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# Begone, Euclid!: Leasing Custom and Zoning Provision Engaging Retail Consumer Tastes and Technologies in Thriving Urban Centers

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# **Begone, *Euclid!*: Leasing Custom and Zoning Provision Engaging Retail Consumer Tastes and Technologies in Thriving Urban Centers**

**Michael N. Widener\***

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\*©2014, All Rights Reserved by the author, Adjunct Professor of Law, Arizona Summit Law School and Sperling School of Business, University of Phoenix; Zoning Adjustment Hearing Officer, City of Phoenix; and Of Counsel, Bonnett, Fairbourn, Friedman & Balint, P.C. This is dedicated to the three Gen Y retailers in my family.

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## I. Introduction

Is urban center retailing in a death spiral? Competition for consumers with Internet vendors is afoot; winners and losers shall be anointed.<sup>1</sup> The threats to physical retailing in an era of the “Internet of Goods” initially are described below. Adaptations by tenants, landlords, and stakeholders in urban centers will be required quickly, and new perspectives and partnerships, including those among local and regional governments, are instrumental if physical retail operations in municipal cores are to survive.<sup>2</sup> The balance of this article describes these needs from the vantage point of each stakeholder; but this article argues that integrating information and communication technological infrastructure into retail leasing practices and land use planning and zoning strategies is inescapable for the maintenance of resilient town centers. Part II of this article describes the overwhelming impact of Internet consumerism upon physical retailing while Part III explains the physical milieu’s remaining but shrinking opportunities to remain competitive with the online consumer realm. Parts IV and V demonstrate how information and communication technologies, with innovative strategizing by retailers and their landlords, can be leveraged to incite lasting consumer interest in physical shopping environments within a community’s commercial nodes. Parts VI and VII articulate the municipal imperatives, including policies to implement robust technology

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1. See ARLINGTON (VA.) RETAIL TASK FORCE, RETAIL ACTION PLAN UPDATE 8 (2013) [hereinafter RETAIL UPDATE], *available at* <http://www.arlingtonvirginiausa.com/?LinkServID=BC2E9B10-DABF-5285-DAECA4FE981025E3&showMeta=0> (“In retail, ultimately only the strongest survive, and retail demand models built primarily upon the premise of lack of competition typically fail over time.”). This likely explains why, according to the U.S. Small Business Administration, only half of new retail stores survive five or more years, while about one-third survive 10 years or more. *See id.* at 7.

2. An illustration of the potential of public private partnerships to revitalize retail projects is the renewal of the historic Queen Victoria Market, Melbourne. *See* Burning House, *Queen Victoria Market Renewal Project*, YOUTUBE (Nov. 12, 2013), <http://www.youtube.com/watch?v=SDcJtYr5MPo>. The video features expressions of joint commitment by government officials and private sector representatives (“traders”) to revitalize the central marketplace, instrumental in maintaining Melbourne’s urban fabric in its downtown area. *Id.*

infrastructure and capitalizing on ICT's inherent "intelligence," required to maintain commercial core competitiveness.

Should communities care what happens to physical retailing from a land-use vantage point? Yes, since retailing catalyzes wider urban regeneration in the marketing and branding of municipal life.<sup>3</sup> In most urban centers<sup>4</sup> today, the battle is to keep retailing afloat - and the stakes, in succeeding to resuscitate retail businesses in downtowns, are exquisitely high. More value still than jobs creation and sales tax revenue, community vitality itself lies in the balance. As urban centers become more homogeneous, a product in large part of national brand retailing, the importance of promoting differentiation among urban retail opportunities increases.<sup>5</sup> A thriving town center needs to have a mixture of social, civil, residential and leisure (including retail) opportunities for its citizens,<sup>6</sup> enabling holistic provision within the urban center's space. In short, the community's core-neighborhood commercial centers must

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3. Gary Warnaby, *Marketing Retail Provision in UK Towns and Cities: Present Practice and Future Prospects*, 2 PLACE BRANDING 195, 195 (2006); Gary Warnaby et al., *Marketing Town Centres: Retailing and Town Centre Management*, 20 LOC. ECON. 183, 184 (2005) [hereinafter *Marketing Town Centres*].

4. For point of reference, I have chosen "urban centers" to be shorthand for the T6 Zone in SmartCode-speak. It appears to be functionally equivalent to a traditional downtown or "central business district" where residential business and entertainment developments concentrate and, theoretically, interact in "immersive environments" producing some coherence and a sense of place. See Michael E. Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 269 (2006); see, e.g., Philip Langdon, *A Good Place to Live*, 261 ATL. MONTHLY 39-60 (1988) (consider projects like "the original" Seaside, Florida); *City Place in West Palm Beach, Florida*, CITY PLACE, <http://www.cityplace.com/info/neighborhood> (last visited Feb. 25, 2015); *Crocker Park in Cleveland, Ohio*, CROCKER PARK, <http://www.crockerpark.com/about/> (last visited Feb. 25, 2015); *The Grove in Los Angeles, California*, THE GROVE, <http://www.thegrovela.com/live.php> (last visited Feb. 25, 2015); *Kierland Commons in Scottsdale, Arizona*, KIRKLAND COMMONS, <http://www.kierlandcommons.com/About> (last visited Feb. 25, 2015) (similar to Seaside's more contemporary counterparts and built around transportation corridors similar to Kierland Commons in Phoenix, Arizona); *Zona Rosa in Kansas City, Missouri*, ZONA ROSA, <http://www.zonarosa.com/> (last visited Feb. 25, 2015). All these projects feature not just a mixture of uses, but captivating synergies (often with entertainment-based anchors) and strong experiential elements characterized by walkability and civic and social hub-spaces.

5. *Marketing Town Centres*, *supra* note 3, at 185.

6. *Id.*

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respond to the belief that citizens seek community, that is, pedestrian-scale areas featuring identities apart from the corporate and bureaucratic structures that daily dominate work culture. These vibrant neighborhoods foster repeated, casual contacts among neighbors and merchants, achieving an indigenous identity created by the efforts of diverse people over a protracted period.<sup>7</sup> Ultimately, urban concentrations facilitate close and multifarious interpersonal relations forming the community's heartbeat.<sup>8</sup> To this end, technology becomes an ally, not the enemy, of local governments and merchants alike.

Downtowns and like urban centers compete for customer traffic not merely with Internet retailers but with occupants of outlying malls and regional shopping centers; mixed use urban centers often are handicapped by the realities of less-convenient parking and commuting distances. The failure of successful retail merchandizing in many downtowns stymies growth of residential populations in urban centers starving for the demographic quality needed to increase densification and continued economic competitiveness in the realms of knowledge workers.

## II. Today's Physical Retailing: Technology and Consumer Behavior Shifts

The jaded retail landlord or retailer claims young people today have attention spans akin to lesser apes. If that is true, thanks in part to continual interconnectedness with each other and with data streams, then someone older and wealthier enabled that hub and spokes to develop. Marketers ponder whether today's twenty- to thirty-five-year-old demographic will curtail its shopping at physical retail units,<sup>9</sup> or are perilously

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7. See J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 *FORDHAM URB. L.J.* 1595, 1595-1609 (2013).

8. See Edgar M. Hoover, *The Evolving Form and Organization of the Metropolis*, in *ISSUES IN URB. ECON.* 237, 277 (Harvey S. Perloff & Lowdon Wingo, Jr. eds., 2011).

9. See M. Leanne Lachman & Deborah L. Brett, *Generation Y: Shopping and Entertainment in the Digital Age*, 1 *URB. LAND INST.* (2013). Physical retail shopping is not dead among America's youth, as reported in a 2013 survey of 1,251 Millennial generation (aka "Generation Y" or "Gen Y," that group of persons born roughly between 1983 and 1995) members by the Urban Land

inattentive to the large block of techno-savvy youth believing themselves better informed than store associates about available merchandise, discount coupons and competitive pricing.<sup>10</sup> Given the constant stimulation to which shoppers today routinely are exposed on-line,<sup>11</sup> a widely-held reaction among youthful consumers to physical stores is: Where's the novelty here?<sup>12</sup> Do mainline retailers concede or buck that perception? Since physical retailers want to grow sales at their stores according to the metric of dollars generated per square foot of leasable area, "tried and true" erects a merchandising barrier to innovation. Cutting-edge product development threatens to separate them too far from the herd of mainline competitors, after all. Changing a successfully-sold garment, a prepared food item's ingredients, or gadget more than a bit

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Institute with Lachman Associates. *Id.* More than half of Gen Y members go to a variety of physical retail locations at least monthly, and 54% go to "neighborhood business districts." *See id.* at 4. Some 46% of those surveyed dine out at least weekly and one quarter do so more frequently still. *See id.* "Downtowners" are more frequently male and members of racial minorities, and on the whole are younger than the rest of the sampled persons. *Id.* at 6.

10. *See 2014 Retail Industry Outlook*, CIO J. (Jan. 7, 2014, 12:01 AM), <http://deloitte.wsj.com/cio/2014/01/07/2014-retail-industry-outlook/> [hereinafter *Outlook*]. As many as 60% of shoppers surveyed by Deloitte for its 2013 Holiday Survey believe they know more than the store staff. *Id.*; *see* Christine Barton et al., *The Millennial Consumer: Debunking Stereotypes*, 5 BOS. CONSULTING GRP. (2012). In part that is due to online comment evaluations by shoppers accessed by later shoppers online. *Id.* Of course, these user reviews will be read while shopping. *Id.* at 6; *see also* James Surowiecki, *Twilight of the Brands*, NEW YORKER (Feb. 17, 2014), *available at* [http://www.newyorker.com/talk/financial/2014/02/17/140217ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2014/02/17/140217ta_talk_surowiecki) ("consumers are supremely well informed and far more likely to investigate the real value of products . . ."; consumers can read research about whatever they want to purchase). Additionally, Millennials prolifically advise one another by posting detailed product reviews, writing how-to guides on blogs and answering questions via message boards; consequently, Millennials commonly "crowd-source" opinions from among their friends and followers on social media and networking Websites about purchasing decisions. *See* Barton et al., *supra* note 10, at 6.

11. *See, e.g.*, Lachman & Brett, *supra* note 9, at 4, 18 (45% of Gen Y members spend more than an hour daily looking at retail-oriented websites, researching products, comparing prices or responding to flash sales or coupon offers); *Outlook*, *supra* note 10 (Online retailers are creating consumer "emotional rush" through devices like flash sales, social shopping and augmented reality applications.).

12. Lachman & Brett, *supra* note 9, at 12 (eighteen- to thirty-five-year-olds are bored easily, seeking new excitement in consumption, wherever shopping is occurring).

between seasons, presents a huge risk from the physical retailers' perspective in development and marketing expense. But as online generations' members indicate, "turnover" is *au courant*,<sup>13</sup> along with instant gratification from the shopping experience.<sup>14</sup> Selling and buying philosophies apparently are diverging, not converging. Customer detours from the physical retailing to the online retailing space are accelerated by these items, among others:

The Price Comparison challenge, where myriad interactive Websites invite consumers to price-shop, such as [www.Progle.in](http://www.Progle.in),<sup>15</sup> or phone applications such as BuyVia, RedLaser or The Find.<sup>16</sup>

The Rapid Delivery challenge, evident by Amazon's distribution centers in many American cities, ensuring that barring natural disasters or weather crises, delivery of much merchandise is available to the consumer in under twenty-four hours. Since the cost of shipping is largely dependent on distances shipped, the larger the number of distribution centers fulfilling online orders, the lower average distance of consumer shipping.<sup>17</sup>

The Marketing Utility threat emanates from Pinterest and Twitter, arguably more effective marketing platforms of consumer goods to the under forty demographic than conventional network television, radio and print advertising

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13. *See id.* at 7. Millennials turn over their technology instruments rapidly; and Generation Y CBD dwellers tend to be the fashionistas of this cohort, shopping frequently in all types of centers and stores. *Id.*

14. *See id.* Among elements of this gratification are same-day delivery and free shipping of products. *See Outlook, supra* note 10. Some sixty-eight percent of surveyed shoppers said they are more likely to shop online if the retailer offers free shipping. *Id.* In addition customers intend to use price-checkers, self-checkout payment lanes, information kiosks and digital signage when shopping. *See id.*

15. Progle offers shoppers with smart phones a tour through different e-commerce websites in a single click. *See* SUR.LY, <http://sur.ly/o/progle.in/> (last visited Apr. 12, 2015).

16. *See* Chandra Steele, *The 10 Best Shopping Apps to Compare Prices*, PC MAG, (Nov. 21, 2012), <http://www.pcmag.com/slideshow/story/290959/the-10-best-shopping-apps-to-compare-prices/4>.

17. *See* McKinsey & Company, *Next-Day Shipping Wars: Can Etailers Compete with Amazon?*, FORBES (Dec. 18, 2013), <http://www.forbes.com/sites/mckinsey/2013/12/18/next-day-shipping-wars-can-etailers-compete-with-amazon/>.



campaigns,<sup>18</sup> coupled with the next wave of marketing leveraging YouTube's platform, such as by rewarding people for creating themed retail products powered by YouTube videos – or, candidly, any video content centered around a retailer's product lines – or via investing in marketer-owned channels of original digital content targeted at this “wired” demographic.

The Collection of Data threat arises where online retailers, through cookies-posting and purchasing of consumer data, learn more than physical retailers exploiting their point of sale computers and seldom-initiated personal interviews, enabling online retailers consistently to add value to the consumer's experience by knowing their customer's tastes and price-sensitivities. Add to this the reputation of physical retailers losing customer data (a recent black-eye starring Target and Niemen Marcus), and consumer confidence in physical retailing use of their information is not high.

The Physical Health and Violence threat is evidenced by (a) communicable diseases' transmission by person to person contact,<sup>19</sup> more common in communal settings, together with (b) Bureau of Justice Statistics data for the period 1993-1999 revealing that retail industry workers experience the third-highest workplace violence victimization rate after law enforcement and mental health professionals.<sup>20</sup> Coupled with media sensationalizing<sup>21</sup> of retail-center tragedies such as Jared Lee Loughner's murder of five people and wounding fourteen more (including former U.S. Representative Gabrielle Giffords),<sup>22</sup> anxieties about disease and violence in personal

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18. See, e.g., *Outlook*, *supra* note 10 (“many retailers still rely heavily on the ‘old school’ approach . . .” of mass advertising and promotions that do not resonate with today's “omnichannel customer”).

19. See, e.g., Amy Lukits, *Why Some Flu Viruses May Be More Contagious*, WALL ST. J., Jan. 28, 2014, at D1 (influenza is transmitted among persons by inhaling virus particles when infected individuals cough or sneeze, or by direct contact from another's contaminated fingers; of course, fingers touch many surfaces and items in retail stores).

20. National Safety Council, *Preventing Retail Violence*, SAFETY + HEALTH MAG. (Jan. 1, 2011), <http://www.safetyandhealthmagazine.com/articles/4276>.

21. Miguel A. Faria, Jr., *Shooting Rampages, Mental Health, and the Sensationalization of Violence*, 4 SURGICAL NEUROLOGY INT'L 16 (2013), available at <http://www.surgicalneurologyint.com/article.asp?issn=2152-7806;year=2013;volume=4;issue=1;spage=16;epage=16;aulast=Faria>.

22. See, e.g., *CBS News, Tucson: Descent into Madness*, YOUTUBE (Jan. 16,

shopping at crowded centers render it unappealing to many.

### III. The Prime Retailing Directive and Its Corollaries

#### A. *The Prime Directive: It's the Experience or It's Not Happening*

The essence of in-store consumption by shoppers and diners is this: Consumption is a social activity.<sup>23</sup> There is a communal instinct about shopping and eating out – we want to be with other people, and nothing online stores and food purveyors can do to perfect inventory selection and distribution can make up for the lack of social experience in online shopping. A consumer's expectation that stores will deliver experiences that are remarkable (and not digitally reproducible)<sup>24</sup> exists today, and it will continue to grow.

Recall your most intense retail shopping experience. In recent years, the author's occurred inside the Queen Victoria Market, Melbourne,<sup>25</sup> the largest open air market in the Southern Hemisphere, during December 2011. "Sweet, sweet, *sweeeet bananers*" screeches a nearby huckster<sup>26</sup> at top volume in piercing vocal register, vigorously gesticulating "come hither" outside his fruit stall. The market's atmosphere is that of a scarcely – contained mass demonstration, featuring

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2011), <https://www.youtube.com/watch?v=GPrYZ9wwCv4> (where 60 Minutes, a major journalistic enterprise, saw fit "to reconstruct the pathway to mass murder" for public consumption, including interviews with Laughner's acquaintances, recordings of Laughner's last message on audiotape and other minutiae).

23. DOUG STEPHENS, THE RETAIL REVIVAL: REIMAGINING BUSINESS FOR THE NEW AGE OF CONSUMERISM 158-59 (2013).

24. *Id.*; see Lachman & Brett, *supra* note 9, at 1 (sensory aspects of retail facilities need to evolve constantly). This sensory assault is essential to the success of projects like Queen Victoria Market with Millennials, as are projects that are denser and pedestrian-oriented. See *id.* at 5.

25. See QUEEN VICTORIA MARKET, [www.qvm.com.au/](http://www.qvm.com.au/) (last visited Apr. 12, 2015).

26. Australians, like their British forebears, cannot pronounce words ending with the letter "a" without adding the "r" sound, unapologetically. See *English Language & Usage*, ENGLISH LANGUAGE & USAGE STACK EXCH., available at <http://english.stackexchange.com/questions/69542/difference-in-pronunciation-at-the-end-of-a-word-in-british-and-american-eng> (last visited Mar. 2, 2015).

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unpredictable crowd movements and a panoply of smells, sounds (including recorded and live music) and tastes (samples). Here is a riotous assault on the consumer's senses. The diversity of the shoppers is as astounding as the variety of goods, perishable and imperishable, on offer. Interactivity between merchants and shoppers is intensely animated and fascinating to behold at close range. There is no anticipating who or what you encounter within the stalls of the market and on its adjoining streets from one visit to the next. The human energy level, heightened by the richness of sensory experiences and coupled with the novelty of unfamiliar goods and fellow-travelers, is palpable and vast. While every retail shopping experience cannot resonate with consumers like a live music concert, physical retailers know that a sensory-deadening encounter is one a consumer will act to avoid repeating.

B. *Loyalty Pricing Cannot Replace Retail Experience Details and Inventory Overdosing Cannot Substitute for Service Orientation*

The experiences of physical shopping at Wal-Mart and Target are very different than the Queen Victoria Market encounter. There is nearly as much inventory, far more neatly arranged and labeled, in about the same number of square feet at a Super-sized Target or Wal-Mart, but nothing in the inventory is original or quirky. The shopper could be teleported through a spatial-portal from Portland, Oregon to Portland, Maine, without noticing any difference inside these stores' respective interiors. The human energy level intensifies only by children acting-out, expressing their boredom or exhaustion or by acquaintances having a chance encounter. The fundamental store layout is essentially identical.<sup>27</sup> Little human interaction occurs between the stores' staff and shoppers until you arrive at the check-out stands. Rarely does one locate a clerk in these stores who (more than occasionally) knows what the fabric or materials of a product are without scrutinizing the label, its

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27. See Barney Warf & Thomas Chapman, *Cathedrals of Consumption: A Political Phenomenology of Wal-Mart*, in *WAL-MART WORLD: THE WORLD'S BIGGEST CORPORATION IN THE GLOBAL ECONOMY* 163, 169 (Stanley D. Brunn, ed. 2006).

likely wear life, its manner of assembly or even what colors are available in the storage area.<sup>28</sup> Consumer insistence on information distracts from restocking the shelves and racks, if time is allotted for that activity. The entire business model of the big-box retailer relies on the concept that consumers want low prices for each item sought – and nothing more.<sup>29</sup> The “experience,” therefore, stops at affordability; predictability defines physical retailing featured by most major brand merchandisers. The customer shopping experience possesses a low priority in most major brand retailing; and this explains why urban center regeneration chiefly will not rise from the bedrock of mega-brands’ bricks and mortar.<sup>30</sup>

Shopper interactions with retail staff via the Internet today are better to some degree.<sup>31</sup> While “helplines” may be accessed, the customer representative’s product knowledge (and the representative’s empathy and even familiarity with the consumer’s nation) is debatable. The experience of shopping in any platform is qualitatively different (and increasingly rare) when a customer has a longer, in-depth conversation with a person broadly familiar with the offered product lines and sensing the customer’s tastes.<sup>32</sup> Empathetic outreach, coupled with a sensory-dense social experience with moments of

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28. Nona Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, in *WORK WITHOUT WAGES: COMPARATIVE STUDIES OF DOMESTIC LABOR AND SELF-EMPLOYMENT* 142, 161 (Jane Lou Collins & Martha Giminez, eds. 1990) (“most clerks are no longer hired for their knowledge of products and of the psychology of selling”; preselling of goods through advertising reduced the need for such skills). The date of this paper suggests that sales associates’ lack of skills is not a circumstance of recent vintage.

29. See, e.g., Matthew A. Zook & Mark Graham, *Wal-Mart Nation: Mapping the Reach of a Retail Colossus*, in Brunn, *supra* note 27, 15, 29-30.

30. See, e.g., KYLE MURRAY, *THE RETAIL VALUE PROPOSITION: CRAFTING UNIQUE EXPERIENCES AT COMPELLING PRICES* 10 (2013) (“Well-designed retail value propositions that include a crafted shopping environment, product selection, and customer engagement strategy result in customers who are happy, even eager, to pay the asking price.” The author notes that prices do not create value, only capture it.) (emphases added).

31. See MARSHA COLLIER, *THE ULTIMATE ONLINE CUSTOMER SERVICE GUIDE: HOW TO CONNECT WITH YOUR CUSTOMERS TO SELL MORE!* 148 (2011) (distribution of online and physical retailing service awards-winning indicate a “movement to e-commerce,” and that some major physical retailers are losing their grip on consumers).

32. See Amy Westervelt, *A Shot at the Real World: Online Merchants Get a Chance to Run Pop-Up Shop*, WALL ST. J., Feb. 3, 2014, at R5.

technological insertion – like enabling shoppers to access an app on their smartphones or dialog through an instant chat on the retailer’s Website while shopping, are salutary omni-channel consumer service approaches.<sup>33</sup> Such conventions can become, and perhaps must become, primary remaining advantages of today’s physical retailing. In smaller footprint and unit-combination stores that are tomorrow’s physical retailing current,<sup>34</sup> personnel must be trained to deliver a “personal touch,” in that conversations will be directed to imparting consequential information to retailers and consumers.<sup>35</sup> All such tactics will target not control of product category market-share, which progressively fades in importance, but to the “post-modern” view that physical retailing’s major aim is to capture the highest possible revenue from each shopper while he or she is inside the store.<sup>36</sup>

#### IV. Tenant Retailpolitik and Adaptations

##### A. *The Six Sales Category Advantage: Leveraging These in the Physical Sales Realm*

Retailers must acknowledge the threats to the physical realm of retailing, taking stock of the fact that just six categories of goods and services remain separating those consumers under forty years of age from their tendencies toward increased on-line purchasing. These goods, or combinations of goods and services, are those that:

1. The consumer must receive today, such as upon discovery of the need for a tool or seeds, for instance, to complete a task that day (the Amazon drones are not yet aloft, alas);<sup>37</sup>

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33. See *Outlook*, *supra* note 10.

34. See PRICE WATERHOUSE COOPERS AND KANTAR RETAIL, *RETAILING 2020: WINNING IN A POLARIZED WORLD* 34, 42 (2012), available at [http://www.pwc.com/en\\_US/us/retail-consumer/publications/assets/pwc-retailing-2020.pdf](http://www.pwc.com/en_US/us/retail-consumer/publications/assets/pwc-retailing-2020.pdf) [hereinafter WINNING].

35. See *id.* at 41.

36. See *id.* at 39.

37. This will be the first physical store opportunity that, vulnerable, shall be overcome. Omnichannel market retailers, meaning those reaching consumers in the physical and virtual worlds, feature “click and collect”

2. Are too heavy for shipping costs' affordability (or result in intolerable delays due to a slower, cheaper surface delivery means);
3. Are perishable, like unprocessed foods or plant life, requiring near immediate delivery in controlled climate;
4. Are custom-made for the customer, like designer clothes and jewelry, where returning the purchase is discouraged because there is no ready resale market;<sup>38</sup>
5. Are one of a kind, like art originals requiring first-hand inspection upon completion to ensure consumer satisfaction (potential resale market aside); and
6. Involve real-time delivery, such as hair and nails salon services of today, or such as 3D, additive manufacturing will deliver in five years or fewer.

That only six categories of goods (or mixed goods and services) are identifiable ought to sober city councils and urban planners tasked to create vibrant urban centers, not to mention retailing landlords who must compete across a shrinking leasing landscape. Online retailers are reaching toward those consumers of greatest resistance needing these six categories of items. That's what the "drone delivery" unmanned aerial vehicle experimentation and virtual storefronts are about – trimming away those six category online "failings," one by one. So, too, are

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behavior, in which persons order online and then visit a company unit to pick up the merchandise the same day. See Clint Boulton, *Retailers Still Wrestling with Omnichannel Strategies, CIOs Say*, CIO J. (Jan. 14, 2014, 1:41 PM), <http://blogs.wsj.com/cio/2014/01/14/retailers-still-wrestling-with-omnichannel-strategies-cios-say/>; Harry Wallop, *Click and Collect – the New Way to Go Shopping*, TELEGRAPH (Jan. 8, 2013, 7:30 AM), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9785532/Click-and-collect-the-new-way-to-go-shopping.html>. Since physical retailers still interact with the person doing the pickup, one last opportunity to engage the customer or her agent advantages the store. To the degree online retailers set up shopper-convenient "warehousing/delivery" pickup points in an urban center, the advantage shifts back to the Internet merchandiser.

38. Shoehorned into this category are cosmetics and personal care products. While these actually are not custom-made, cosmetics and some personal care products must be "sampled" in stores in order to know if they are a good choice because of suitability of color, shade and scent; no online avatar can "stand in" for the first-hand determination of product compatibility. Consequently, perhaps, 77% of Millennials shop in physical stores for cosmetics and personal-care products. See Lachman & Brett, *supra* note 9, at 18.

initiatives by online retailers that guarantee constant inventory availability, free returns and buy-online but pick up at the store of customer choice; the intention is to offset online customer inconvenience with savings.

B. *Sensitivity to the Physical Environment's Surroundings*

Physical retailers must abandon rigid scale and business models, using flexible retail formats to blend into the urban center's local character.<sup>39</sup> The retail experience is no poorer if a retailer's conventionally sized floor-plate habits diverge, breaking spatial requirements into separate suites or creating multi-level sales floors using smaller footprints. This activity signals innovative and streetscape-sensitive merchandising when multiple premises are vacant in an existing development,<sup>40</sup> when an historic or otherwise iconic building is not ideally suited yet is repurposed to offer customers a particularly engaging retail atmosphere,<sup>41</sup> or when one element of the retailer's store unit is relocated closer to a transit node, taking advantage of street activation while remaining within walking or biking distance from the balance of its merchandising operation.

C. *Mounting the Social Experience Environment*

Three primary means allow physical retailers to exploit their six-category advantage. By reversing inventory saturation, which enables stores to hire fewer people and schedule the reduced workforce individually for less than forty

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39. See WINNING, *supra* note 34, at 23. Indeed, greater evidence is forthcoming that even established brands, pressured by "sales per square foot" of space declines, will choose lower area floorplans for their stores in the near term, leading to a "dominance of smaller units". See *id.* at 26, 33. Nimbleness will be driven by retailers in the forms of smaller formats, easier to access stores and shorter lease terms, as well as shared interior spaces in physical stores. *Id.* at 23, 33, 42.

40. See REPUBLIC OF IRELAND DEPARTMENT OF THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, GUIDELINES FOR PLANNING AUTHORITIES: RETAIL PLANNING 22 (2012) [hereinafter RETAIL PLANNING].

41. See generally Michael N. Widener, *Renewed Energy: Sustainable Historic Assets as Keystones*, in *Urban Center Revitalization*, 32 QUINNIPIAC L. REV. 709 (2015) [hereinafter *Renewed Energy*].

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weekly hours to avoid employee benefits, encounters with customers will grow. The business model of fewer persons and greater inventories on racks, shelves and tables to potentially increase revenues has not worked (except in some branded big boxes) and is not productive.<sup>42</sup> Instead, retailers stocking fewer goods on the sales floor open up their premises to interactivity and increased customer encounters when sales staff retrieve merchandise from the storage area for their shoppers. While big box retailing has taught us that customer interaction is unimportant when price is the controlling purchase determinant, physical retailing will never compete with the “Internet of Everything” – unless it competes by expanding the customer’s social experience. Retailers therefore must integrate the workforce into that social experience by training associates in communications “bedside manner” and cultural awareness.<sup>43</sup> Retailers must, however, additionally integrate the online shopping experience into their physical merchandising environments. Beyond making Wi-Fi customer-accessible,<sup>44</sup> they can install placards throughout these interiors with QR Codes<sup>45</sup> linking smart-phone users to the retailer’s website and to other sites featuring coupons for the store’s merchandise.

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42. The ULI-Lachman 2013 survey revealed that 72% of Millennial CBD residents visit their district’s retailers at least monthly and that one quarter of them visits at least weekly. Lachman & Brett, *supra* note 9, at 12-13. Nearly fifty five percent of all Gen Y members say they visit neighborhood business districts at least monthly. *Id.* at 12. If a retailer in an urban center places all its available merchandise on the store’s shelves, racks, and tables at one time, what remains for Millennial shoppers to freshly discover on subsequent visits? It is counter-intuitive to leave nothing new for investigation by “steady” customers, unless the merchant’s goal is lower the frequency of their visits, or unless its inventory changes weekly regardless of sales volumes.

43. The ULI-Lachman 2013 Millennial survey discloses that good customer service is “very important” to forty eight percent of those surveyed and “somewhat important” to another forty eight percent. *Id.* at 14.

44. Lachman and Brett learned that forty two percent of Millennials’ “downtowners” always or often use their cellphones to check prices. *Id.* at 18. It is a youthful consumer habit; since comparison shopping will occur anyway, even if the shopper has to leave the store for broadband coverage, physical retailers must facilitate the process instead of effectively inviting the shopper to exit the premises. This is especially true when formerly “purely” online retailers are opening showrooms to enable shoppers to see and feel their goods. *Id.* at 20.

45. See Michael N. Widener, *Driving Pedestrian Traffic to Law Journals*, 104 LAW LIBR. J. 569, 571 n.13 (2012) [hereinafter *Driving Pedestrian Traffic*].



Stores must feature kiosks where shoppers directly order out-of-stock sizes or colors of goods to be shipped directly to their residences.<sup>46</sup>

Second, retailers routinely must enliven the shopping experience. Store management must make the interior space engaging. Interactivity ideas in clothing outlets include simple acts like placing mannequins with interchangeable head inserts on the sales floor, where customers can interchange heads and pose them wearing apparel for shoppers' creative indulgence.<sup>47</sup> If the mannequins are movable next to a projection surface like a large monitor, the shoppers' saved photographs can be displayed there as backdrops for new digital photographs featuring the mannequins in the foreground. Apparel retailers may seek to revive the "trunk show," as a way to engage in-store shopping and local designers;<sup>48</sup> while other goods merchants may want to have on-site product demonstrations, featuring maintenance and applications segments. Cookware stores with show kitchens have substantial experience in product demonstrations of the multi-sensory sort. In-store video-games contests between consumers of those products provide an opportunity to try out a new game, and prizes will increase participation. Retailers can hire musicians to play live music in store interiors to increase customer movement and the attending release of dopamine.<sup>49</sup>

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46. Lachman & Brett, *supra* note 9, at 20.

47. This proposal is absurdly low-tech. Robotic mannequins exist today; for \$50,000, Flower Robotics' sleek, modern Palette mannequin moves its arms and head upon detecting a nearby potential customer. Travis Deyle, *Fashion, Robots, and Travis' Hiatus to Lollipop*, HIZOOK (Mar. 24, 2013), <http://www.hizook.com/blog/2013/03/24/fashion-robots-and-travis-hiatus-lollipop>.

48. See Jane Hamill, *The Secrets of Trunk Shows: What Is a Trunk Show and Why Should I Do One?*, FASHION BRAIN ACAD. (Aug. 2, 2010), <http://fashionbrainacademy.com/blog/what-is-a-trunk-show-and-how-do-i-make-one-work-for-me/>.

49. Ron Jon's Surf Shop, Cocoa Beach, Florida is open every day of the year and features live music. See RonJon Surf Shop, *Ron Jon Celebrates 50 Millionth Guest*, YOUTUBE (Aug. 19, 2011), <http://www.youtube.com/watch?v=baTTN6fuNPI>. Dopamine is the "feel-good" chemical naturally produced by the brain's nerve cells in response to pleasurable or thrilling stimulation characteristic of "novelty-seeking behavior". See Alice Park, *Why We Take Risks – It's the Dopamine*, TIME (Dec. 30, 2008), [available at](#)

Besides live interactions, more technology capacity will enhance the consumer's in-store social experience. For example, a monitor linked to touchscreen tablet computers or smartphones can be activated to show shoppers how to use their new tool or small appliance, or how to pair wines with ingredients or recipes. An avatar can try on a piece or ensemble of apparel to demonstrate a "look" or be "dressed up" with available merchandise to accessorize garments to create an outfit.<sup>50</sup> Soon, store operators must implement "smart shelves" that instantly recognize buyers' faces as they approach merchandise and, recalling their data from the store's database, initiate conversations with a digital "clerk." A shopper proceeds to select products as the smart shelves' software automatically identifies their account, tracks purchases, takes discounts and charges their account.<sup>51</sup> Additionally, printing customized products in the store via additive manufacturing techniques<sup>52</sup> will electrify the customer's shopping experience.

Third, physical merchants should *encourage* comparison-shopping via the Internet; every store needs broadband Wi-Fi capability and increased delivery speed (think Google Fiber<sup>53</sup>)

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<http://content.time.com/time/health/article/0,8599,1869106,00.html>.

50. In addition, sites like Fits.me (Virtual Fitting Room) allows shoppers with varying body types to avoid buying the wrong garment size; this is particularly useful for retailers with limited in-store inventory or high turnover of stock, especially if the merchandiser seeks to minimize apparel returns. See generally *How Fit Is Online Fashion*, FITS.ME (Feb. 2014), available at <http://communication.fits.me/acton/fs/blocks/showLandingPage/a/8391/p/p-0005/t/page/fm/0>.

51. See, e.g., Geoffrey A. Fowler, *SXSW First Look: Store Shelves That Talk to Your Phone*, WALL ST. J. (Mar. 9, 2014), <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-476247/>; *ShelfX Facial Recognition Fridge Charges Shoppers for What They Take*, PRWEB (Apr. 21, 2013), available at <http://www.prweb.com/pdfdownload/10651215.pdf>. Shelfbucks, another vendor using beacon technology, enables phones to use an app that pop-up product discounts; these coupons are redeemed by the shopper's holding the smart phone at the wireless checkout station. Fowler, *supra* note 51.

52. See *infra* Part V.B.

53. See, e.g., Andy Kessler, *Why Super-Fast Internet Is Coming Super Slowly*, WALL ST. J. (Feb. 23, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702304315004579381463769362886> (Google Fiber has speeds up to 100 times faster than basic broadband provided by cable and phone companies).

and, where appropriate, monitors to display price comparisons.<sup>54</sup> Three benefits accompany in-store coordination with Internet shopping. Initially, this builds a sense of consumer happiness about the convenience. Doubtlessly some consumers are driven only by price, yet if the goods subject to spot comparison are directly before the shopper at the moment of her price-check, what's the small cost differential compared to the excitement of taking the goods home immediately? Moreover, connectivity provides links to their websites of merchandise on offer, allowing shoppers to gauge those products consumers are intrigued by and whether the retailer sells at an on-line discount. Using Radio Frequency Identification (RFID) or other "readable tags," merchants can provide shoppers with enormous quantities of data on product composition or ingredients, countries of materials and labor origin in the supply chain, environmental impacts of the manufacturing process, product certificates of genuineness and other information bespeaking transparency of the retailer's operation.<sup>55</sup> These tags also can direct the shopper to online checkout lines, creating virtual interruption points which incite impulse purchases.<sup>56</sup>

D. *The Novelty Imperative: Employing Concession and Licensing Strategies*

Few retailers today compete with Amazon in supply, and there is a counter-tendency in retailing to slide between trends smoothly, due to supply-chain delays. Just in time production is the province of relatively few merchandisers.<sup>57</sup> Overcoming inertia affecting freshness can be achieved by merchants

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54. Currently, forty-two percent of Millennials' shoppers in America's downtown urban centers price compare on smartphones "always or often" before purchasing. Lachman & Brett, *supra* note 9, at 18. No urban center tenant is going to gain market advantage over physical retailers in other locations by impeding this well-ingrained consumer habit.

55. *See generally* WINNING, *supra* note 34, at 31.

56. *See id.* at 15.

57. *See* Greg Petro, *The Future of Fashion Retailing – The Zara Approach*, FORBES (Oct. 25, 2012, 10:16 AM), <http://www.forbes.com/sites/gregpetro/2012/10/25/the-future-of-fashion-retailing-the-zara-approach-part-2-of-3/> (providing information about Zara in apparel as one illustration).

granting concessions and licenses<sup>58</sup> to local merchants selling distinctive wares inside a tenant's space. These occupancy agreements deliberately should be brief, to cause a constant flow of new merchandise "slotted" in the space. This fundamentally evokes the "pop-up shop" phenomenon,<sup>59</sup> but requires a landlord's initial tolerance of short-duration occupancies of portions of its premises, departing from traditional retail leasing paradigms. If the pop-in retailer succeeds, the parties may alternatively allow the short-termer to linger or move to occupy another, ideally larger, space while its successful run continues. Prospering small-scale merchandisers will not require repeated concession renewals; monthly inventory sell-offs will drive the local actor to seek its own physical space or devote full-time energy to its e-commerce storefront.<sup>60</sup>

Another method to increase variety of product inventories is to encourage longer lease-term tenants to sublease "cubicles" to small vendors, incubating new retailing models.<sup>61</sup> One online retailing platform, Storenvy, Inc., leased a physical location

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58. See, e.g., *Lordi v. Nassau Cnty.*, 246 N.Y.S.2d 502, 505 (App. Div. 1964). Concessions or licenses are personal privileges, similar in that neither yields to the occupant exclusive possession of a designated portion of the premises; exclusive possession is the hallmark of a leasehold interest. *Id.* Therefore, the concession or license is revocable at the whim of the licensor. *Id.*

59. *Renewed Energy*, *supra* note 41, at 31-32 (discussion of pop-up shops). Pop-up projects can take on the magnitude of an entire temporarily installed marketplace, such as Industry City's Factory Floor in Sunset Park, Brooklyn. See *Fashion on the Factory Floor Showcases 50 Made in NYC Designers at Inaugural Holiday Market*, PRWEB (Nov. 19, 2013), <http://www.prweb.com/prweb/11347585.htm>. A longer-duration project of (initially) pop-up stores is City Mall's Re:START in Christchurch, New Zealand, an extraordinary response to the devastating earthquake in that community of February 22, 2011, that has rejuvenated the central city. See RE:START, <http://www.restart.org.nz/> (last visited Mar. 22, 2015) (shops made of recycled shipping containers support quality retailers in a beautiful setting).

60. An e-commerce (sometimes, "virtual") storefront is a low-cost means for small businesses to sell services or merchandise using a completely web-based system. See *What Is an Ecommerce Storefront?*, WISEGEEK, <http://www.wisegeek.com/what-is-an-ecommerce-storefront.htm> (last visited Mar. 22, 2015).

61. This requires certain modularity in the setup of the store interior, something on the model of Trader Joe's. See Glenn Llopis, *Why Trader Joe's Stands Out from All the Rest in the Grocery Business*, FORBES (Sept. 5, 2011, 9:55 AM), <http://www.forbes.com/sites/glennllopis/2011/09/05/why-trader-joes-stands-out-from-all-the-rest-in-the-grocery-business/>.

where five online sellers could pop up a temporary shop for thirty days.<sup>62</sup> Such locations enable online merchants to explore their appetites for physical retailing with a low entry-barrier and little long term financial exposure to a landlord.<sup>63</sup> “Master” tenants must allow “cube-dwellers” freedom of tastes in music, technology and decoration, allowing the incubating retailers experimentation, thereby increasing the opportunity to crowd-fund their business models through in-store soliciting.<sup>64</sup> The incubating-retailer rents must be based on lower fixed occupancy costs, perhaps swapped for the obligation to pay above-normal sublease percentage rents. Higher percentage rents from concession holders should drive the most successful modular subtenants to locations they will control. Since likely such new sites will be in the vicinity where their success first was garnered, this retailing practice enhances the retail variety imperative, creating novelty while increasing the attractiveness of the entire merchandising corridor.

#### V. Landlord Opportunities and Challenges

Landlords generally are not nimble by disposition; these dinosaurs roam deliberately, sometimes ploddingly, through their projects’ vast interior spaces. Redecorating a retail building’s common areas is a major project. Accordingly retail landlords are unwilling to do much on a recurring basis beyond repairing damage, shampooing carpets, watering the plant material and cleaning up graffiti unless economic survival is in jeopardy due to competition. SiriusXM contracts keep the same play lists blaring from loudspeakers month after month. Most physical retail tenants themselves avoid doing more in their interiors than re-garb mannequins and move floor stands and racks around inside their spaces, creating a minimal illusion of “newness.” Youth see through that illusion, responding (with

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62. See Westervelt, *supra* note 32.

63. See *id.*

64. See Caitlin Huston, *How to Prepare for Crowdfunding*, WALL ST. J., (Feb. 3, 2014), <http://www.wsj.com/articles/SB10001424052702303932504579252402009731252> (crowd-funding is most successful when backers are gathered before the Kickstarter or other crowd-funding platform campaign begins).

their feet) that all is predictable and stale.<sup>65</sup> Until landlords and tenants begin to make their spaces resemble the landscape of video games, by innovations like smart walls that constantly change messages and elicit interaction, plodding is challenged by Internet retailer websites changing frequently in their content and audio and visual (including animation) inputs. That sensory experience is as fresh as the owners and website developers jointly create, at significantly lower cost than what physical retailers must expend across their units to project freshness to consumers. Web retailing novelty surpasses what physical stores with the largest marketing and decoration budgets can offer; retailers increasingly recognize that they need constantly to innovate their apps to keep users returning.<sup>66</sup> Indeed, many large physical retailers are moving to serve mobile customers with a mobile-optimized website having unique features building brand loyalty in addition to e-commerce transactions.<sup>67</sup> Success for mobile apps today is measured by reviews and numbers of engagements in addition to revenue generation.<sup>68</sup> One new focus for retail apps is supplying in-store features such as indoor geo-location and self-service checkout,<sup>69</sup> which may save apps from extinction. The onslaught of nimble mobile platforms<sup>70</sup> determinedly engaging consumers is

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65. Shelly Banjo & Drew Fitzgerald, *Stores Confront New World of Reduced Shopper Traffic: E-Commerce Not Only Siphons off Sales, But Changes Shopping Habits*, WALL ST. J., (Jan. 16, 2014), <http://online.wsj.com/news/articles/SB10001424052702304419104579325100372435802?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424052702304419104579325100372435802.html>.

66. See Chantal Tode, *Are Retail Apps Losing Relevancy as the Mobile Web Gains?*, MOBILE COM. DAILY (Nov. 19, 2013), <http://www.mobilecommercedaily.com/are-retail-apps-losing-relevancy-as-the-mobile-web-gains>.

67. *Id.*

68. *Id.*

69. *Id.* While only a few retailers initially were offering this, Apple's iBeacon, which uses Bluetooth Low Energy to communicate with app users, may spur more in-store mode apps. *Id.* Still, Jason Goldberg, Chicago-based executive at Razorfish, believes retailers are finding that mobile apps require a significant investment in new updates to hold the interest of their user base, and they can serve their mobile customers equally well, if not better, with a mobile-optimized Website. *Id.*

70. These generically are referred to today as Depth Marketing Platforms. Those technologies enable marketers to create social experiences on their websites and leverage user-generated content to help prospective customers

daunting for landlords and tenants alike.

A. *The Bigger Picture for Retail Landlords*

Three major insights must gain traction with urban center retail landlords. First is that urban centers frequently are awash with history and culture, neighborhood character evolving over centuries, in stark contrast to the mall-area environment emerging over mere decades. Second, place-making implicates “mobility” of persons within and outside retail premises. This speaks to two location determinants, floor space and Information and Communication Technology, or “ICT.” Retail developers must adapt to retail formats suitable for smaller floor-plates. Disaggregating tenants “break up” retail uses by using different suites throughout the retail building or project, stocking different categories of goods at each site. Another approach is to leave historic or architecturally significant structures substantially intact, without modifying walls and floors to achieve the scale some retailers prefer. Respect for landmarks and design excellence promotes both a sense of place within the urban fabric and landlord good-will within the consumer population. As to broadband accessibility, it must be robust and fully incorporated into landlord provisions to tenants and their customers, in partnership with the government apparatus where the center is located, as described below in Part IV.<sup>71</sup>

B. *Specific Imperatives for Physical Retail Landlords*

Just as retailers must respond to competition from Internet retailing, landlords must face the potential loss of business resulting from less nimbleness than Web retailing platforms feature. Major initiatives landlords must undertake include first, spending to enliven common areas surrounding their

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understand offerings, evaluate products, and make purchasing decisions. See generally KIM CELESTRE ET AL., THE FORRESTER WAVE: SOCIAL DEPTH PLATFORMS, Q3 2013 (2013), available at <https://www.lithium.com/pdfs/whitepapers/Forrester-WAVE-Social-Depth-Platforms-t5OS6ShZ.pdf>.

71. See *infra* text accompanying notes 144-48.

tenants' stores. The entire retail project's interior must be engaged in the social experience, including connections to the street and neighboring public areas. To this end, landlords must invest in common areas features engaging customer physical expression and interaction; these periodically should change to maintain consumer interest. Sidewalk sales, correctly staged, entice persons to enter the larger premises for further exploration. Landlords should place QR Code-labeled placards in common areas to allow tech-savvy shoppers to learn of the center's scheduled events and to retrieve coupons for center-wide discounts. Next, landlords must be circumspect, potential leasing revenue losses aside, about renting only to the usual cast of franchised and corporate brand store characters. Instead, landlords must encourage (in their form leases) sub-tenancies and concessions-making by their primary tenants to maintain innovation and variety; franchised stores will be unprepared or unwilling to address this initiative.

Landlords can make a statement unavailable to e-commerce retailers by embracing disruptive technologies in partnership with a city's or town's planning administration and local educational institutions to achieve optimal impact. Below I describe the game-changing potential of Additive Manufacturing, or "AM," an instrumental technology in the near term. AM is a manufacturing process bound together with information technology. Using "matter printers," myriad products are made from software-programmed, precise specifications (the technological "die," "injection mold" or "jig" aspect) as raw materials are fed into the programmable print "factory." Within the constraints of the laws of physics and biology, ethical norms and perhaps copyright and patent law, and incorporating nanotechnology advances, essentially anything will be susceptible to manufacture, to any scale within our lifetimes. In short, additive manufacturing's capacity to make inorganic materials will be boundless.<sup>72</sup> Eventually, this means that humans will engage only in design, not production,<sup>73</sup>

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72. MARK STEVENSON, AN OPTIMIST'S TOUR OF THE FUTURE 132-33 (2012).

73. See *Solid Print: Making Things with a 3D Printer Changes the Rules of Manufacturing*, ECONOMIST (Apr. 21, 2012), available at <http://www.economist.com/node/21552892> [hereinafter *Solid Print*] (eventually, robots will operate the AM replicators).



phases of manufacturing, as churning out prototypes, followed by serviceable products, will be exclusively the realm of AM “printing” devices.<sup>74</sup> For now, startup costs of AM operations are beyond the capacity of many individuals, due to the cost of the replicator device,<sup>75</sup> programs for useful products to be produced<sup>76</sup> and recurring expenses for feedstock, as well as unfamiliarity with the software manipulation. Economic barriers to entry in this industry will shortly be removed, however, since competition drives the cost of replicators and software designing downward. Websites like “MakerBot Thingiverse”<sup>77</sup> daily add new software design templates, downloadable free for the most part, to the catalog of items reproducible. Multiple replication technologies with commercial applicability are available now.

AM generically and somewhat incorrectly is referred to as “3-D printing.” Several AM processes are briefly summarized here, beginning with selective-laser sintering or “SLS.” This process features a laser that hardens and bonds small grains of plastic, ceramic, glass, metal, and other materials into layers of a three – dimensional structure.<sup>78</sup> The laser traces cross-sectional patterns of the 3D software design onto a bed of powder. After each layer is built, the bed lowers and another layer is built atop the preceding one. The bed continues lowering until every layer is built and a part is complete. When the goal is a durable plastic part, SLS turns out parts rivaling those made under traditional manufacturing methods like injection molding, and are already used in the automotive and aerospace industries. As opposed to SLS, parts made using other AM

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74. STEVENSON, *supra* note 72, at 133.

75. See *Solid Print*, *supra* note 73; see also CUBIFY.COM, <http://cubify.com/cube/> (last visited Mar. 3, 2015). For about \$1,300, a consumer range of small 3D printers, called the Cube can be had; these units can make things like toys, chess pieces and ornaments. CUBIFY.COM, *supra* note 75. They have been developed along with an online platform called Cubify to provide services for a community of users. *Id.*

76. See *Solid Print*, *supra* note 73. About the only consumer-targeted items mass-produced at the time this paper is published are toys and items like key chains, due to the limit on available software programs; however, aircraft parts and satellite components already have been produced by AM processes. *Id.*

77. THINGIVERSE, <http://www.thingiverse.com/> (last visited Mar. 2, 2015).

78. See HOD LIPSON & MELBA KURMAN, FABRICATED: THE NEW WORLD OF 3D PRINTING 9 (2013) [hereinafter FABRICATED].

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methods, for now, become brittle over time.

Direct-metal laser sintering (DMLS) relies on fiber-optic lasers to fuse material together like traditional laser sintering, but the DMLS uses extremely fine metal powder with granularity on the order of 6 to 9 angstrom units. Parts again are built up gradually, one layer atop another. The end result is a chemically pure, highly-dense metal part used for prototyping or suited for a wide range of end-use applications. Metals used in DMLS include stainless and tool steels, super alloys, nonferrous alloys, precious metals, alumina, titanium, aluminum, and cobalt chromium.

Stereolithography (SLA) is similar to the SLS process, in that a laser hardens materials.<sup>79</sup> In SLA, however, an ultraviolet laser traces a pattern onto a vat of liquid photosensitive resin, hardening the resin and forming a solid layer. The bed for the object lowers, the part is coated with a new layer of resin, and succeeding layers appear atop the others until the part is complete, cleaned with solvents and cured in a UV oven. SLA is often used when form, fit, and assembly are critical, such as in creating precise patterns for injection molding, casting, and vacuum casting. These accurately-made parts can be functional prototypes.

Multi-jet printing (MJP), an inkjet-printing process, uses piezoelectric crystal printheads to deposit layer upon layer of photo-curable plastic resin or wax-casting materials<sup>80</sup> to build parts, patterns, and molds with fine features. What is so attractive about this AM process is that MJP high-resolution printers shortly will be economical to own and operate; and they use a separate, meltable or dissolvable (like “lost wax” processes) support material to simplify post-processing. Support material removal is virtually hands-free, allowing even the most delicate features and complex internal cavities to be thoroughly cleaned without damage. Office compatibility, together with MJP’s capabilities, make it well suited for direct investment-casting applications in jewelry, dentistry, medical, and aerospace, entailing significant time, labor, quality, and cost advantages over traditional production methods. A final AM process is

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79. FABRICATED, *supra* note 78, at 73-74.

80. *Id.* at 70-71.

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fused-deposition modeling (FDM); here, machines send heated material — often a production-quality thermoplastic,<sup>81</sup> through one or more nozzles, which forms into a layer when it hardens.<sup>82</sup> (Polylactide (PLA) and strong base anion (SBA) resins are commonly-used plastics.) FDM-produced parts build up layer by layer like other AM approaches.

Printer variations for each of these AM methods may be prohibitively expensive to an individual consumer, but that is not true of many members of the commercial development community. These printers do require significant electrical-current expense; some of the feed-stock today must be heated to temperatures of 230 degrees Kelvin for the deposition of layers to work correctly. Landlords possess commercial grade transformers and high-amperage electrical panels in their projects. Interestingly, the printer equipment usually is not enormous or bulky; most AM machines range in size between those of a water cooler or refrigerator, although they may be too large for a residential garage stocked with vehicles and other possessions. Few waste products result from processing the feed-stock, and there is little evidence that the materials cause any environmental concerns. Landlords have the rare opportunity to express support for the public's entrepreneurial inclinations through AM processes and to demonstrate leadership in the coming movement toward individual entrepreneurialism through exploitation of new technologies like AM.

This opportunity for a cutting edge retail consumer experience - one not available at e-commerce sites - begins by landlords subsidizing several AM machines in retail centers and encouraging tenants to sell materials that AM requires – and perhaps to promote products of AM – niche fabricators. Partnering with retailers and city governments, landlords may increase occupancy and rents by providing these items: Inexpensive rental of AM equipment “processing-time” by the hour (or object) in discreet cubicles; coaching in use of AM methods by technical college or community college instructors occupying project suites; locations for AM “user groups” to

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81. *Id.* at 82.

82. *Id.* at 68-69.

network and establish an innovation atmosphere; incubator laboratories (so-called “Maker Spaces”) for fledgling AM companies;<sup>83</sup> and classrooms for advanced education in AM and development of entrepreneurial skills offered by community colleges or trade schools.<sup>84</sup> Imaginative landlords integrating a disruptive technology into their projects, however counter-intuitively,<sup>85</sup> will feel the embrace of the “creative class” among cadres of shoppers with curiosity. A retail center’s technology theme, whether additive manufacturing or another that fuses novelty with technology (including ICT<sup>86</sup>), spurs interest among a cross-generational niche of “wired” consumers, leading to place-making benefitting the entire urban core.

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83. Maker spaces, a new type of storefront, provide equipment and machines available to users as part of their membership. RETAIL UPDATE, *supra* note 1, at 13. These “third places,” outside of home or work, are where people meet, socialize, and learn from one another, adding to “street activation,” as planners say. *Id.* at 2, 13. These spaces allow developers to make prototypes and models of work that will enable funding of their projects. *Id.* In the example proposed, Landlords may be able to joint venture and share in the cost of such maker spaces with the educational system and local government, justified because such infrastructure lures individual entrepreneurs of the creative class, start-up companies and those employed by these enterprises. *See id.* It also will lure the curious, who will linger and perhaps purchase maker and other retail projects. Gen Y members feel that more “third places” are needed for lingering, networking, and online exploration of what is being absorbed. *See* Lachman & Brett, *supra* note 9, at 5.

84. Education enterprises potentially increase urban center vitality. *See generally* Dianna M. Nández, *Tempe Aims to Expand Foot Traffic Beyond Mill*, AZCENTRAL (Feb. 14, 2014), <http://www.azcentral.com/community/tempe/articles/20140213tempe-expand-foot-traffic-beyond-mill.html> (Arizona State University’s initiative to increase neighborhood walkability by combining classroom space with a marketplace and student congregation facility in downtown Tempe); Michael N. Widener, *Inlaid-Ivory Towers: Higher Education Joint-Use Facilities as Community Redevelopment Bulwarks*, 33 PACE L. REV. 327, 333-37 (2013) [hereinafter *Inlaid-Ivory Towers*]. Public libraries may also be a resource where information experts employed by the municipality share space in the project.

85. Readers worried about the zoning implications of additive manufacturing are perhaps calmed in Section VI.B.2. *See infra* Part VI.B.2.

86. *See infra* Part VI.A.

VI. Land Use Administration Leadership in Urban Center  
Retailing Rescue Initiatives

A. *The Comprehensive Planning View: Everything in Proportion*

Socrates identified physical retailing's proper role in urban centers by intoning "everything in moderation, nothing in excess."<sup>87</sup> Retail consumerism is a blazing obsession in American society, stoked by an advertising apparatus keeping consumption satiated just beyond the public's reach. Healthy urban mixed-use centers provide a range of retail and related service functions like banks, local business offices (e.g., insurance, investments and escrow companies), restaurants and community and cultural facilities joining other employment and government-based functions. Retail dominance throws a hub of urban life out of balance and converts a mixed-use center to a merchandising mall. The first goal of long-term planning in sustainable growth strategies, therefore, is learning whether additional urban core retail development serves anticipated population increases appropriately, or if it satisfies a demonstrable under-provision of goods and services in a particular trade area<sup>88</sup> – or, instead, simply saturates a center's "market area," threatening the essential character of an otherwise vibrant place of human scale.<sup>89</sup> A ready example of "overabundance" is excessive souvenir provision in an area of historical, religious or other arts-and-culture-themed significance. Balancing need with availability of retail provision (otherwise put, "mall effect" deterrence) in an urban center having authenticity, appropriate scale and vitality compels assessing: (1) whether the next substantially-sized urban retail

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87. CHRISTOPHER PHILLIPS, SIX QUESTIONS OF SOCRATES: A MODERN-DAY JOURNAL OF DISCOVERY THROUGH WORLD PHILOSOPHY 59 (2004).

88. See RETAIL PLANNING, *supra* note 40, at 22 (observing a set of Irish references for American town planning may be tempered by the fact that Ireland has considered urban center planning elements holistically and on a national scale seldom observed in other countries, although the EU encourages such perspective of its members).

89. See RETAIL UPDATE, *supra* note 1, at 10 (expresses concern for oversupply of retail and provides guidance for future retail development throughout Arlington County, Virginia).

(or retail-anchored) project (call them “nushoppes”), implemented in full measure, impacts adversely one or more other urban centers within the same market area in its (or their) wider function in promoting or encouraging the arts, culture, leisure or similar public-realm functions, to the degree that the nushoppes development hampers the economic or social sustainability of the larger community, a 360 degrees’ view of community development impact;<sup>90</sup> (2) whether nushoppes will contribute to an increase in vacant properties in the same urban market area for a substantial period;<sup>91</sup> (3) whether nushoppes captures ready consumer access by transit, pedestrian and bicycle use as well as personal vehicle modes, rendering nushoppes appealing and practically useful to urban center consumers of diverse socio-economic standards;<sup>92</sup> and (4) whether nushoppes stimulates urban center synergy inside and outside the stores or saps the vitality in surrounding mixed use neighborhoods.

Many market areas under analysis transcend boundaries of a single jurisdiction and, consequently, assessment must include impacts beyond a single planning authority’s jurisdiction, especially in megapolitan regions. This implicates regional retail activity planning apparatuses that jointly appraise and adopt market area strategies.<sup>93</sup> Once those strategies are developed, dual action initiatives must be undertaken. The first adopts, regionally, movement-of-persons measures balancing improving retail center accessibility against optimizing street life activation by enabling pedestrians, cyclists and persons using disability-oriented mobility modes to participate fully.<sup>94</sup> The second improves the retailing experience by adopting (without standardizing, stifling novelty) high-quality civic

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90. See, e.g., RETAIL PLANNING, *supra* note 40, at 34. This work charmingly and perhaps more accurately refers to market area by the appellation “consumer catchments area.” *Id.*; see also RETAIL UPDATE, *supra* note 1, at 10 (concern for impacts of oversupply of retail).

91. See, e.g., RETAIL PLANNING, *supra* note 40, at 34.

92. See *id.*

93. See *id.*

94. RETAIL PLANNING, *supra* note 40, at 21. Plainly, transit-oriented development will be a chief objective in communities seeking to increase density in development, frequently by substantial vertical development. *Id.*; *id.* at 30.

improvements designs for roads, street signage and lighting.<sup>95</sup> With these criteria established, a community's administration is prepared to engage with the development realm possessed of management and retailing-design standards critical to realizing its urban center vision.<sup>96</sup>

B. *Strategic Planning Vision and Implementation*

1. Replacing Euclidian Zoning Through Crafting Ordinances to Reestablish Community

Limitless traffic trips were encouraged when streets were less crowded and gasoline and diesel fuels were cheaper. Euclidean zoning<sup>97</sup> insured that uses were segregated one from another, engendering motor vehicle dependence,<sup>98</sup> the current anathema among New Urbanists<sup>99</sup> and increasing numbers of citizens. Land use regulations over the last eighty years, fine-tuned to the micromanagement point, subjected governments to the critique that these controls not only separated uses but ultimately people as well, cataloging ills like bad public health, suffering economies, and sickly environments. Rigid use segregation no longer makes sense in transit-oriented development<sup>100</sup> areas or anywhere where a community melds concentrations of workers, students and dwellers. Smart Growth<sup>101</sup> sought a responsible middle ground by balancing conflicting agendas among the public sector, which seeks to represent the common good; the private sector, representing the

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95. *Id.* at 30.

96. An illustration of the partnership is the Queen Victoria Market, see *supra* note 1 and accompanying text, but essentially every Community Benefits Agreement affords an example of partnering between community and private developer. See *infra* notes 129-35 and accompanying text.

97. See Lewyn, *supra* note 4, at 263. This essay assumes a reader's facility with certain terms in the lexicon of New Urbanism; however, I refer extensively to Lewyn's seminal primer on New Urbanist thought for the benefit of laypersons exposed to this language for the first time.

98. *Id.* at 260 n.32, 263, 271.

99. *Id.* at 258-60.

100. See Lewyn, *supra* note 4, at 259.

101. See *Policy Guide on Smart Growth*, AM. PLAN. ASS'N (Apr. 14, 2012), <https://www.planning.org/policy/guides/adopted/smartgrowth.htm>.

community of land owners; and environmentalists and their kindred groups opposing increased development initiatives.<sup>102</sup> To enable fast-paced retail urban centers, however, Smart Growth's principles permit a community to respond to new technologies and vacillating consumer appetites.<sup>103</sup> Among Smart Growth's first principles is endorsing mixed-use projects<sup>104</sup> in communities promoting competitiveness in the areas of economic development and job growth.

New Urbanism's influence in some jurisdictions is causing zoning control transformation from a regime of rigid prescriptions affecting land use categories and development standards to flexible sets of rules allowing proposed projects to be regulated, on a case-by-case basis, by negotiated impact-mitigation measures.<sup>105</sup> While such flexibility creates some inherent danger of "unfairness" to either camp<sup>106</sup> – the developer

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102. See Charles C. Bohl, *To What Extent and in What Ways Should Governmental Bodies Regulate Urban Planning?*, 6 J. MKTS. & MORALITY 235, 248 (2003).

103. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 12 (2010).

104. Lewyn, *supra* note 4, at 266, 268.

105. *Id.*

106. Initially, state courts struck down arrangements reached between local governments and developers smacking of "contract zoning." See, e.g., *State ex rel. Zupancic v. Schimenz*, 174 N.W.2d 533 (Wis. 1970) (contract made by a zoning authority to zone or rezone or not to zone is illegal and the adopted city ordinance is void because a municipality may not surrender its legislative powers and functions, thereby inhibiting the valid exercise of its police powers). Courts reasoned that arrangements where a government bound itself to grant rezoning constituted an abdication of that community's police power. Later, however, courts usually distinguished "conditional zoning" from "contract zoning," upholding the former as bilateral arrangements supported by a rational basis-connection to a legitimate state objective. See, e.g., Philip L. Fraietta, Note, *Contract and Conditional Zoning Without Romance: A Public Choice Analysis*, 81 FORDHAM L. REV. 1923, 1933 (2013) (cataloging jurisdictions that permit both contract and conditional zoning, neither contract nor conditional zoning, only conditional zoning, or, alternatively have not spoken clearly about their preferences by declining to articulate review standards or refusing to rule altogether). Still later, "government in the sunshine" frequently trumped "insider trading," introducing a new era of representative reliability under which transparently-operating local governments no longer bestowed entitlements on a developer for a *quid pro quo* benefitting persons other than the directly affected-by-development parties; thus, courts merely manage the dangers of "cabined" negotiating over exactions connected to approving proposed land development. See Been, *supra*



or those to varying degrees directly impacted by a development – negotiations and contractual obligations gradually are becoming an entrenched feature of land use controls in most metropolitan areas.<sup>107</sup> Consequently, form-based codes<sup>108</sup> are at the forefront of community planning strategies, where cities acknowledge that potential commercial spaces in urban centers where dense development and rejuvenation are sought may be appropriate for physical retailing, regardless of those parcels' underlying zoning.

Adaptations of controls governing such tracts may be accomplished under any of the zoning-code scenarios outlined below or, for transient occupancies, may be authorized under a use permit or special exception<sup>109</sup> during periods of transition, such as while local zoning regulations are under revision. Euclidian zoning stymies mixed-use project implementation in this phase of resurgence of the urban center's sustainable retail consumer market. Recognizing that reality does not justify a community's leaping forward thoughtlessly into a new realm of form-based regulations prior to their acceptance by its citizens.<sup>110</sup>

Opinion makers and officials first must tease out a collective community vision of an urban center's destiny.<sup>111</sup> For instance, is true "walkability" a community virtue to be implemented rapidly, or is it sufficient to establish incremental benchmarks toward greater "human-scaled" improvements in mixed-use centers? Time, money and political constraints often inform a

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note 103, at 13-14. Legislatures in some states address these "dangers" themselves via statutory schemes imposing accountability through joint development agreements and community benefits agreements or "contract zoning" generically. See, e.g., ARIZ. REV. STAT. ANN. § 9-500.05 (2011) (development agreement); ME. REV. STAT. ANN. tit. 30-A, §§ 4301(4)-(5), 4352(8) (2010) (contract and conditional zoning).

107. See Fraietta, *supra* note 106; Been, *supra* note 103.

108. See Lewyn, *supra* note 4, at 268-69.

109. See Michael N. Widener, *Curbside Service: Community Land Use Catalysts to Neighborhood Flowering During Transit Installations*, 45 URB. LAW. 407, 438 (2013) [hereinafter *Curbside Service*]. Critically, temporary uses need a streamlined process for implementation approvals. See RETAIL UPDATE, *supra* note 1, at 32.

110. See Michael N. Widener, *Moderating Citizen "Visioning" in Comprehensive Planning: Deliberative Dialog Processes*, 59 WAYNE L. REV. 29, 30, 34, 37-38 (2013) [hereinafter *Moderating Citizen*].

111. *Moderating Citizen*, *supra* note 110, at 42.

more incremental approach to implementing Smart Growth principles in urban centers. Once a community's administration stakes out a proposed vision for densely – developable areas, dated zoning laws cannot be replaced without engaging in a transparent and inclusive public dialog that ultimately endorses a collective local vision, preferably with consensus, and its implementation.<sup>112</sup> Communities committing to such a holistic approach to replacing dated controls with Smart Code doctrines include the City of Miami, Leander, Texas; Pass Christian, Mississippi; Penn, Pennsylvania; Ranson, West Virginia; and Ridgeland, South Carolina.<sup>113</sup>

## 2. Implementing Zoning Code Innovations

Since Euclidian zoning codes' use segregation feature undermines mixed use place-making, communities seeking to end "separateness" will adopt a form-based codes,<sup>114</sup> minimally applying them to areas where they seek greatest development intensity. In areas of intended high density occupancy and commerce, cities must include in their definitions of "urban

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112. See, e.g., LEE C. SLUSSER, PLANNING PROCESSES, PLANNING FUTURES, AND PUBLIC PARTICIPATION TECHNIQUES, [www.txplanning.org/files/185/download/](http://www.txplanning.org/files/185/download/) (last visited at May 28, 2015); Jennifer A. Hurley, *On Public Process*, in NEW URBAN POST: A COMPILATION OF ONLINE DISCUSSIONS ABOUT THE NEW URBANISM (Jennifer A. Hurley & Steven Bodzin, eds. 2003); *Curbside Service*, *supra* note 109, at 34-35, 46; Patricia E. Salkin, *Collaborative Processes for Preparing and Adopting a Local Comprehensive Plan*, in MODERNIZING STATE PLANNING STATUTES (PAS 480/481), 2 GROWING SMART WORKING PAPERS (1998); Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969).

113. Miami and Mesa, Arizona are the only two major American cities yet to replace Euclidian zoning with form-based ordinances. See, e.g., DONALD L. ELLIOTT ET AL., THE RULES THAT SHAPE URBAN FORM (PAS 570) 60-68 (2012) (describes the Miami 21 process of adopting a form-based code); OPTICO DESIGN INC., MESA, ARIZONA FORM-BASED ZONING CODE (2012), available at <http://www.mesaaz.gov/bettermesa/downtownfocus/pdf/fbc/AdoptedFBC.pdf>. The latter code immediately applies to Mesa's downtown area and certain other neighborhoods assigned to a transect zone; the code will be phased in for other areas of the city as "Smart Growth Community Plans" are adopted by the City Council. ELLIOTT, *supra* note, at 56-1.

114. Lewyn, *supra* note 4, at 268. Form-based codes focus on building type, street type, or both as primary elements of regulation. *Id.* (citing JOEL RUSSELL, CONG. FOR THE NEW URBANISM, CODIFYING NEW URBANISM (PAS 526) 25-30 (2004)).

centers” those areas anchored by transit stations and a radius of a half-mile<sup>115</sup> or more from their passenger platforms. Form-based codes or PUDs, as they sometimes appear in zoning codes, addressing these sites ultimately emphasize street appeal through quality design of retail, dining, pocket-parks and other “gathering” destinations, investing in traditional neighborhood development.<sup>116</sup> Within such urban centers, neighborhood vacant lots<sup>117</sup> should be usable to host pop-up stores,<sup>118</sup> modular temporary structures subject to special development conditions (such as duration of use and infrastructure connections) taking into account that these installations are susceptible to being “disconnected from their moorings” and transported elsewhere.

Because form-based codes are time-consuming to create and very detailed,<sup>119</sup> communities seeking retailing revival may consider alternatively implementing either overlay retailing districts or floating zones.<sup>120</sup> Traditional mixed-use neighborhood development-type districts are the subject of floating zones not identified with specific locations initially. Indeed, the application of the floating zone to one location is not “fixed” unless and until the community approves a specific owner’s request for development meeting the zone’s standards.<sup>121</sup> An overlay district, by contrast to a floating zone, is one in which additional standards are imposed or its underlying district’s standards are modified, to induce certain

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115. See *infra* text accompanying note 134.

116. Lewyn, *supra* note 4, at 259. Under a form-based code, whether 3-D printing is a permitted use is not at issue; instead, the community planner’s inquiry is how this use will integrate with its surroundings and with transportation connections to the AM location.

117. See *Curbside Service*, *supra* note 109, at 431-32.

118. See *id.* at 436.

119. See, e.g., OPTICO DESIGN INC., *supra* note 113 (for Mesa, Arizona’s Form-Based Zoning Code, 196 pages containing numerous photographs, maps, drawings and sketches and myriad tables).

120. *Curbside Service*, *supra* note 109, at 434.

121. See RUSSELL, *supra* note 114, at 30-31; *Curbside Service*, *supra* note 109, at 433-37. This can be a particularly salutary process for what are perceived as “interim uses.” See RETAIL UPDATE, *supra* note 1, at 33. An AM “print shop” likely would be a use permitted as of right along with similar “light duty” fabrication or assembly activities in a floating zone designed to energize a moribund city center. An overlay district likely will permit small scale manufacturing that does not feature above-ambient levels of noise, dust, odor, gasses, or other obnoxious by-products of work.

geographic areas to engage in municipally-desired development behaviors.<sup>122</sup> Further, certain communities adopt in their zoning codes so-called “downtown Infill-Incentive Districts” containing provisions that “trump” otherwise-allowed densities or other development standards (such as building heights or sidewalk setbacks) imposed by an underlying zoning district or another overlay district. These provisions spur particular infill project types by inducing development of vacant parcels and revitalizing or even repurposing existing buildings in core urban centers.<sup>123</sup>

### 3. Recognizing Adaptive Reuse for Sustainability, and Leading on Parking Issues

New Urbanists object to structure parking. In the T6 Zone, under the current version of the SmartCode, landlords are required to provide three stalls for 1,000 square feet of retail operations.<sup>124</sup> Communities seeking to revive urban centers should render such ratios the upper limit – assuming that urban governments should impose any parking requirements under zoning codes. Adequate parking remains a concern when citizens are vehicular-dependent;<sup>125</sup> in walkable mixed-use

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122. See *Curbside Service*, *supra* note 109, at 430. These definitions become dicey when jurisdictions characterize “floating” districts as a type of “overlay” district, but the general distinction holds.

123. See, e.g., ARIZ. REV. STAT. ANN. § 9-499.10 (2015) (an enabling statute); SCOTTSDALE, ARIZ. DOWNTOWN INFILL INCENTIVE PLAN 1 (2010); TUCSON, ARIZ. UNIFIED DEV. C. ART. (Downtown Area Infill Incentive District) 5 § 5.12.1. Each of these cities’ infill districts may be elected at the option of the developer in opposition to compliance with the standards of the underlying zone (or with any overlay development option that otherwise might apply). A new infill initiative is locating miniature retail warehouses in urbanized small spaces, to enhance delivery speed when product is depleted inside showroom spaces. See Kaitlin Ugolik, *3 Ways The Retail RE Game Is Changing*, L. 360 (Aug. 1, 2014), <http://www.law360.com/articles/563282/3-ways-the-retail-re-game-is-changing>. This enables retail showroom-oriented spaces to feel more interactive, driving inventory off-site yet nearer to the showroom’s location than traditionally occurs. See *id.*

124. See SMARTCODE: VERSION 9.2, Sec. SC39, Table10, *available at* <http://www.transect.org/codes.html>.

125. Separating garden variety mixed-use development from so-called “transit oriented development,” sometimes referred to as TOD, is useful here. Ben Broesamle, *What Is Transit-Oriented Development, Anyway?*, SEATTLE TRANSIT BLOG (Dec. 3, 2013, 7:51 AM), <http://seattletransitblog.com/2013/12/03/what-is-transit-oriented->

areas, however, mass transit usage and shared parking should be the expectations; debates about “how much parking is adequate” should not, therefore, consume the attention of promoters of urban center revitalization. Past obsessions about available city-owned structured parking afford an opportunity city leadership can leverage for urban center competitiveness. In brief, municipal parking structures, like other public amenities, can be repurposed for purposes of creating walkable neighborhoods.

Garages themselves are convertible to mixed use projects featuring retail stores on the ground levels of some structures, while parks or community gardens occupy rooftop levels exposed to daylight.<sup>126</sup> Levels between the ground and the roof, which often present utility challenges due to weight-bearing capacities and low ceilings, can park a variety of vehicles, including bicycles, Segues, mini and midi-buses, para-transit and city-services vehicles. This adaptation frees up redevelopment of more surface parking lots and liberates street-side stalls. One remarkable city garage transformation is the Tacoma, Washington, joint venture with Pacific Plaza Development, a private concern; they negotiated a 100-year long lease to develop first-floor retail space occupied in part by a grocer and deli until

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development-anyway/.

TOD is . . . mixed-use, walkable development near high quality transit investments [where parking is unavailable]. It provides essential retail services, at least some employment options, and access to high-capacity, rapid, reliable transit all within a convenient, 5-minute walk. TOD actively reduces the availability of on- and off-street parking as much as possible and therefore uses space otherwise filled with [motionless] cars. In practice this means development near high quality transit without private parking.

*Id.* TOD purists would hold that the complete absence of parking is “adequate.”

126. See, e.g., Alan Snel, *Zamboni on the Roof? Must Be the Las Vegas Plaza*, LAS VEGAS REV. J. (Feb. 18, 2014, 4:18 PM), <http://www.reviewjournal.com/business/economy/zamboni-roof-must-be-las-vegas-plaza> (Wranglers Hockey Club will play in 45 thousand square-foot modular building featuring metal skeleton covered with fabric shell to house rink and seating for 3,500 fans on the roof of the Plaza Hotel Casino – which was once part of a parking structure).

2014,<sup>127</sup> with another part occupied by a medical clinic.<sup>128</sup>

Community administrators must leverage their influence to engage private parking purveyors to make shared parking agreements with local retailers so merchants need not provide separate parking areas. Office buildings, for example, use few stalls in their garages in the evenings and on weekends when urban center restaurants and some retailers are busiest. While this is no revelation, new attention to community sustainability mandates that every underutilized garage structure be optimally exploited, even if retailers and the community pay nominal license fees for longer hours of private garage availability to customers.<sup>129</sup> By ordinance, frequently underutilized garages themselves should be treated as “vacant commercial spaces” in urban centers available for pop-up retailing<sup>130</sup> and other adaptive re-usage, such as becoming “events” venues on garage roofs or conversion to urban gardens.

Parking optimization strategies, especially structured parking capacities and availability, are vital to the overall mission of transportation planning. Cities study and analyze their findings from parking reports; but implementing strategies from these analyses is the true role of leadership. City administrations therefore must sponsor, in partnership with the private sector, “parking exchanges” in urban centers; here,

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127. See Katie Scaff, *City Grocer Came, Went Too Soon*, BUS. EXAMINER, Feb. 2014, <http://www.busessexaminer.com/February-2014/City-Grocer-came-went-too-soon/> (IGA-branded “City Grocer” store opened September, 2011, but closed in February, 2014); *Repurposing Existing Parking Structure Pays Off*, DOWNTOWN IDEA EXCHANGE, Sept. 2011, available at <http://www.downtowndevelopment.com/dixarticle1.pdf>.

128. See Kathleen Cooper, *Last Spot in Downtown Tacoma’s Pacific Plaza to Become DaVita-Run Medical Clinic*, NEWS TRIB. BIZ BUZZ (Sept. 14, 2011, 11:47 AM), <http://blog.thenewstribune.com/business/2011/09/14/last-spot-in-downtown-tacomaspacific-plaza-to-become-davita-run-medical-clinic/>.

129. In San Francisco, by order of the Mayor, the city’s online open data depository allows apps’ programmers to create applications like a map of privately-owned but publicly available structured parking. See GSMA, GUIDE TO SMART CITIES: THE OPPORTUNITY FOR MOBILE OPERATORS 28 (2013), available at [http://www.gsma.com/connectedliving/wp-content/uploads/2013/02/cl\\_sc\\_guide\\_wp\\_02\\_131.pdf](http://www.gsma.com/connectedliving/wp-content/uploads/2013/02/cl_sc_guide_wp_02_131.pdf) (representing city ICT leadership).

130. See *Tvsdesign Partners with Mall Plaza to Repurpose Garage Into Retail*, CHAIN STORE AGE (Mar. 5, 2012), <http://www.chainstoreage.com/article/tvsdesign-partners-mall-plaza-repurpose-garage-retail>.

owners of parking structures and developers of new office and retail projects buy and sell, in a market environment, leases of blocks of existing parking stalls, obviating construction of new structured parking except when current inventories are exhausted. Leases can be set up by time of day;<sup>131</sup> for instance, a retailer can lease stalls from an office building or business hotel nearby for weekend and evening hours' usage. A formalized marketplace for such stall-block leasing would draw a critical mass of attention to sharing. Awarding LEED "points" to parking projects where sharing during off-peak hours occurred might offer a further incentive to developers. While cities cannot compel participation in excess-parking sharing, they may be able to mandate structured-parking owners to participate in creating a database of inventory, which alone might spur sharing initiatives in the private sector.

Curbside parking in some, albeit not all,<sup>132</sup> urban center retail areas should be the exclusive province of short-term delivery vehicles, vehicles transporting persons with disabilities and shared-passenger vehicles like Zipcar, enhancing the pedestrian walking environment by activating interiors of buildings facing pedestrians alongside the storefronts.<sup>133</sup> Curbside parking also separates non-motorized wheeled travelers from social experiences of gathering and lingering in a human-scaled neighborhood where decompression occurs in the midst of novelty and messiness. Optimization of structured parking reduces curbside parking demand, in turn enabling some blocks of mixed use development to feature pedestrian ways and biking lanes while maintaining occasionally-interspersed street parking.

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131. See Adam Bejan Parast Comment to *Sustainable Urbanism Means Less Parking*, SEATTLE TRANSIT BLOG (Jan. 7, 2014, 9:34 AM), <http://seattletransitblog.com/2014/01/07/sustainable-urbanism-means-less-parking/>.

132. Robson Street in Vancouver, British Columbia is an example of where there is traffic and parking but the area remains lively for pedestrian interaction. See generally ROBSON STREET BUS. ASS'N, <http://www.robsonstreet.ca/> (last visited May 28, 2015).

133. For an example see Portland, Oregon's Pearl District, especially in the area of 10<sup>th</sup> and Lovejoy Streets. See generally EXPLORE THE PEARL, <http://explorethepearl.com/> (last visited May 28, 2015).

#### 4. Adjusting Noise Ordinances and Special Events Use Permit Requirements

Noise ordinances are infrequently rigorously enforced, so city administrations will not obtain initial broad community support for amending noise ordinances to allow greater sound levels in urban centers. The path of least resistance is found in integrating noise ordinance requirements into both Entertainment District Zoning use ordinances and community policing initiatives. The integration of noise control with urban center revitalization is being addressed by the Town of Fort Myers Beach, Florida.<sup>134</sup> That community carefully surveyed and vetted noise and entertainment district ordinances in other communities before drafting its own proposed form of noise ordinance.<sup>135</sup> Noise ordinances, no matter how well drafted, have scant likelihood of being consistently enforced without a “neighborhood resource officer” presence in crowded urban centers during peak shopping hours. Small sub-stations for police presence in these districts are imperative and should be a topic of developer contribution (in cash and dedicated locations forms) within Community Benefits Agreements. Until there is a permanent location for such officers, a pop-up stall for resource officer presence combined with an ATM location is an interesting sort of mixed-use opportunity, relatively unobtrusive yet inescapably evident.

Another solution to potential noise issues in urban open public spaces is to require a special event permit (a variety of special exception) from the jurisdiction for any event as to which its promoters, or neighbors to the venue, anticipate sound levels above a certain decibel reading. Complaints are avoidable to some degree by limiting the hours of operation of outdoor concerts or other amusements. One advantage of garage structure rooftops as events venues is dissipation of noise generated at higher elevation than natural grade – unless, of

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134. See LARUE PLANNING & MGMT. SERVS., INC., CREATING AN ENTERTAINMENT DISTRICT (2013), *available at* <http://www.fortmyersbeachfl.gov/DocumentCenter/View/6148> (model noise ordinance was thoughtfully crafted before the Entertainment District ordinance went into effect).

135. See *id.* at 22-23.



course, the garage's roof is surrounded by midrise or taller residential buildings. Requiring some form of sound baffling as a condition of the special exception may reduce noise propagation, which is increasingly problematic in high-density cities with natural "canyon" corridors.<sup>136</sup>

### 5. Restricting Formula Retail/Chain Store Stagnation

National and major regional brand stores share one strategy in pursuit of market dominance: To increase the quantity of their stores (and thereby sales revenues) until the market will bear no more.<sup>137</sup> A Forbes staff writer wryly observed recently that soon every urban corner will feature a Starbucks coffee store.<sup>138</sup> Branded stores want to sell a lot of merchandise, but offer little novelty to the urban centers they occupy. Section 703.3 of the San Francisco Planning Code, labeled "Formula Retail Uses," effectively "calls out" and limits implementing new stores having multiple locations and a recognizable "look" and "branded" inventory, prohibiting them altogether in particular city districts like North Beach and Chinatown and requiring special exception authorization in others.<sup>139</sup> Less medieval means to induce variety include requiring, in form-based codes, that chain retailers must add architectural and design elements that invoke the character of the neighborhood. Additionally, Community Benefits Agreements can require chains to address their product lines with neighborhood residential groups in

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136. See, e.g., Jian Kang, *Sound Environment: High-Versus Low-Density Cities*, in DESIGNING HIGH-DENSITY CITIES FOR SOCIAL AND ENVIRONMENTAL SUSTAINABILITY 163, 175-79 (Edward Ng ed., 2010).

137. See DELOITTE DEVELOPMENT LLC, RETAIL GLOBAL EXPANSION: THE JOURNEY STARTS AT HOME 2 (2010), available at [http://www.deloitte.com/assets/Dcom-MiddleEast/Local%20Assets/Documents/Industries/Consumer%20Business/Retail%20Companies/me\\_consumer\\_business\\_retail\\_global\\_expansion\\_10.pdf](http://www.deloitte.com/assets/Dcom-MiddleEast/Local%20Assets/Documents/Industries/Consumer%20Business/Retail%20Companies/me_consumer_business_retail_global_expansion_10.pdf) (most retailers eventually reach domestic market saturation, so seek international expansion opportunities).

138. Maggie McGrath, *New Store Openings Push Starbucks Revenue Up 13%*, FORBES INVESTING (Oct. 30, 2013, 5:28 PM), <http://www.forbes.com/sites/maggiemcgrath/2013/10/30/new-store-openings-push-starbucks-revenue-up-13/>.

139. S.F. PLANNING CODE § 703.3 (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/planning/article3zoningprocedures?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_303](http://www.amlegal.com/nxt/gateway.dll/California/planning/article3zoningprocedures?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_303).

order to compromise on percentages of “standard inventory” provision, thereby inducing some variety in their goods on offer. If Starbucks must replace the corner grocer, will it kill the operator to sell a few loaves of fresh baked bread along with their coffee and pastries?

#### 6. Augmenting Transit and Shared Ridership-Retailing Interactivity

Cities lead by partnering with retailers to afford economic incentives to transit users. For instance, since transit systems control rider tickets, stubs issued for rides into urban center zones can provide retailers store location advertising and customers’ coupons for discounts, driving traffic to downtowns and other transit-served urban centers. This “public partner” mentality is needed to sustain urban center retailing. Cities must emphasize virtues of cycling and walking in the densest developed areas, curbing obesity that leads to other adverse health conditions. Cities can emphasize walking the half-mile standard for transit-sheds;<sup>140</sup> and they can encourage riding a full mile from transit nodes by implementing bike-sharing programs.<sup>141</sup> Government emphasis on cycling can be augmented by creating a TOD zoning or regional transportation authority standard that bicycles must be portable on all buses and fixed-path streetcars or light rail lines, and by mandating from their occupants some form of securing bicycles outside stores and restaurants.

Public/private partnerships must address the need for “jitney-style” conveyances<sup>142</sup> from transit nodes to social nodes. Just as heavy rail attracts riders only if there are ample and reliable transportation options in and around each station,<sup>143</sup>

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140. See Erick Guerra et al., *Half-Mile Circle: Does It Best Represent Transit Station Catchments?*, 2276 TRANSP. RES. RECORD: J. TRANSP. RES. BD. 101, 101 (2012), available at <http://trb.metapress.com/content/p106007675672255/fulltext.pdf?page=1>.

141. *Curbside Service*, *supra* note 109, at 440-41.

142. *Id.* at 432 n.153.

143. See Tom Zoellner, *Making High-Speed Trains Work in the U.S.*, WALL ST. J. (Jan. 31, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702304691904579349264138993436>.

local mass transit must be supported with means to convey its riders the final half-mile of their journey (especially those with mobility issues) on some dependable basis at an affordable cost. Car share programs like Zipcar are initiatives with promise, but they are unavailable to youth, those with disabilities or suspended drivers' licenses, and others who cannot drive vehicles.<sup>144</sup>

### 7. Moderating Community Benefits Agreements with Neighborhoods

Some urban center stakeholders recognize the necessity to ramp up mass transportation and data/communications infrastructure improvements through innovative land use controls to maintain retailing competitiveness. Other stakeholders will see these transitions as threats to their daily routines and perceptions of "neighborhood." The latter group is not stuck in the past; but advancing transit-oriented districts and connectivity in a neighborhood's space must happen if retail commerce is to have a legitimate chance of survival there. This imperative does not oblige residents in a neighborhood to make disproportionate sacrifices to serve commercial interests alone. In those communities with Community Benefits Agreement protocols, derived from state enabling statutes or otherwise, the neighborhood's parties increasingly negotiate their way to paths of urban center innovation.

Community Benefits Agreements (CBAs) are equitable development instruments.<sup>145</sup> The equitable development

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144. But "peer to peer" private car owner shuttle service companies like Uber and Lyft achieve the same parking reduction objectives, so long as they are not put out of business by legislation or protectionist gambits. See Ivan Moreno & Ray Henry, *Taxi, Limo Firms Upset Over Rules for Tech Competition Ask Officials to Regulate Uber, Lyft*, ASSOCIATED PRESS (Mar. 7, 2014), <http://www.usnews.com/news/business/articles/2014/03/07/taxis-limos-upset-over-rules-for-tech-competition>; Brad Stone, *Invasion of the Taxi Snatchers: Uber Leads an Industry's Disruption*, BLOOMBERG BUS. WK. (Feb. 20, 2014), <http://www.businessweek.com/articles/2014-02-20/uber-leads-taxi-industry-disruption-amid-fight-for-riders-drivers>; LYFT, <https://www.lyft.me/> (last visited Mar. 8, 2015); UBER, <https://www.uber.com> (last visited Mar. 8, 2015).

145. See Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J. L. & POL'Y 157, 176 (2009).

movement's purpose is to produce reasonable returns for property developers and benefits for the surrounding community through ensuring community stakeholder participation, leadership and ultimate "ownership" of (or at least informed acceptance of) planning and development initiatives.<sup>146</sup> The movement toward community benefits agreement adoption began in California in the late 1990s to make major development project owners accountable in some measure to neighborhoods impacted by their implementation.<sup>147</sup> CBAs are particularly salient in urban center regeneration via physical retail opportunities-infusion, because without neighborhood commerce, authentic mixed-use development cannot be sustained. Therefore, new projects will be encouraged by communities seeking to remain competitive in jobs creation and working-wage enhancement. In the course of developing a significant mixed use project, residents are going to be impacted by both the construction phase, which alone can be disruptive,<sup>148</sup> and longer term impacts such as increased noise and street-traffic burdening.<sup>149</sup> The offset of goods-availability in close proximity to dwellings does not alone mitigate the neighborhood detriments of growth in density and loss of affordable housing.

Below are certain recognizable common features of CBAs, where municipalities believe their use reduces the negative effects that development will impose on a community, reduces conflict, promotes civic engagement, and creates community buy-in and goodwill toward a new development project.<sup>150</sup> Besides mitigating negative effects from development, community groups through CBAs secure amenities from the developer (so-called "public benefits") that otherwise would be unobtainable, either because they are not traditionally

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146. *Id.*

147. *Id.* at 177.

148. *See generally Curbside Service, supra* note 109.

149. For examples of sample mitigation measures, *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK LAND USE COMMITTEE, THE ROLE OF COMMUNITY BENEFIT AGREEMENTS IN NEW YORK CITY'S LAND USE PROCESS (2010), *available at* <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

150. *See* Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 356 (2013).

addressed in the normal planning process or because of local government's budget constraints.<sup>151</sup> The consideration stakeholders usually provide for the community benefits received is the return promise to support (or at least tolerate through inaction) approval of the development. In short, the CBA is an enforceable contract enabling each party (developer and community interest groups alike) to predict or rely upon the other party's conduct throughout the development process.<sup>152</sup> CBAs take any of three fundamental forms; typically, they are private agreements negotiated and signed between community groups and the developer directly.<sup>153</sup> A "hybrid" approach is a private CBA that becomes part of the public regulatory process through development agreements with the community government.<sup>154</sup> Further, CBAs may be negotiated directly between the governmental authority and the developer, involving local authorities in those agreements' implementation and enforcement.<sup>155</sup>

#### 8. Implementing ICT Infrastructure Strategies Through Public-Private Partnerships

Urban centers competing successfully with other commercial areas of a community and online retailing must embrace the instrumental function of Information and Communication Technology, or ICT for short. ICT is the "suite" of technologies undergirding today's communications, such as cellular, cable, fiber optics, telephony (DSL), WiFi and so on.<sup>156</sup>

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151. *See id.* at 361, 364-65. These may include within the relevant planning area amenities like space or funding for community centers, childcare facilities, neighborhood streetscape upgrades and medical centers. *See* Salkin & Lavine, *supra* note 145, at 188-89.

152. *See* Salkin & Lavine, *supra* note 145, at 159.

153. *See* Camacho, *supra* note 150, at 361-63.

154. *See id.* at 359. About a dozen states statutorily allow local governments to enter into development agreements, which are bilateral agreements not directly involving community advocacy groups. *See* Salkin & Lavine, *supra* note 145, at 207.

155. *See* Camacho, *supra* note 150, at 361-62. In states like California, a city's or county's planning staff is more intimately involved in negotiating CBAs. *See* Salkin & Levine, *supra* note 145, at 197 n.171.

156. *See* Marlien Herselman & K.G. Britton, *Analysing the Role of ICT in Bridging the Digital Divide Amongst Learners*, 22 S. AFR. J. EDUC. 270, 270

The continuous evolution of each such technology and its spin-offs have enhanced performance and reliability, but networks offering these technologies to the public are too frequently stand-alone, leading to community patchworks in coverage<sup>157</sup> and obligating users to maintain multiple devices with unique configurations, leading to complexity, greater user expense and fragmentation.

Urban centers seeking to compete in retailing with Internet commerce have one potential contemporary advantage, expressed in the concept of the Intelligent Community.<sup>158</sup> Key features of the Intelligent Community include ubiquitous high-speed network bandwidth; continuous innovation in information and communications technology; and strong collaborative models joining local governments, education enterprises and business and community-based organizations.<sup>159</sup> In an Intelligent Community, stakeholders develop a high-density terrestrial (copper and fiber) network infrastructure surrounding the urban center, complemented by an area-wide wireless network that together provide continuous, reliable connections to the municipal broadband backbone and the Internet, no matter where a person locates in the center.<sup>160</sup>

Community leaders in the public and private sectors must make these investments because there is no returning to a simpler, technology-unteathered era. Youth and their parents alike seek increased “freedom of location” that ICT promises. Different types of networks affect reorganization of time, distance, and space, as well as rapidly increase the quantity of

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(2002).

157. See, e.g., Virginia Office of Telework Promotion and Broadband Assistance, *Broadband Toolkit: Calculate In-Kind Contributions*, WIRED.VIRGINIA.GOV, <http://www.wired.virginia.gov/toolkit/calculate-contributions/> (last visited Mar. 17, 2015).

158. See FUTURE CITIES: DESIGNING BETTER, SMARTER, MORE SUSTAINABLE AND SECURE CITIES 8-11, 61-63, 73-74, 94-95, 126-27 (Joseph N. Pelton & Indu B. Singh eds., 2009).

159. See Nicos Komninos, *What Makes Cities Intelligent?*, in SMART CITIES: GOVERNING, MODELLING AND ANALYSING THE TRANSITION 82 (Mark Deakin ed., 2013).

160. Mark Deakin, *From Intelligent to Smart Cities*, in SMART CITIES: GOVERNING, MODELLING AND ANALYSING THE TRANSITION 23-24 (Mark Deakin ed., 2013).

information in social circulation.<sup>161</sup> Such freedom gives consumers the choice to congregate wherever they want, since physical locations of providers of goods and services lacks its former significance. The opportunity of densely-populated community centers is to recognize that consumers soon will chose where to locate their “bases of operations” and to congregate socially based upon the perceived significance of desirable features of a place,<sup>162</sup> including on-demand availability of access to one’s peers and family supported by a reliable, fast ICT backbone.

The competitive community’s administrators create premium network spaces around physical retailing activities in urban centers, so truly mixed enclaves develop as dense hives of neighborhood commerce and forums for social engagement. The initial element of leadership urban center administrators show is mandating ICT as an element of comprehensive (i.e., master) planning, indicating in plans the community’s main actions to elevate the Intelligent Community.<sup>163</sup> Acknowledging the primacy of integrated ICT in planning, leadership decides both locally and regionally those minimum service standards of ICT in their areas, setting goals for near and distant horizons.<sup>164</sup> To meet those goals, leadership negotiates with technology’s network operators to share costs of implementing service standards to every part of the urban center.<sup>165</sup> Policies jointly

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161. See Juha Talvitie, *Incorporating the Impact of ICT into Urban and Regional Planning*, EUR. J. SPATIAL DEV. NO. 10, 1, 5 (Sept. 2004), available at <http://www.nordregio.se/Global/EJSD/Refereed%20articles/refereed10.pdf>.

162. See *id.*

163. Talvitie, *supra* note 161, at 14-15.

164. *Id.* at 17.

165. *Id.* The Kansas legislature had before it Senate Bill No. 304, the Municipal Communications Network and Private Telecommunications Investment Safeguards Act, forbidding municipalities to “purchase, lease, construct, maintain or operate any facility for the purpose of enabling a private business or entity to offer, provide, carry or deliver video, telecommunications or broadband service to one or more subscribers.” See S.B. 304, Reg. Sess. (Kan. 2014); see also Scott Canon, *Kansas Bill Would Bar Cities from Selling Cable and Internet Services*, KAN. CITY STAR (Jan. 31, 2014), <http://www.kansascity.com/2014/01/31/4790321/kansas-bill-would-bar-cities-from.html#storylink=cpy>. The bill appears to have died in February, 2014, after being referred to the legislature’s Commerce Committee. See S.B. 304, Reg. Sess. (Kan. 2014). Clearly, deft diplomacy is required of goals-setting leaders seeking ubiquitous connectivity in urban centers, since fear resides

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developed with the private sector become embedded in all future development projects, acknowledging the principle that honoring relevant ICT service standards is an absolute prerequisite for competitiveness in attracting businesses and skilled knowledge workforce members to innovative milieus in mixed-use urban centers.<sup>166</sup> Implementing such continually-evolving standards by requiring buy-in from developers via form-based codes or CBA negotiation (for cost sharing in new-generation infrastructure or upgrades) is forward-thinking municipal stewardship.

No matter the vehicle for implementing ICT infrastructure, all applicants for zoning and subdivision entitlements must explain to the planning apparatus how its technology infrastructure dovetails with long-term implementation of the community's ICT service standards.<sup>167</sup> This obligation will become more consequential as municipalities move toward adopting regulations calculated to progress toward the status of "smart communities."<sup>168</sup> An illustration of one community's implementation plan is the regional-municipal government of Wood Buffalo, Alberta. It has adopted a "connectivity plan"<sup>169</sup> with the central goal of ubiquitous, high-speed connectivity: "[A] dense terrestrial and wireless infrastructure, fully integrated into a single seamless network . . . leveraged by the entire

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among executives in the telecom industry about gigabit capacity their companies cannot supply to cities.

166. See Talvitie, *supra* note 161, at 17.

167. See GSMA, *supra* note 129, at 17. Every stakeholder can play a role in urban center ICT augmentation; for example, consider a new mobile phone retail store. Its staff could demonstrate to new customers how to use smart city services as these gradually are implemented; perhaps the store's owner could be paid a fee from the or for increasing each service's customer base. *Id.*

168. See, e.g., International Organization for Standardization, *Smart Community Infrastructures – Review of Existing Activities Relative to Metrics* (2014), available at <https://www.iso.org/obp/ui/#iso:std:iso:tr:37150:ed-1:v1:en>. This technical report, reviewing metrics, addresses community infrastructures such as energy, water, transportation, waste and information and communications technology (ICT); here, the concept of "smartness" is couched in terms of performance relevant to technologically implementable solutions consistent with sustainable development and community resilience. *Id.*

169. See OUR SUSTAINABLE FUTURE CITY CENTRE AREA REDEVELOPMENT PLAN, REG'L MUNICIPALITY WOOD BUFF. 44 (2012), available at <http://www.woodbuffalo.ab.ca/Assets/Departments/Planning+and+Development/CCAP/Final+Draft+of+CCARP.pdf>.



community, resulting in higher value with lower overall cost than the patchwork of networks found in most locales.”<sup>170</sup> The municipality will modify local construction standards to maximize installation of advanced fiber and copper infrastructure into all new construction and rehabilitation projects, ensuring that all locations can easily be provided fiber-optic networks – or another next-generation technology.<sup>171</sup> Among other community ambitions are these strategy statements:

- Monitoring municipally-owned assets and ensuring that capacity is in place to meet ICT standards;
- Establishing partnerships between local educational institutions and vendor and development partners to provide knowledge transfer and training to the next generation of network and ICT experts;
- Leveraging long-term collaborations such as shared ICT services through collaboration among community, educational, corporate and (IT) vendor partners; and
- Ensuring that everyone in the area served realizes the maximum opportunity and benefit of the evolving network.<sup>172</sup>

#### VII. Mixed Uses Reenergized Through Community Joint Engagement

Is commerce vital to urban center place-making? Public gathering districts, bereft of merchandising, are uninspiring, even strange:

[r]etailing is what gives a city its character. Retailing is what local people, visitors and investors judge the city’s core by, declaring it either “vital” or “dead.” So, beyond paying and generating taxes, creating employment and

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170. *Id.*

171. *Id.*

172. OUR SUSTAINABLE FUTURE CITY CENTRE AREA REDEVELOPMENT PLAN, *supra* note 169.

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serving shoppers, retailing is the face and heart of your community. Investors, office locators, residents, convention organizers, tourists, and shoppers all make their spending decisions based on how alluring a downtown retail area is.<sup>173</sup>

Consumer spending constitutes more than one-half of U.S. economic activity, measured by gross domestic product.<sup>174</sup> While some of that activity occurs at auto malls and appliance stores, atypical merchants in walkable neighborhoods, such a magnitude of consumer spending means a great deal of time not used for sleeping or working is invested in shopping, dining out or related retail consuming. Cities are centers for both socialization and consumption precisely because they pull people out of their private spaces into public areas.<sup>175</sup> Mixed-use neighborhoods do not weave the essential urban fabric, the safer and tighter-knit, relationship-oriented communities envisioned by planners or developers, unless small and family-owned merchants occupy some of that territory.<sup>176</sup> Merchandisers, their wares and services (including their owners' participation in community life) are instrumental, not merely convenient, to this setting.

A chasm sharply divides conventional urban retail centers and consumers in the age of the ubiquitously-connected shopper.<sup>177</sup> Community leaders inadequately supervise the

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173. Maureen Atkinson & John Archer, *Retail Revitalization and Recruitment*, in *MAKING BUSINESS DISTRICTS WORK: LEADERSHIP AND MANAGEMENT OF DOWNTOWN, MAIN STREET, BUSINESS DISTRICT, AND COMMUNITY DEVELOPMENT ORGANIZATIONS* 293, 293 (David Feehan & Marvin D. Feit eds., 2006).

174. See William R. Emmons, *Don't Expect Consumer Spending to Be the Engine of Economic Growth It Once Was*, *REG'L ECONOMIST* (2012), available at <http://www.stlouisfed.org/publications/re/articles/?id=2201>.

175. EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER AND HAPPIER* 124 (2012).

176. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 35-37 (1992).

177. Shopping does not constitute a sufficient interruption to change the "always on" culture; this is because multitasking feels good because of the dopamine release because multi-taskers believe the promise that one can accomplish more (increased "productivity") with less time that connectivity seemingly affords, and because of the human herd mentality or, more politely

data/information/communication highway in their territories.<sup>178</sup> Whether leaders admire or detest citizens always “connected” to their devices, succeeding generations of consumers will behave this way.<sup>179</sup> While communities may want their mixed-use districts to have a distinctive “sense of place,” often that sense of place is not perceived to be fostered by wireless connectivity.<sup>180</sup> In short, ICT is not sufficiently prioritized in forward-looking land use policies, although economically viable communities inextricably are linked to technological advances and seamless integration of ICT into everyday life of urban centers.<sup>181</sup>

People engage with interactive technologies as part of place and space, while land use plans arose under older notions of “community” predating communication technologies as integral elements of the natural and built environments.<sup>182</sup> This literal and figurative “disconnect,” unless addressed, will separate victors and become vanquished in the competition to win tomorrow’s consumers, seeking robust connections to a rapid-fire wired and mobile civic backbone.<sup>183</sup> Developers of mixed-use projects, city planners and their communities’ administrators

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stated, multitasking has become the norm, an accommodation to what technology offers. See SHERRI TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* 163-64, 167, 177 (2011); Hamill, *supra* note 48. No amount of novelty or variety in atmosphere or goods provision will postpone for long a shopper’s resumption of “connection behavior,” for instance, recording the moment for sharing online. TURKLE, *supra* note 177, at 163-64, 167, 177.

178. See, e.g., Jan Fernback & Gwen Shaffer, *Urban Planning Unplugged: How Wireless Mobile Technology Is Influencing Design Elements in Seven Major U.S. Cities*, 27 COMM. ASS’N INFO. SYST. 651, 659 (Nov. 2010), available at <http://aisel.aisnet.org/cais/vol27/iss1/35/> (“There is little indication in [planning documents] that human social arrangements will be impacted by ubiquitous connectivity, because these documents . . . use the language and institutional arrangements of plans from decades past[]” – decades before the Internet era, that is).

179. See TURKLE, *supra* note 177, at 293-94.

180. Fernback & Shaffer, *supra* note 178, at 659.

181. *Id.*

182. *Id.*

183. Indeed, the challenge for “Generation Z’s” city managers will be to keep their communities competitive in the era of the Digital Public Space: an assembly of shared technologies, standards, and processes emerging from fully capitalizing on Web technologies to which everyone has access in a plethora of public spaces. See Tony Ageh, *Why the Digital Public Space Matters*, in DIGITAL PUBLIC SPACES 6 (Drew Hemment et al. eds., 2013).

have little choice but to treat evolving “information/communication” corridors with equal urgency as they do community physical transport systems. No matter which of the private or public sectors first concludes ICT provision superiority represents a crucial competitive priority, that sector must engage the other stakeholders in conversations, and propose partnerships, to raise funds and awareness to remain a “well-wired community”<sup>184</sup> reputation.<sup>185</sup> To this end, a new subfield of technology planning, in which planners and their superiors strategize to leverage mobile communications devices utility in shared environments, and to build robust wireless infrastructure,<sup>186</sup> must populate the land use governance apparatus. Failing to integrate ICT principles into every new municipal land use regulatory scheme<sup>187</sup> will exact a heavy toll on long-term economic prosperity of urban centers

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184. See *Into the Mind of . . . Aric Zion*, ARIZ. REP., Feb. 21, 2014, at B1, available at [https://www.zionandzion.com/wordpress/wp-content/uploads/2014/02/2014\\_02\\_22-AZ-Republic-Google-Fiber.pdf](https://www.zionandzion.com/wordpress/wp-content/uploads/2014/02/2014_02_22-AZ-Republic-Google-Fiber.pdf) (“There’s the pure sexy branding value of having Google Fiber[]”; Zion believes that acquiring the fiber network symbolically indicates “how forward thinking and evolutionary our [Phoenix] metro area is [.]” thereby attracting talented people and business).

185. Fernback & Shaffer, *supra* note 178, at 660 (“Ubiquitous connectivity is certain to impact the ways in which urban residents utilize public space[]”; the authors note private Internet service providers’ practice to blanket public locations with Wi-Fi hotspots, as these companies recognize the “dominant role mobile devices play in daily life.”). The easy analogy is why a community would not establish an inter-generational civic park without installing plant materials or seating: It would attract only skaters and bikers. Voilà.

186. *Id.* Some attention in this planning exercise must be given to the social issues arising from the “digital divide” affecting persons of different socio-economic strata. These knowledge and communications gaps seem destined to become another element of the social justice movement. See *id.* For an explanation of the “digital divide” in terms of “information poor” and “information rich” populations see Herselman & Britton, *supra* note 156, at 271; Kazuki Sakamoto, Participatory Planning: Gaining a Voice in the Digital Divide, 12-13 (2013) (unpublished M.S. Thesis, Columbia University School of Architecture), available at <http://academiccommons.columbia.edu/catalog/ac%3A162184>.

187. See, e.g., Anthony M. Townsend, *Life in the Real-Time City: Mobile Telephones and Urban Metabolism*, 7 J. URB. TECH. 85, 89, 98-99 (2000) (city planners have barely begun thinking about the larger impacts of mobile technologies, even where mobile communications have substantial market penetration; and massive decentralization of coordination of urban activities sponsored by these technologies threaten the foundations of city planning which do not focus upon the specific nature of individual interactions).

behaving like reactionaries to this planning element.

Prospering fully mixed-use urban centers in which partnering between governments and the private sector affords a joint commitment to competitiveness will force exiting “comfort zones” in conventional leasing and retail operations and abandoning outdated, Euclidean land use restrictions. These centers’ resources instead will be devoted to carefully analyzing crucial relationships among developing ICT infrastructure networks, designing and implementing of interfaces, and networking and making universally accessible protocols for different user groups.<sup>188</sup> Local and regional governments promoting ICT infrastructures and community adaptations to new technologies at the same time must guard against too much “privatization” of physical and electronic public spaces threatening social cohesion and increasing social disparity and the digital divide.<sup>189</sup> Because of the broad community applications of ICT, “public space” today incorporates both physical place and electronic space.<sup>190</sup> Since physical and electronic public spaces are key interfaces between infrastructure networks and ICT users, they must be carefully planned, designed, constructed and constantly evaluated and monitored, including when “outsourced” to private sector stakeholders.<sup>191</sup> This can be challenging work, indeed, when local or regional governments have scant in-house expertise in evaluating and performing strategic planning for these resources.<sup>192</sup> Communities with daring vision will dash today’s paradigms, encouraging new initiatives for place-making

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188. See Wei-Ju Huang, *ICT-Oriented Urban Planning Strategies: A Case Study of Taipei City, Taiwan*, 19 J. URB. TECH. 41, 48 (2012). Different user groups challenge governments to fit user needs due to the diversity of users, encompassing citizens, tourists, visiting students and business persons or public servants from abroad and additional populations of disparate ages and socio-economic backgrounds. *Id.* at 61.

189. See *id.* at 58. Huang notes that electronic space might become privatized as telecommunication providers attempt to ‘package’ electronic spaces to niche consumers. *Id.* at 57.

190. *Id.*; see also Townsend, *supra* note 187, at 85.

191. Huang, *supra* note 188, at 58; see also Townsend, *supra* note 187, at 96, 100-02 (planning and evaluations of planning strategies must incorporate analyzing interactions among individuals, updating that information in real time).

192. Huang, *supra* note 188, at 61.

investment by alliances among local governments, property developers, and retail operators. They will relegate Euclidean zoning to the dust bin where urban centers are concerned, acknowledging that its underlying premise has surrendered all utility in this period of the Intelligent City. Unconventional pathways not relying on the old conventions of commerce or land use planning will revive downtowns, “high street” districts and similar mixed-use community cores with mercantile functions.