.<sup>75</sup> The ordinance stipulates that any new formula restaurant that wishes to develop in the city subsequent to the enactment of the ordinance may only do so if it replaces an existing formula restaurant, which is further limited to specified business districts.<sup>76</sup> Outside of these designated districts, formula retail is prohibited.<sup>77</sup>

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<sup>71</sup> Institute for Local Self-Reliance, *Formula Business Restrictions*, <http://www.newrules.org/retail/formula.html> (last visited Mar. 10, 2010).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> S.F., CAL., PLANNING CODE § 703.3(e)–(f) (2009).

<sup>75</sup> ARCATA, LAND USE CODE § 9.42.164. Arcata is about 5 hours north of San Francisco, CA. The ordinance defines a “formula restaurant” as an establishment that offers standardized food, uniforms, décor, or similar standardized features that make that establishment substantially the same as more than eleven other restaurants, no matter the location or ownership. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

*2. Bristol, Rhode Island*

In May 2004, Bristol, Rhode Island adopted an ordinance restricting formula businesses larger than 2,500 square feet or those occupying more than 65 feet of street frontage, from locating in the town's Historic District.<sup>78</sup> The stated purpose of the Historic District Zone is to "regulate the location and operation of formula business establishments, within Bristol's Historic District Zone, in order to maintain the district's unique character and diverse blend of business offerings."<sup>79</sup>

Formula businesses are not strictly prohibited from Bristol's Historic District, but must first obtain a certificate of appropriateness from the Historic District Commission, and a special use permit from the zoning board.<sup>80</sup> The zoning board is required to ensure that certain standards are met before issuing a conditional use permit so that approval of a formula business will not alter the unique character of the historic district or contribute to a nationwide trend of standardized downtown offerings.<sup>81</sup> The board must also find that the proposed business will contribute to a diverse and appropriate blend of businesses in the historic district zone and that it will complement existing businesses and aid in promoting the local economic base as a whole.<sup>82</sup> Further, the formula business must be compatible with existing surrounding uses and it must be operated in a non-obtrusive manner that preserves the community's character and ambiance.<sup>83</sup> To this effect, the ordinance prohibits drive-through

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<sup>78</sup> BRISTOL, R.I., CODE OF ORDINANCES § 28-150(h)(1)-(2) (2009).

<sup>79</sup> *Id.* § 28-281(b). Restaurants, retail stores, banks, and hotels are examples of businesses that are subject to the formula business standard, which the ordinance defines as one that maintains a "standardized ('formula') array of services and/or merchandise, trademark, logo, service mark, symbol, decor, architecture, layout, uniform, or similar standardized features, and which causes it to be substantially identical to more than five other businesses regardless of ownership or location." *Id.* §§ 28-1.

<sup>80</sup> *Id.* § 28-281(d).

<sup>81</sup> *Id.* §2-150(h)(1).

<sup>82</sup> *Id.* § 2-150(h)(1)(a)-(c).

<sup>83</sup> *Id.* § 28-150(h)(1)(d).

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windows, internally illuminated signs, and corporate logos.<sup>84</sup>

*3. San Francisco, California*

San Francisco's 2004 zoning ordinance, discussed above, also placed restrictions on formula businesses in order to preserve neighborhood-serving retail operations and enhance future opportunities for resident employment in, and ownership of, such businesses.<sup>85</sup> The city found that it could not effectively maintain a diverse retail base if formula retail went unmonitored in neighborhood commercial areas.<sup>86</sup>

The city specifically found that formula retail would unduly eliminate small and medium-size businesses, which tend to be more unique, and would skew the business mix toward national rather than local, diverse retailers.<sup>87</sup> Therefore, in specified Neighborhood Commercial Districts ("NCDs"), formula retail was prohibited outright, but generally permitted in all other neighborhoods after the neighborhoods received notice.<sup>88</sup> Moreover, the Planning Commission would only review formula retail use upon request.<sup>89</sup> The 2004 Formula Retail Use ordinance also required formula businesses in other specified NCDs to apply for a conditional use permit to the Planning Department prior to commencing development.<sup>90</sup> Conditional use authorization required that the Planning Commission conduct a public hearing and consider the number and similarity of other

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<sup>84</sup> *Id.* § 28-150(h)(1)(d)(3),(7),(8). This is a non-exhaustive list.

<sup>85</sup> S.F., CAL., PLANNING CODE § 703.3(a)(2) (2009). The Planning code defines formula retail as a type of retail establishment with eleven or more other retail establishments in the United States. *Id.* § 703.3(b). Formula retail maintains two or more of the following features: standardized merchandise, building design and color, apparel, trademark, or signage. *Id.*

<sup>86</sup> *Id.* § 703.3(a)(9).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 703.3(e)-(f).

<sup>89</sup> Institute for Local Self-Reliance, Formula Business Restrictions: San Francisco, <http://www.newrules.org/retail/formula.html> (last visited Mar. 10, 2010).

<sup>90</sup> *Id.* § 312(d).



formula retailers in that NCD, compatibility of the physical appearance of the proposed establishment, the amount of existing vacant retail space, and the mix of neighborhood-serving retailers with those that serve beyond the neighborhood.<sup>91</sup>

Unsatisfied with the effectiveness of the 2004 ordinance, San Francisco voters approved the Small Business Act through a ballot proposition in 2006.<sup>92</sup> The amendment requires all formula retail uses in any NCD to obtain a conditional use permit from the Planning Commission, subject to the guidelines set forth above.<sup>93</sup> The Planning Commission determines if “the proposed use or feature, at the size and intensity contemplated, will provide a development that is necessary or desirable for, or compatible with, the neighborhood or the community.”<sup>94</sup> Further, this amendment allows the Board of Supervisors to adopt more restrictive provisions on permits for formula businesses or to prohibit them from operating in any other NCDs.<sup>95</sup>

### III. STATUTORY PROTECTIONS BEYOND ZONING ORDINANCES

State and city governments can enact legislation beyond zoning regulations that will impact small and large businesses in different ways. As discussed below, some laws, such as local purchasing preferences, commercial rent controls, and tax breaks, are designed to help small businesses stay open, while others, like living wage ordinances, are designed to discourage non-unionized, large retailers (such as Wal-Mart) from opening stores. These tools have all been used in different areas

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<sup>91</sup> *Id.* § 703.3(h).

<sup>92</sup> Patrick McGeehan, *Now, Big-Name Retail Chains Will Take the Other Boroughs, Too*, N.Y. TIMES, Jan. 14, 2007, [http://www.nytimes.com/2007/01/14/nyregion/14chains.html?\\_r=1&sq=midtown&st=nyt&scp=2700&pagewanted=print](http://www.nytimes.com/2007/01/14/nyregion/14chains.html?_r=1&sq=midtown&st=nyt&scp=2700&pagewanted=print). This amendment became effective in 2007.

<sup>93</sup> S.F., CAL., PLANNING CODE § 703.4(b). Formula retail uses are still fully prohibited in the North Beach NCD as well as the Hayes-Gough NCD.

<sup>94</sup> *Id.* § 303(c)(1).

<sup>95</sup> *Id.* § 703.4(c).

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throughout the country at various times.

*A. Local Purchasing Preferences*

To generate more local economic activity, some states or cities give preference to local businesses for public contracts. Some will choose a local business when there is a tie bid with a non-local business, while other laws mandate that the government accept local business bids even when they are higher, so long as the local bid is within a given percentage of the lowest non-local bid.<sup>96</sup> Local purchasing preferences are intended to boost the local economy by providing more jobs and greater tax revenue.<sup>97</sup> Albuquerque, New Mexico and Wyoming have enacted local purchasing preference laws.

*1. Albuquerque, New Mexico*

Albuquerque, New Mexico enacted an ordinance to regulate the allocation of contracts and designated purchasing preferences for residential and local businesses in 1994.<sup>98</sup> and recently amended it to enhance preferences for small local businesses as well.<sup>99</sup> The ordinance regulates three types of business and the situations under which they are to be given preference.<sup>100</sup> A “local business” is one whose principal office or place of business is in the Greater Albuquerque Metropolitan Area.<sup>101</sup> Local preferences apply to: requests for proposals, requests for bids, and requests for quotes for purchasing goods or services or for the award of concession contracts.<sup>102</sup> “Resident businesses”

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<sup>96</sup> Institute for Local Self-Reliance, Local Purchasing Preferences, <http://www.newrules.org/retail/rules/local-purchasing-preferences> (last visited Mar. 10, 2010).

<sup>97</sup> *See id.*

<sup>98</sup> ALBUQUERQUE, N.M., CODE OF ORDINANCES, § 5-5-17 (2009).

<sup>99</sup> *Id.* § 5-5-17(c).

<sup>100</sup> *Id.* § 5-5-17(A).

<sup>101</sup> *Id.* § 5-5-17(B)(1). The Greater Albuquerque Metropolitan Area is, “all locations within the city and Bernalillo County.” *Id.* § 5-5-3.

<sup>102</sup> *Id.* § 5-5-17(A)(1).

refer to those businesses that maintain their principal office and do business in New Mexico or New York.<sup>103</sup> Pursuant to New Mexico State law, residential contractor preferences apply to construction contracts, and residential business and manufacturer preferences apply to requests for bids or requests for proposals for the purchase of goods or services.<sup>104</sup> The Albuquerque ordinance accounts for the state law, but sets forth that the State's residential business preference applies only when no offers have been made by local businesses.<sup>105</sup> Finally, "small businesses" are local businesses that employ an average of less than twenty full-time employees and are afforded slightly more protection by the Albuquerque ordinance.<sup>106</sup> A preference is given to small businesses in their requests for bids, proposals, and quotes for the purchase of goods or services.<sup>107</sup> The stated goal of the new ordinance is to include small businesses in at least ten percent of total goods and services purchases; therefore, small businesses do not have a preference over local businesses, except as reflected in this ten percent goal.<sup>108</sup> None of these preferences apply to solicitations for purchase or concession contracts for more than five million dollars, or if federal funds or projects are involved.<sup>109</sup>

To determine whether a proposal or bid must be awarded to a preferred business, the local, residential, or small business is

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<sup>103</sup> N.M. STAT. ANN. § 13-1-21(A)(1)–(2) (West 2009). New York businesses are also given residential preference, because New York statutes had recently barred businesses residing in States which discriminated against New York state enterprises in their procurement of products and services from selling goods or providing services to New York state agencies. *See* N.Y. State Fin. Law § 165(6). This act eliminated the discriminatory treatment so that New Mexico businesses would be allowed back into the New York market. *See* ALBUQUERQUE, N.M., CODE OF ORDINANCES. § 13-1-21(A)(1)–(3).

<sup>104</sup> ALBUQUERQUE, N.M., CODE OF ORDINANCES § 5-5-17(A)(3)–(4).

<sup>105</sup> *Id.* A "resident contractor" has similar characteristics to a "resident business." *Compare* N.M. STAT. ANN. § 13-1-21 with § 13-4-2.

<sup>106</sup> ALBUQUERQUE, N.M., CODE OF ORDINANCES, § 5-5-17(B)(5).

<sup>107</sup> *Id.* § 5-5-17(A)(2).

<sup>108</sup> *Id.* § 5-5-17(D).

<sup>109</sup> *Id.* § 5-5-17(A)(5).

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given a five percent differential margin on its bid, quote, or proposal.<sup>110</sup> For instance, if a local business bids \$100,000 for a solicited project, and a competitor from outside the Albuquerque metropolitan area bids \$96,000, the city would be required to accept the local offer, since the local bid is within five percent of the lowest non-local bid.

In 2000, Bernalillo County, which is subject to Albuquerque's zoning amendment, appealed a lower court's ruling that mandated the county award a construction bid to a local business when the local bid was within five percent of the out-of-state bid.<sup>111</sup> In *Bradbury & Stamm Constr. v. Bd. of County Comm'rs*, the county argued that the statute gave it discretionary power to determine whether the local preference was practicable, regardless of the percentage differential.<sup>112</sup> The Court ruled that the local purchasing preference formula was mandatory and provided no discretion for the city when the local bid's price differential is within five percent of the local offer.<sup>113</sup> According to the court, a local preference was per se practicable under the statute when the local bid was within five percent of the non-local bid and the county had no further discretion.<sup>114</sup>

## 2. Wyoming

In Wyoming, state or local authorities can only award local offers based upon preferential price differentials when purchasing agricultural products, or constructing and maintaining public structures, so long as they are not inferior to materials offered from out-of-state suppliers.<sup>115</sup> A five percent price differential preference may be given for Wyoming materials when the contract is less than \$5,000,000.<sup>116</sup> Additionally, the

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<sup>110</sup> *Id.* § 5-5-17(B)(2).

<sup>111</sup> *Bradbury & Stamm Constr. v. Bd. of County Comm'rs of Bernalillo County*, 35 P.3d 298, 299 (N.M. Ct. App. 2001).

<sup>112</sup> *Id.* at 299.

<sup>113</sup> *Id.* at 302.

<sup>114</sup> *Id.*

<sup>115</sup> WYO. STAT. ANN. § 16-6-105(a) (2010).

<sup>116</sup> *Id.* §§ 16-6-105(a)-107.

statute prohibits a resident bidder from sub-contracting more than thirty percent to non-residents.<sup>117</sup>

The Supreme Court of Wyoming has upheld this local purchasing preference against Equal Protection and Due Process claims under both Wyoming and United States Constitutions. In *Galesburg Constr. Co., Inc. of Wyoming v. Bd. of Trs. of Memorial Hosp. of Converse County*, an out-of-state construction company was the lowest bidder, but lost a construction bid because its bid was less than five percent lower than that of the lowest residential bidder.<sup>118</sup> After determining that the statute should not be examined under a strict scrutiny standard, the court examined whether the statute served a legitimate state interest and whether the statute was rationally related to advancement of that interest.<sup>119</sup> In so doing, the court upheld the statute, finding that the local purchasing preference furthered the state's legitimate intent to encourage local business through enhancing and stabilizing the local economy and tax base by keeping revenues within the state.<sup>120</sup>

### B. Commercial Rent Controls

Commercial rent control, like residential rent control, is intended to cap the amount of rent that a landlord can demand, thereby eliminating landlords' incentive to deny lease renewals for existing tenants.<sup>121</sup> This functions to protect small businesses, which are often unable to compete with larger, national retailers who are able to pay much higher rents for choice locations. In the current economic downturn, small and large retailers alike are closing, but small businesses are being hit especially hard by

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<sup>117</sup> *Id.* § 16-6-103.

<sup>118</sup> *Galesburg Constr. Co. of Wyo. v. Bd. of Trs. of Mem'l Hosp.*, 641 P.2d 745, 747 (Wyo. 1982).

<sup>119</sup> *Id.* at 749-50. The Court found that neither fundamental rights nor suspect classification should be applied to corporations.

<sup>120</sup> *Id.* at 750.

<sup>121</sup> Free Advice, Landlord Tenant: What Is Rent Control, [http://real-estate-law.freeadvice.com/landlord\\_tenant/rent-control.htm](http://real-estate-law.freeadvice.com/landlord_tenant/rent-control.htm) (last visited Mar. 25, 2010).

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loss of sales,<sup>122</sup> making it increasingly difficult to make already high rent payments.<sup>123</sup> In New York City, small business advocates have seen this downturn as another opportunity to try to pass new commercial rent control regulation.<sup>124</sup> (The last attempt was in 1984). A bill that would require landlords to negotiate lease renewals with commercial tenants or face binding arbitration, is awaiting Council vote as of the time of this writing.<sup>125</sup> Although no other jurisdictions currently use commercial rent control, three cities in the United States have enacted commercial rent control ordinances in recent history: Berkeley, California (on three separate occasions beginning in 1978); Albany, New York (for a brief period during 1948); and New York City (from 1945 through 1963).<sup>126</sup> The current and previous attempts to revive commercial rent control in New York City, as well as the different regulations in Berkeley, California illustrate how rent control assists small business.

*1. New York, New York*

New York City's commercial rent control statute of 1945 expired in 1963 and stayed dormant until 1984 when City Council members introduced a bill that would apply rent controls to businesses occupying less than 10,000 square feet.<sup>127</sup> The bill would have limited rent increases to forty-five percent over five years for tenants in good standing.<sup>128</sup> It called for

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<sup>122</sup> See *supra* Part I.

<sup>123</sup> Christine Haughney, *Stores Go Dark Where Buyers Once Roamed*, N.Y. TIMES, July 20, 2009.

<sup>124</sup> Eliot Brown, *Mom and Pop Go to City Hall*, N. Y. OBSERVER, Nov. 23, 2009.

<sup>125</sup> Small Business Survival Act, Proposed Int. No. 847-A (N.Y., N.Y. 2008).

<sup>126</sup> W. Dennis Keating, *The Elmwood Experiment: The Use of Commercial Rent Stabilization to Preserve a Diverse Neighborhood Shopping District*, 28 WASH. U. J. URB. & CONTEMP. L. 107, 124-38 (1985).

<sup>127</sup> Michel Marriott, *A Bill to Control Business Rents Is Called Flawed*, N.Y. TIMES, Nov. 16, 1988, at B6.

<sup>128</sup> *Id.*

arbitration when landlords and tenants could not agree on a lease renewal under that limit.<sup>129</sup> Lawyers appearing before the committee cited aspects of the bill that might pose legal problems, including, (1) the city's authority to enact such a law; (2) the legality of using private-citizen arbitrators to determine rents; and, (3) the limitation on a landlord's fair return on his investment.<sup>130</sup> The bill was defeated at the committee level,<sup>131</sup> and commercial rent control was not considered again until recently.

In 2008, City Council member Robert Jackson introduced a new rent control bill to address lease renewals for small, local businesses.<sup>132</sup> The bill applies to independently owned and operated New York City businesses, with no more than 100 employees, where such business is not dominant in its field.<sup>133</sup> Under this regulation, tenants would have the option to renew their leases for a ten-year term, unless they lost that right for specified reasons, such as consistently failing to pay rent, using the space in a manner substantially different from what is described in the current lease agreement or for conversion into a different commercial purpose by the landlord himself.<sup>134</sup> If the landlord agrees to renew the lease, he and the tenant can negotiate the rent or either party can compel non-binding mediation.<sup>135</sup> If after 90 days of negotiations and/or mediation

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Council Panel Defeats Commercial-Rent Bill*, N.Y. TIMES, Dec. 2, 1988, at B2.

<sup>132</sup> Small Business Act, Proposed Int. No. 847-A §§ 22-801, 22-802(c) (N.Y., N.Y. 2008).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* § 22-804(a), (d). Other grounds for non-renewal are: if the landlord is going to perform major construction that requires tenants to vacate; the tenant is using the space for illegal activities or permitting such activity; substantial breach of substantive lease obligation without cure within thirty days after written notice has been given to cure the breach; subletting without notification by certified mail to the landlord and without the landlord's consent; or it has been determined that the tenant persistently violates New York City tax laws or fails to obtain necessary licenses relating to the premises or New York City's laws. *Id.* § 22-804(d).

<sup>135</sup> *Id.* § 22-804(e)(1).

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there is no agreement, the tenant must initiate arbitration in order to retain the right to renew.<sup>136</sup> The arbitrator's rent determination is binding and based on considerations including, the rental market in the area, the condition of the space and services provided, the landlord's maintenance costs, and the extent to which the business is bound to a particular location.<sup>137</sup> However, if the tenant still does not agree to pay the determined rent, he may remain in that space, paying no more than five percent more than the previous year's average rent, until such time when a new tenant approaches the landlord.<sup>138</sup> Even then, the landlord must give the tenant the right of first refusal on a bona fide offer from a new prospective tenant.<sup>139</sup> While this bill has significant support in the City Council, Mayor Michael Bloomberg opposes it.<sup>140</sup>

*2. Berkeley, California*

Berkeley, California regulated commercial rental practices three times, beginning in 1978.<sup>141</sup> The first regulation, a ballot initiative passed in November 1978, "required a partial rebate to residential and commercial renters of the property tax reductions received by the city's landlords as a result of Proposition 13."<sup>142</sup> According to the regulation, eighty percent of a landlord's tax savings were to be credited to renters in the form of rent reduction, and rent control initiatives were enacted to prevent landlords from offsetting the costs of the rebate through extreme rent increases.<sup>143</sup> The initiative lacked effectiveness as it did not create a means by which to enforce the law and it expired by its

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* §§ 22-804(e)(3)(d), (e)(3)(f).

<sup>138</sup> *Id.* §§ 22-804(e)(3)(f), (e)(3)(g).

<sup>139</sup> *Id.* § 22-804(e)(3)(g).

<sup>140</sup> Daniel P. Bader, *Is the Small Business Survival Bill Dead?*, MANHATTAN TIMES, Nov. 18, 2009, at 10.

<sup>141</sup> *Ross v. City of Berkeley*, 655 F. Supp. 820, 823 (N.D. Cal. 1987).

<sup>142</sup> *Id.* (internal citations omitted).

<sup>143</sup> *Id.* (internal citations omitted).



own terms on December 31, 1979.<sup>144</sup>

In 1982, Berkeley passed another initiative, establishing the Elmwood Commercial Rent Stabilization and Eviction Protection Program.<sup>145</sup> Under the ordinance, landlords needed “good cause” to evict commercial tenants or refuse to renew existing leases.<sup>146</sup> The stated purpose of the Elmwood ordinance was to protect commercial tenants who served local needs from rent increases that were not justified by their landlord’s cost increases and to test the viability of commercial rent control as a means of preserving such business outside of the downtown district.<sup>147</sup>

Berkeley enacted its most recent commercial rent control ordinance for another commercial district in 1986.<sup>148</sup> The stated purpose of the ordinance was “to preserve the unique character of the Telegraph Avenue Area Commercial District and to prevent business displacement by excessive rent increases and/or evictions.”<sup>149</sup> The ordinance specified limited grounds for eviction,<sup>150</sup> coupled with an arbitration procedure to determine

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<sup>144</sup> *Id.* (internal citation omitted).

<sup>145</sup> *Id.* (internal citation omitted).

<sup>146</sup> *Id.* (internal citations omitted). The eight reasons that constituted good cause to evict were:

(1) failure to pay rent; (2) substantial violation of the terms of the lease (other than an obligation to surrender possession at the end of a term or upon notice); (3) committing a nuisance on the premises; (4) using the premises for an illegal purpose; (5) refusal to execute an extension or renewal of a lease upon expiration of a prior rental agreement; (6) refusal to allow a landlord access to make necessary repairs; (7) a landlord’s desire to recover possession to remove the premises from commercial use; and (8) a landlord’s desire to recover possession to make repairs that cannot be completed while the tenant occupies the premises.

*Id.* at 824 n.3 (internal citation and quotation marks omitted).

<sup>147</sup> *Id.* at 824 n.2 (internal citation omitted).

<sup>148</sup> *Id.* at 825–26.

<sup>149</sup> *Id.* at 826 (internal citation omitted).

<sup>150</sup> *Id.* at 826 & n.6. The enumerated grounds for eviction are:

(1) failure to pay rent; (2) substantial lease violation; (3) committing a nuisance on the premises; (4) using the premises for an illegal purpose; (5) refusal to renew or extend an expired lease; and

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commercial rents.<sup>151</sup> This ordinance was successfully challenged for violating the Contracts Clause of the United States Constitution.<sup>152</sup>

California has since banned commercial rent control by statute, stating that it discourages commercial development, discourages competition by giving an artificial advantage to certain enterprises at the expense of others and has adverse economic consequences statewide.<sup>153</sup>

*C. Tax Incentives*

Tax incentives can be used to protect small businesses in two ways: (1) by rescinding tax breaks currently allowed to large retailers; and (2) by providing tax incentives for small businesses. Over the last twenty years, state and city governments have attempted to use tax breaks and other kinds of subsidies to bolster their economies by attracting or retaining large retail chains.<sup>154</sup> For example, as of 2004, Wal-Mart had received about \$1 billion in public subsidies from state and local governments.<sup>155</sup> However, there has been increasing awareness

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(6) refusal to provide the landlord access to make repairs, improvements, or to show the premises to prospective buyers or tenants.

*Id.* at 826 n.6.

<sup>151</sup> *Id.* at 826. Under the ordinance, “particular weight [was to] be given to the first criterion, which require[d] consideration of the extent to which a business contributes to the uniqueness and diversity of the Telegraph Avenue Area and to the availability of goods and services in the Telegraph Avenue Area and the city.” *Id.* (internal citation and quotation marks omitted).

<sup>152</sup> *Id.* at 836. There was a claim under the Takings Clause of the United States Constitution as well, but since the amount of compensation had not yet been determined through arbitration, the claim was not ripe for judicial review. *Id.* at 841–42.

<sup>153</sup> CAL. CIV. CODE § 1954.25 (West 2010).

<sup>154</sup> Institute for Local Self-Reliance, *Eliminating Subsidies for Big Businesses*, <http://www.newrules.org/retail/rules/eliminating-subsidies-big-business> (last visited, Mar. 10, 2010) [hereinafter *Eliminating Subsidies*].

<sup>155</sup> PHILIP MATTERA & ANNA PURINTON, *GOOD JOBS FIRST, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS*

that such subsidies do not produce the desired economic effects.<sup>156</sup> Although state and local governments are increasingly less inclined to assist large retailers through the use of tax subsidies, because large retailers already have a significant competitive advantage over small businesses, a comprehensive plan to protect small businesses will probably have to incorporate both approaches of tax incentives to be effective.

According to the Institute for Local Self Reliance (“ILSR”), granting subsidies to large businesses is particularly unwarranted in the retail sector, because this creates an uneven playing field for locally owned businesses,<sup>157</sup> and big retail stores produce no net gain in employment or in wages paid.<sup>158</sup> Some jurisdictions follow this line of thinking, as evidenced by the State of Arizona’s ban upon tax abatements for large retailers.<sup>159</sup>

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NEVER-ENDING GROWTH 14 (2004), available at <http://www.goodjobsfirst.org/pdf/wmtstudy.pdf>. Good Jobs First is a self-described resource center for grassroots groups and public officials which aims to promote corporate and governmental accountability in economic development for working families. See Good Jobs First, Who We Are, [http://www.goodjobsfirst.org/about\\_us.cfm](http://www.goodjobsfirst.org/about_us.cfm) (last visited Mar. 25, 2010).

<sup>156</sup> Institute for Local Self-Reliance, Years of Subsidizing Retail and Nothing to Show for It, <http://www.newrules.org/retail/news/years-subsidizing-retail-and-nothing-show-it> (last visited, Mar. 10, 2010).

<sup>157</sup> Eliminating Subsidies, *supra* note 154. The Institute for Local Self Reliance (“ILSR”) asserts that subsidies are rarely provided to locally owned businesses, and that exacerbating the situation is the fact that the local businesses will often see their tax dollars being used to subsidize their biggest competitors. *Id.*

<sup>158</sup> *Id.* The ILSR references a study conducted in Minnesota which found that half of Minnesota’s recent subsidies were granted to companies paying wages more than 20 percent below market levels for their industries. *Id.* The ILSR also makes reference to a phenomenon that it terms “job piracy,” whereby cities use tax incentives and subsidies in attempts to lure companies from other cities or states. *Id.* According to the ILSR, “job piracy” produces no real economic benefit, as no new jobs are created, only the relocation of existing jobs. *Id.*

<sup>159</sup> ARIZ. REV. STAT. ANN. § 42-6010(a) (2010).

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*1. State of Arizona*

In July 2007, Arizona adopted a law barring “municipalities in the Phoenix region from providing tax breaks or incentives to retail development.”<sup>160</sup> The Arizona statute states that a city or town within the Phoenix metropolitan area with a population over two million “shall not offer or provide a tax incentive to a business entity as an inducement or in exchange for locating or relocating a retail facility in the city or town.”<sup>161</sup> A city or town violating this prohibition “is subject to a penalty equal to the amount of the incentive realized by the taxpayer, extended over a period of sixty months.”<sup>162</sup> In this manner, Arizona is attempting to eliminate the “subsidies” that certain municipalities offer as incentives for large retailers to locate or relocate within their jurisdiction.

One of the exceptions to the Arizona ban is of particular interest. The statute does not apply to “[t]ax incentives for retail business facilities in an area designated as a redevelopment project, where the average household income is less than the average city household income, as determined by the United States census bureau.”<sup>163</sup> This exception encourages development, big or small, in poorer neighborhoods. As further discussed below, big-box retail businesses in such areas may be a mixed blessing, as they offer low prices to customers, but may not pay employees a living wage.

*D. Living Wage Ordinances*

“Living Wage” ordinances usually require businesses that have contracts with local governments to provide a specified wage and benefits package that is higher than the federal minimum.<sup>164</sup> Since the mid-1990s, more than 140 living wage

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* § 42-6010(B).

<sup>163</sup> *Id.* § 42-6010(D)(3). Redevelopment projects are areas that relate to slum clearance and redevelopment. *Id.* § 36-1471(17).

<sup>164</sup> Institute for Local Self-Reliance, Living Wage, <http://www.newrules>.

laws have been enacted.<sup>165</sup> Municipal living wage ordinances vary in their provisions, but the overarching goal of these ordinances is to ensure that public contractors, employers, and corporations receiving public financial assistance pay their employees a specified wage and benefits package that is higher than the federally defined poverty level.<sup>166</sup> More recently, Chicago, Illinois, and Lawrence Township, New Jersey, have both proposed living wage ordinances specifically targeted at formula retail businesses.<sup>167</sup>

### 1. Chicago, Illinois

In July 2006, Chicago, Illinois, became one of the first municipalities to attempt to specifically target large retailers with living wage legislation.<sup>168</sup> The ordinance passed by the City Council was vetoed by Mayor Daley, and did not have enough

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org/equity/node/2067 (last visited, Mar. 10, 2010) [hereinafter Living Wage].

<sup>165</sup> Jeanette Wicks-Lim, *Should We Be Talking About Living Wages Now?*, DOLLARS & SENSE, Mar./Apr. 2009, at 11.

<sup>166</sup> See Living Wage, *supra* note 164. The “Federal Poverty Level” refers to the federal poverty guidelines issued each year by the Department of Health and Human Resources and are used for administrative purposes such as determining financial eligibility for certain federal programs. See Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4,199 (Jan. 23, 2009). As of February 2010, Congress had taken action to maintain the 2009 poverty guidelines in effect until March 10, 2010. U.S. Department of Health & Human Services, 2009 Federal Poverty Guidelines, <http://aspe.hhs.gov/poverty/09poverty.shtml> (last visited Mar. 10, 2010). With respect to a four-person family within the 48 Contiguous States and the District of Columbia, the poverty guideline is an annual income of \$22,050. Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. at 4,200. Accordingly, a person working 40 hours a week would have to earn at least \$10.60 per hour to earn above the federal poverty guideline with respect to a family of four.

<sup>167</sup> Big Box Living Wage & Benefits Ordinance, Proposed Municipal Code § 4-404-020 (Chi., Ill. 2006); Large Retail Living Wage & Benefits Ordinance, Proposed Ordinance § 1 (2006).

<sup>168</sup> Big Box Living Wage & Benefits Ordinance, Proposed Municipal Code § 4-404-020 (Chi., Ill. 2006). This ordinance was not limited to public contractors or those receiving public benefits as most living wage ordinances are. See *id.*

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support to override the veto.<sup>169</sup>

The proposed ordinance would have mandated that all large retail employers in Chicago “provide employees an hourly compensation package with a total value of no less than the sum of the living wage rate and the benefits rate for each hour that the employee works on the premises of a large retailer.”<sup>170</sup> Large retailers are defined as those with annual gross revenues of \$1 billion or more and indoor square footage of 75,000 square feet or more.<sup>171</sup> The ordinance defined the “living wage rate” as an hourly rate of \$10.60, increasing by the annual “increase in the cost of living.”<sup>172</sup> “Benefits rate” is defined as an hourly rate of \$3.00, also increasing by the annual “increase in the cost of living.”<sup>173</sup> Large retail employers who failed to pay a “living wage” would have been “required to pay the employee the balance of the compensation owed, including interest thereon, and an additional amount equal to twice the underpaid compensation.”<sup>174</sup> Large retail employers who attempted to retaliate against employees would have been liable for “an amount set by the agency designated by the city to administer the ordinance or a court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars [\$150.00] for each day that the violation continued or until legal judgment is final.”<sup>175</sup>

*2. Lawrence Township, New Jersey*

In 2006, the Lawrence<sup>176</sup> Living Wage Coalition conducted a

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<sup>169</sup> *See id.*

<sup>170</sup> *Id.* § 4-404-020(a).

<sup>171</sup> *Id.* § 4-404-010(d).

<sup>172</sup> *Id.* § 4-404-020(b).

<sup>173</sup> *Id.* § 4-404-020(c).

<sup>174</sup> *Id.* § 4-404-070(f).

<sup>175</sup> *Id.*

<sup>176</sup> Lawrenceville and Lawrence Township are the same place. Lawrence Township still uses the name “Lawrenceville” occasionally. The title of the website is “Lawrenceville Living Wage Coalition” but all other references (in the website’s article itself, as well as the newspaper articles cited therein) to

successful petition to place a living wage ordinance aimed at large retailers on its ballot.<sup>177</sup> The stated purposes of the proposed ordinance included (1) promoting wages and benefits that allow working families to meet basic needs; (2) safeguarding the economic well-being of the public; (3) reducing the burden on taxpayers; and (4) ensuring that large retailers pay their workers a living wage and encouraging them to provide important benefits.<sup>178</sup> The proposed ordinance targeted “large retailers,” defined as retailers (1) having annual gross revenues totaling \$1 billion or more and (2) having an “indoor premises” (which may be the aggregate of certain adjacent stores) comprising 100,000 square feet or more.<sup>179</sup> Large retail employers would have been required to pay an hourly compensation package of no less than the sum of the “living wage rate” and “benefits rate” for each hour an employee worked on its premises.<sup>180</sup> The “living wage rate” was defined in the proposed ordinance as “an hourly rate of \$11.08—a wage which would enable a full-time worker to earn an income that will lift a family up to approximately 115% of the Federal Poverty Guidelines for a family of four” and would be subject to an annual cost of living increase.<sup>181</sup> The “benefits rate” was established as \$3.50, also subject to an annual cost of living increase.<sup>182</sup>

Two weeks after the Lawrence Township Council postponed placing the the proposed ordinance on a ballot, a New Jersey State Superior Court judge ruled that the local officials did not have the power to change minimum wage standards in any

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said Coalition are to the “New Jersey Living Wage Coalition.” See New Jersey Living Wage Coalition, Lawrenceville Living Wage Coalition, <http://www.njlivingwagecoalition.org> (last visited, Mar. 10, 2010).

<sup>177</sup> *Id.*

<sup>178</sup> Large Retail Living Wage & Benefits Ordinance, Proposed Ordinance § 1 (2006).

<sup>179</sup> *Id.* § 2(c).

<sup>180</sup> *Id.* § 3(a).

<sup>181</sup> *Id.* § 3(b).

<sup>182</sup> *Id.* § 3(c).

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way.<sup>183</sup> An appeal was filed with the New Jersey State Superior Court, Appellate Division, but was eventually withdrawn.<sup>184</sup>

## IV. POTENTIAL LEGAL CHALLENGES

Although state and local governments may enact zoning laws to protect small and local business, there are limits as to how intrusively the government may regulate. As demonstrated throughout this Article, small and local businesses may favor these measures to protect their interests and preserve their vitality, but such measures are potentially subject to legal challenges.<sup>185</sup> Specifically, if proposed legislation permits preferences for local businesses over national businesses without a rational basis, attempts to manipulate market forces, interferes with private contracts between businesses, arbitrarily deprives an owner of a protected property interest, attempts to regulate local interests without authority from the state government, or exceeds the scope of its authority from the state government, the legislation may violate state and federal constitutional law.<sup>186</sup> A detailed discussion of the potential legal challenges explores the viability of these tools in order to determine the best options for protecting local and small businesses in New York City.

*A. The Dormant Commerce Clause*

The Dormant Commerce Clause doctrine may prevent regulation involving community impact reviews, store size caps, and formula business restrictions. While the Commerce Clause of the United States Constitution gives Federal government the power to regulate commerce “with foreign Nations, and among

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<sup>183</sup> Lisa Rich, *Superior Court Judge Denies Bid for Minimum Wage Hike on Ballot*, TIMES (Trenton), Aug. 31, 2006, at A3.

<sup>184</sup> Lea Kahn, *Living Wage Group Withdraws Appeal*, LAWRENCE LEDGER, Feb. 1, 2007, available at [http://www.njlivingwagecoalition.org/press/articles/LawrenceLedger\\_2007-02-01.pdf](http://www.njlivingwagecoalition.org/press/articles/LawrenceLedger_2007-02-01.pdf).

<sup>185</sup> See discussion *infra* Part IV.

<sup>186</sup> *Id.*



the several States, and with the Indian Tribes,”<sup>187</sup> the Dormant Commerce Clause, a product of judicial doctrine, applies to the states even when Congress has not acted to regulate commerce.<sup>188</sup> Under the Dormant Commerce Clause doctrine, state and local governments cannot regulate matters that economically burden or discriminate against interstate commerce.<sup>189</sup> Land use regulations such as store size-caps, conditional use permits, formula business restrictions and living wage ordinances, which all address national chain retailers, may be struck down under the Dormant Commerce Clause. Because such chain stores are frequently incorporated out-of-state and operate in “several states,” Commerce Clause violations are commonly argued by businesses seeking to operate in various localities.<sup>190</sup>

Under modern Dormant Commerce Clause jurisprudence, a statute will almost always be struck down if it is facially discriminatory.<sup>191</sup> A facially discriminatory statute is one whose language clearly makes a distinction favoring in-state commerce over out-of-state commerce, or local commerce over state commerce.<sup>192</sup> Even if a statute is not facially discriminatory, it may still be struck down if it was enacted for a discriminatory

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<sup>187</sup> U.S. CONST. art. I, § 8, cl.3.

<sup>188</sup> *Oltra, Inc. v. Pataki*, 273 F. Supp. 2d 265, 271 (W.D.N.Y. 2003) (internal citations omitted).

<sup>189</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>190</sup> Corporations are not protected by the Privileges and Immunities Clause of the United States Constitution though, as it only applies to individuals. *See Asbury Hosp. v. Cass County*, 326 U.S. 207, 210–11 (1945) (affirming that a corporation is “neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution”).

<sup>191</sup> *See, e.g., Granholm v. Heald*, 544 U.S. 460, 487–88 (2005). *But see Maine v. Taylor*, 477 U.S. 131 (1986) (finding overtly discriminatory laws may be upheld only if they serve a legitimate local purpose where nondiscriminatory alternatives are not available).

<sup>192</sup> *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Ore. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 107–08 (1994).

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purpose,<sup>193</sup> or if its effects directly discriminate against out-of-state competition for the benefit of in state economic interests.<sup>194</sup> Such “protectionism” in direct purpose or effect is subject to strict scrutiny by the courts, which requires that the government prove that the regulation is narrowly tailored and the least restrictive means of achieving a compelling purpose.<sup>195</sup> Strict scrutiny is generally fatal to state or local regulation.<sup>196</sup>

However, if a statute is facially neutral (one which does not explicitly discriminate against interstate trade)<sup>197</sup> and the state or local government can demonstrate that the discrimination served a *legitimate* purpose unrelated to protecting local interests and that there are no less discriminatory means to achieve their permissible goals, the statute will usually pass judicial review

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<sup>193</sup> See *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (finding an excise tax on all wholesale liquor sales imposed by Hawaii, and exempting local wines from the tax was purposeful discrimination because the alcoholic products which the law exempted competed with different beverages produced outside the state); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977). The test for standing articulated in *Hunt* has been superseded by statute, see Title VII of the Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C.A. § 2000e-5(f)(1) (West 2010), as recognized in *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 557 (1996).

<sup>194</sup> See *W. Lynn Creamery v. Healy*, 512 U.S. 186, 199 (1994) (invalidating a subsidization program where, even though the funding tax was applied evenly to the in-state and out of state producers of milk, only the in-state producers would be assured that their taxes paid would be refunded through the subsidy); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

<sup>195</sup> *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1950); *Baldwin*, 294 U.S. at 524.

<sup>196</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568, 575, 583 n.16 (1997) (striking down a Maine statute providing tax exemptions to Maine charitable institutions generally, but providing only a more limited tax benefit on charitable institutions serving primarily out-of-state clients); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 526–29, 545 (1949) (holding that a state may not deny operating licenses to out-of-state distributors in order to stabilize the in-state milk supply).

<sup>197</sup> *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 446–47 (1978).

under the “*Pike* balancing test.”<sup>198</sup> Under *Pike*, a facially neutral statute with a legitimate purpose, and merely incidental effects on interstate commerce, will only be invalidated if the burden on interstate commerce is “clearly excessive” in comparison to the local benefit.<sup>199</sup> Because of careful drafting by state, city, and town legislators, the statutes, codes, and ordinances addressed in this article would likely face this lower level of scrutiny to analyze whether the facially neutral statute is Constitutional under the Dormant Commerce Clause.<sup>200</sup>

Regardless of meticulous drafting, however, certain zoning ordinances will still run the risk of being overturned because the burden on interstate commerce outweighs the benefit to the local interest.<sup>201</sup> This is especially true if the purpose or effect of denying a development permit protects local business or excludes out-of-state business. Protecting local economies at the expense of outside competition is a discriminatory purpose.<sup>202</sup> For example, the community impact review required by Brattleboro, Vermont and the Maine State ordinance to protect local economies have such a discriminatory purpose.<sup>203</sup> Additionally, under San Francisco’s formula business restriction Article 7,<sup>204</sup> Section 703.3(a)(2) specifically references the need to control the mix of businesses in the geographic area so that the district is not unduly skewed toward national retail.<sup>205</sup> This, similarly, indicates a local preference. However, San Francisco’s Neighborhood Commercial Districts, discussed in Part II(A) of this Article, is a clear example of a zoning system designed to protect small business, cap retail store sizes, and

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<sup>198</sup> See *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (articulating the balancing approach).

<sup>199</sup> *Id.*

<sup>200</sup> See *id.*

<sup>201</sup> See, e.g., *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281, 1289–90, 1292 (S.D. Fla. 2007), *aff’d*, 542 F.3d 844 (11th Cir. 2008).

<sup>202</sup> *Id.* at 1293 (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 351–52 (1977)).

<sup>203</sup> See *supra* Part II.B.

<sup>204</sup> See *supra* Part II.D.

<sup>205</sup> S.F., CAL., PLANNING CODE § 703.3(a)(2) (2009).

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withstand a Constitutional challenge under the Dormant Commerce Clause.<sup>206</sup> San Francisco's Ordinance could serve as a useful model for a New York City paradigm.

Careful crafting remains imperative. Discriminatory effects challenges could be brought against store size caps and formula business restrictions, as these types of restrictions may discriminate by denying national chains (who are typically incorporated out-of-state) their ability to buy and store in bulk and maintain their competitive edge.<sup>207</sup> By removing the advantage out-of-state businesses have over local businesses, a statute discriminates in its effect. For example, in 1989 a Federal District Court in New York found that an ordinance prohibiting fishing boats over 90 feet long violated the Dormant Commerce Clause because, while it only applied to one local vessel, there were at least ten out-of-state applicants who would have had to either buy smaller boats or be excluded from the market.<sup>208</sup>

However, national chains incorporated out-of-state, like Wal-Mart, Exxon or Staples will not always win a Dormant Commerce Clause claim against regulations with discriminatory effects. For instance, in *Exxon Corp. v. Governor of Maryland*, a Maryland statute made it prohibitive for Exxon to operate any retail service stations within the state but did not prevent Exxon

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<sup>206</sup> *Wal-Mart Stores Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006). "The Ordinance's putative benefits—avoidance of traffic congestion, prevention of urban blight, minimization of air pollution, and preservation of land-use objectives as to location and character of economic zones within Turlock—are not so outweighed by any burden on interstate commerce as to render the Ordinance unreasonable or irrational." Wal Mart failed to prove the imposition of "any disparate or other burden upon interstate commerce" *Id.* at 1017.

<sup>207</sup> See Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 941–42 (2005). Volume buying allows large national chains to obtain price concessions from suppliers and is a key for national chains to maintain lower prices than local businesses. *Id.* at 941. This requires large spaces to display and store the goods bought in bulk. *Id.*

<sup>208</sup> *Atl. Prince, Ltd. v. Jorling*, 710 F. Supp. 893, 895, 897, 903 (E.D.N.Y. 1989).

from operating in the state.<sup>209</sup> The statute was enacted in response to a petroleum shortage and complaints that petroleum producers and refiners received preferential treatment during shortages.<sup>210</sup> The statute, therefore, uniformly required those producers and refiners to offer a voluntary price reduction to service stations supplied in Maryland. The purpose of the statute's discrimination in support of the Maryland market did not distinguish between the out-of-state retailers, and its effect did not prevent out-of-state retailers from operating in the state.<sup>211</sup> In so holding, the Supreme Court affirmed that the Commerce Clause provides protection for the general interstate market against undue regulatory burdens, not for only one particular business or enterprise.<sup>212</sup>

Further, a recent case in New York illustrates how a court may give deference to legislatures when a plaintiff alleges discriminatory purpose and effect. In 1998, the Court in *Great Atlantic and Pacific Tea Co. v. Town of East Hampton* dismissed a supermarket chain's Dormant Commerce Clause claim that the town's store size cap was an undue burden on interstate commerce.<sup>213</sup> The Court found that although the ordinance did seek to protect small businesses, it applied to both in-state and out-of-state businesses alike. The Court also noted that while some of the supermarket's products came from out-of-state, there was not even an incidental burden to interstate commerce.<sup>214</sup> The Court considered whether the law applied evenhandedly to large and small businesses alike, rather than comparing the disparate impact the store size cap would have on out-of-state actors' ability to bring their business into the town.<sup>215</sup>

Finally, under the market participant theory though, state or

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<sup>209</sup> *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119, 121 (1978).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 126.

<sup>212</sup> *Id.* at 127-28.

<sup>213</sup> *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 997 F. Supp. 340, 345, 351 (E.D.N.Y. 1998).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

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local governments may favor local business over non-local business without violating the Dormant Commerce Clause by acting as a market participant. A government is a participant and not a regulator when, for example, it is contracting for its own construction project instead of regulating private construction contracts. Thus, local purchasing preference laws<sup>216</sup> favoring government contractors are permitted through the market participation exception. Developed in 1976, the market participant theory illustrates the principle that while states should not be able to regulate private trade in the national market, there is no need to restrict a state from regulating itself.<sup>217</sup> However, if the state or local government is acting as a market participant, it may not regulate commerce once it no longer has a proprietary interest. For example, while the state of Alaska was selling timber in the marketplace the state was permitted to regulate the terms of sale as a market participant; however an Alaskan law, which required all purchasers to process the timber in-state after the sale and prior to shipping, was not protected by the market-participant exception. Once the timber was sold, the state no longer had a proprietary interest.<sup>218</sup>

*B. Equal Protection and Due Process*

The Fourteenth Amendment of the United States Constitution guarantees that, “no state shall . . . deprive any person of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the *equal protection* of the laws.”<sup>219</sup> Equal Protection and Due Process claims against land use regulations typically allege injury to an economic interest, but the regulation will be upheld so long as it is rationally related to a legitimate government purpose.<sup>220</sup> Commercial use

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<sup>216</sup> See *supra* Part III.A.

<sup>217</sup> See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n.7 (1980) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)).

<sup>218</sup> *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984).

<sup>219</sup> U.S. CONST. amend. XIV, § 1 (emphases added).

<sup>220</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926). However, Courts are less deferential when the classification involves a

zoning in New York City must be implemented in accordance with a “well considered plan.”<sup>221</sup> A well considered zoning amendment is one that reflects the community’s changes and growth and would, “benefit the community as a whole as opposed to benefiting individuals or a group of individuals.”<sup>222</sup>

It will probably be difficult for a plaintiff to prevail on an Equal Protection claim within this context. When permits are denied based on store size caps, community impact reviews, neighborhood serving tests, and formula business restrictions, challengers claiming a violation of Equal Protection may argue that the distinction was arbitrary and therefore an abuse of power.<sup>223</sup> However, the governmental unit has only to show that there was a conceivable legitimate purpose for the legislation, such as concern for traffic congestion, environmental hazards or inadequate infrastructure.<sup>224</sup> Also, municipalities can “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”<sup>225</sup> Equal Protection claims could be made against living

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“suspect class,” such as race or national origin or involves a fundamental right such as the right to privacy or free speech. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365, 371–72, 376 (1970); *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967). Classifications between different size retailers will not require this special protection. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

<sup>221</sup> N.Y. GEN. CITY LAW § 20(25) (McKinney 2009).

<sup>222</sup> *Asian Ams. for Equal. v. Koch*, 527 N.E.2d 265, 270 (N.Y. 1988).

<sup>223</sup> *See, e.g., Wal-Mart Stores Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 995–96 (E.D. Cal. 2006) (ruling in favor of defendant city where plaintiff Wal-Mart alleged violation of the Equal Protection Clause because its stores were situated similarly to a range of other retail forms with respect to preserving traffic flows, air quality and preventing urban blight, yet the city ordinance allowed the other retail forms and barred Wal-Mart).

<sup>224</sup> *See, e.g., id.* at 1006 (holding specifically that the prevention of blight was a legitimate state interest); *Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989) (holding that the preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion, and maintenance of property values, were all legitimate purposes of planning and zoning).

<sup>225</sup> *Trs. of Union Coll. v. Members of Schenectady City Council*, 690 N.E.2d 862, 864 (N.Y. 1997) (quoting *Penn. Cent. Transp. Co. v. New*

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wage ordinances since they generally apply to large employers, but governments can argue that larger businesses have a greater impact on the economy and may be better able to absorb the cost of paying higher wages.<sup>226</sup> In 2002, New York City's Mayor Bloomberg signed legislation requiring a living wage for all home health care and child care workers contracting with the city; however, as of this writing the effort to expand a living wage into the private marketplace remains a struggle between City Council members.<sup>227</sup>

Plaintiffs are also unlikely to succeed in raising Due Process challenges that allege the government is denying a property use by restricting certain types of development or denying permits without a legitimate reason. In order to succeed on a Substantive Due Process claim, the property owner must first state a "valid property interest in a benefit that was entitled to constitutional protection at the time he was deprived of that benefit" and then show that the government acted in an arbitrary manner in depriving the property owner of that "protected property interest."<sup>228</sup> A property owner is entitled to a land use only if an agency does not have discretion to deny a permit.<sup>229</sup> Further, the standard for determining a Due Process violation under the New York Constitution is the same as for determining a valid exercise of police power,<sup>230</sup> and land use restrictions are constitutional if they are necessary to protect the public health, safety or general

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York City, 438 U.S. 104, 129 (1978)). In *Union College*, however, the Court struck down an ordinance that prohibited educational uses in a Historic District because historic preservation does not outweigh educational concerns, as a matter of law. *Id.* at 863–64.

<sup>226</sup> Memorandum from the Brennan Ctr. For Justice to Recipient (2006) (on file with author).

<sup>227</sup> Courtney Gross, *Living Wage after Kingsbridge*, GOTHAM GAZETTE, Jan. 2010, <http://www.gothamgazette.com/article/work/20100115/22/3147>.

<sup>228</sup> *Great Atl. & Pac. Tea Co. v. Town of East Hampton*, 997 F. Supp. 340, 350 (E.D.N.Y. 1998).

<sup>229</sup> *See DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 132 (2d Cir. 1998). Procedural due process requires that zoning decisions follow the proper rules of notification and hearings. DANIEL R. MANDELKER, *LAND USE LAW* § 2.41 (5th ed. 2003).

<sup>230</sup> *Great Atl. & Pac. Tea Co.*, 997 F. Supp at 350.



welfare of the citizens.<sup>231</sup> Size caps, formula business restrictions, neighborhood serving zones, and community impact reviews must still be able to show that their sole purpose is not to prohibit big-box retail or favor local economic interests, but rather one that is a legitimate governmental aim.

### C. Takings

The United States Constitution's Fifth Amendment promise that "private property [shall not] be taken for public use, without just compensation"<sup>232</sup> may be relevant in attempting to challenge zoning regulations.<sup>233</sup> If a land-use regulation places too great a restriction on the ability of a private property owner to develop or maintain any economically viable use of that land, then it may be considered a taking by the government and will be invalidated unless the property owner receives just compensation.<sup>234</sup> While a regulation that deprives a landowner of all economically viable uses is always a taking,<sup>235</sup> such circumstances are very rare.<sup>236</sup>

For other regulations,<sup>237</sup> courts will undertake a factual inquiry as set out by *Penn Central Transportation Company v. New York City*.<sup>238</sup> A key consideration under the *Penn Central* test is whether there is an interference with "distinct investment-backed expectations."<sup>239</sup> If a regulation goes too far in limiting

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<sup>231</sup> *Asian Ams. for Equal. v. Koch*, 527 N.E. 2d 265, 270 (N.Y. 1988).

<sup>232</sup> U.S. CONST. amend. V.

<sup>233</sup> The Takings Clause of the Fifth Amendment applies to states through the Due Process Clause of the 14th Amendment. *See Chi., B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

<sup>234</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987).

<sup>235</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>236</sup> *Id.* at 1017–18.

<sup>237</sup> This applies only to those regulations that are not intended for nuisance prevention. A law that regulates a nuisance is never a taking. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>238</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>239</sup> *Id.* at 124.

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the value of the land or severely diminishes the developer's expected economic gains, it is considered a taking.<sup>240</sup> While the Court did not define what it meant by too far, it did say that expectations had to be "reasonable."<sup>241</sup>

Most zoning tools<sup>242</sup> are susceptible to takings claims, for which courts will look to the specific facts of each claim to determine whether a regulation constitutes a taking. While regulations that fall short of denying all beneficial use may still be considered takings,<sup>243</sup> a New York case found that even substantial diminution in property value as a result of a regulation did not necessarily constitute a taking.<sup>244</sup>

*D. The Contracts Clause*

The Contracts Clause of the United States Constitution states, in relevant part, that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."<sup>245</sup> The Contracts Clause is not a complete bar to legislative alterations of contractual obligations, as "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'"<sup>246</sup> In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, the Supreme Court set forth a three-part inquiry to apply to the Contracts Clause.<sup>247</sup> Under the *Energy Reserves* test, a statute will be struck down

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 125.

<sup>242</sup> See *supra* Part II.

<sup>243</sup> *Penn Cent. Transp.*, 438 U.S. at 149-50.

<sup>244</sup> *De St. Aubin v. Flacke*, 496 N.E.2d 879, 885 (N.Y. 1986) ("[T]he property owner must show by 'dollars and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue.").

<sup>245</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>246</sup> *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

<sup>247</sup> *Id.* at 411-12.

for violating the Contracts Clause if it (1) has operated as a “substantial impairment of a contractual relationship”;<sup>248</sup> (2) does not have, in justification, a “significant and legitimate public purpose”;<sup>249</sup> and, based upon the legitimate public purpose identified, (3) is not justifiable as a *reasonable adjustment* of the rights and responsibilities of the contracting parties.<sup>250</sup>

Judicial review of a Contracts Clause claim begins with a determination of “whether the state law has, in fact, operated as a substantial impairment to a contractual relationship.”<sup>251</sup> The more severe the impairment upon the contracting parties, the higher the level of scrutiny.<sup>252</sup> *Energy Reserves* elaborates on the “substantial impairment” requirement, noting that a statute resulting in total destruction of the contractual relationship, or even conversely, one restricting a party to gains reasonably expected from the contract (even though the obligations under the contract may be technically altered)<sup>253</sup> would not necessarily constitute a “substantial impairment.”<sup>254</sup>

In *Ross v. Berkeley*<sup>255</sup> the Court found that the commercial rent control ordinance “applie[d] exclusively and explicitly to

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<sup>248</sup> *Id.* (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (emphasis added)). The severity of the impairment imposed by government is directly proportionate to its burden to show that the nature and purpose of the legislation is for a valid state interest). *Id.* at 411.

<sup>249</sup> *Id.* at 411–12 (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977) (emphasis added)). Legislation must not be designed and enacted for the mere advantage of particular individuals, but rather for the protection of a basic societal interest. *Blaisdell*, 290 U.S. at 445.

<sup>250</sup> *Energy Reserves Group*, 459 U.S. at 412. The balance between the public purpose of the legislation and adjustment of the rights and responsibilities of the contracting parties “must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.” *U.S. Trust Co.*, 431 U.S. at 22.

<sup>251</sup> *Energy Reserves Group*, 459 U.S. at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244).

<sup>252</sup> *Id.* at 411.

<sup>253</sup> *Allied Structural Steel Co.*, 438 U.S. at 245.

<sup>254</sup> *Energy Reserves Group*, 459 U.S. at 411. Furthermore, the Court explained that the amount of previous regulation of the industry where the contract is implicated is another relevant consideration. *Id.*

<sup>255</sup> *Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987).

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the contractual obligations of the narrow group of lessors and lessees in the Telegraph Avenue commercial district of the City [of San Francisco] and confer[red] a direct benefit on one class at the expense of the other.”<sup>256</sup> This finding, along with the severity of the impairments, led the Court to exercise heightened scrutiny.<sup>257</sup> In contrast, the Court upheld a Kansas court decision finding a statute valid under the Contracts Clause, because at the time the contracts were executed, “Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.”<sup>258</sup> As a result, the Court concluded that the reasonable expectations of plaintiff, Energy Reserves Group, were not impaired by the Kansas statute.<sup>259</sup> This conclusion, in conjunction with the finding of a legitimate public purpose,<sup>260</sup> led the Supreme Court to uphold the Kansas statute.<sup>261</sup>

If a court finds a substantial impairment, it will then decide whether or not the impairment is justified by a “significant and legitimate public purpose.”<sup>262</sup> A legitimate public purpose is one that does not focus on any specific enterprise or actor; rather, it is aimed at fixing a broad economic or societal problem, or enhancing the general welfare of the people.<sup>263</sup> For example, In *Allied Structural Steel Co.*, the Supreme Court found a Minnesota statute, which assessed charges against an employer who closed its offices and discharged employees without providing vested pension rights did not have a broad societal interest.<sup>264</sup> The Court found it “applie[d] only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who ha[s] established voluntary private pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer

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<sup>256</sup> *Id.* at 833.

<sup>257</sup> *Id.*

<sup>258</sup> *Energy Reserves Group*, 459 U.S. at 413–14.

<sup>259</sup> *See id.* at 416.

<sup>260</sup> *Id.* at 417 n.25.

<sup>261</sup> *Id.* at 418.

<sup>262</sup> *Id.* at 411.

<sup>263</sup> *Id.* at 412.

<sup>264</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

closes his Minnesota office or terminates his pension plan.”<sup>265</sup>

The final inquiry is whether the adjustment of “the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.”<sup>266</sup> This requires the court to determine whether the relationship between the impairment and the public purpose is sufficiently connected.

For example, the town of Islip, New York, “could not use a zoning amendment to abrogate a prior subsisting lease in which the town itself was a party.”<sup>267</sup> This holding was influenced by the fact that the Town of Islip was a contracting party<sup>268</sup> and should not be construed as barring zoning amendments from changing or voiding existing leases outright. Rather, any precedential value will only apply to those leases to which a local government, like the City of New York, is a contracting party.

The Contracts Clause is most likely to apply within the context of commercial rent control legislation as this measure affects existing contractual relationships. Consequently, any commercial rent control legislation will have to set out its public purpose rather carefully in order to garner maximum judicial deference. Furthermore, the legislation will have to be connected to its public purpose in a way that minimizes “adjustments” to existing contractual relationships.

### *E. Home Rule and Taxation*

Home rule is the legislative authority granted to local governments to manage their own affairs without interference from the state.<sup>269</sup> Pursuant to the New York Municipal Home

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<sup>265</sup> *Id.* at 248.

<sup>266</sup> *Energy Reserves Group*, 459 U.S. at 412 (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

<sup>267</sup> *Wa-Wa-Yanda, Inc. v. Dickerson*, 18 A.D.2d 251, 258 (N.Y. App. Div. 1963), *aff’d*, 238 N.E.2d 332 (N.Y. 1968).

<sup>268</sup> *Id.* at 256.

<sup>269</sup> *City of Ocala v. Nye*, 608 So. 2d 15, 17 (Fla. 1992); *People ex rel. Bernardi v. City of Highland Park*, No. 62419, 1986 Ill. LEXIS 303, \*5-6 (Ill. Nov. 20, 1986); *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291,

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Rule Law, local governments such as New York City may legislate local “property, affairs or government” matters.<sup>270</sup>

States typically restrict the scope of local authority with respect to state affairs.<sup>271</sup> New York’s highest court has determined that matters of state concern, such as taxation, affect residents of the entire state rather than only a particular municipality.<sup>272</sup> However, the methods, agencies, and instruments to attain appropriate local government ends are ordinarily matters under the purview of local governments.<sup>273</sup> Municipal Home Rule authority grants local governments the power to regulate land-use, in general.<sup>274</sup> Taxation matters are more complex: the use of any legislation regulating taxes to protect small businesses will trigger an examination of whether the Council of the City of New York would violate the scope of its authority by enacting such legislation.<sup>275</sup>

## CONCLUSION

Zoning regulations are the most common tool used to protect

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296–97 (N.Y. 1972).

<sup>270</sup> N.Y. MUN. HOME RULE LAW § 10(1)(i)–(ii) (McKinney 2010). A general law is a law enacted by the state legislature, which in terms and effect, applies alike to all counties (other than those wholly included within a city), cities, towns, or villages. *Id.* § 2(5).

<sup>271</sup> *See Wambat Realty Corp. v. New York*, 362 N.E.2d 581, 584 (N.Y. 1977). A state affair is “a matter in which the people of the State as a whole [are] interested, as contrasted with a local affair in which the people of the cities [have] the first and final say.” *Adler v. Deegan*, 167 N.E. 705, 708 (N.Y. 1929).

<sup>272</sup> *See, e.g., City of New York v. New York*, 730 N.E.2d 920, 926 (N.Y. 2000) (finding taxation to be state concern); *Hotel Dorset Co. v. Trust for Cultural Res.*, 385 N.E.2d 1284, 1291 (N.Y. 1978) (finding maintenance of cultural institutions to be state concern); *Adler*, 167 N.E. at 710–11 (finding health of citizens to be state concern).

<sup>273</sup> *Browne v. City of New York*, 149 N.E. 211, 220 (N.Y. 1925).

<sup>274</sup> *Yoga Soc’y. of N.Y., Inc. v. Monroe*, 56 A.D.2d 842, 843 (N.Y. App. Div 1977).

<sup>275</sup> *See City of New York v. New York*, 730 N.E.2d at 925 (citing N.Y. CONST. art XVI, § 1 (2010), which states that the power to tax rests solely with the State Legislature, who may grant such authority to the City).

small and local business, yet other tools have their own advantages. For instance, conditional exceptions that include community impact reviews are appealing as they allow individual communities to assess their particular needs and desires. In addition, courts tend to be more deferential to regulations that allow land use proposals to go through a substantive review process rather than being banned outright. However, some other types of legislation intended for this purpose may be less feasible than others. Commercial rent control is generally unpopular, as many state governments think it unduly interferes with free-market competition, discourages development and provides little incentive for landlords to maintain properties. Furthermore, tax incentives and living wage ordinances typically trigger greater political opposition and may require state as well as local action.<sup>276</sup>

All of the tools discussed *supra* potentially implicate one or more Constitutional issues. Carefully drafting and tailoring legislation and zoning ordinances is necessary to help ensure that they do not violate the Constitutional rights of affected parties. Although courts are generally deferential to zoning ordinances, they must be enacted to protect the public health, safety or general welfare.<sup>277</sup> The sole purpose of any proposed legislation or zoning ordinance cannot be to ban big-box retail or save small and local businesses.<sup>278</sup> Studies that support proposed legislation, such as environmental impact statements, traffic congestion surveys, infrastructure tests, or predictions about potential vacancy rates will help an ordinance to withstand judicial scrutiny, as they provide evidence that it is designed to address issues of public health, safety, or general welfare.<sup>279</sup>

When considering the feasibility of any particular tool, New York City should consider the potential legal implications, and draft carefully to avoid invalidation. Community education and

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<sup>276</sup> While New York City does have a living wage ordinance, it only applies to employees of certain service contractors that do business with the city itself. N.Y., N.Y., ADMINISTRATIVE CODE § 6-109 (2009).

<sup>277</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>278</sup> *See supra* Part IV.A.

<sup>279</sup> *See supra* Part II.

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involvement may be the best way to guide development in each district, as popular support is crucial to influencing government to make changes that would protect small and local business.