



6-2019

Shells of the Stores They Once Were: Returning Vacant Retail Property to Productive Use in the Midst of the "Retail Apocalypse"

Mairead J. Fitzgerald-Mumford
Notre Dame Law School

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>

 Part of the [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

94 Notre Dame L. Rev. 1797 (2019).

This Note is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

SHELLS OF THE STORES THEY ONCE WERE:
RETURNING VACANT RETAIL PROPERTY TO
PRODUCTIVE USE IN THE MIDST OF
THE “RETAIL APOCALYPSE”

*Mairead J. Fitzgerald-Mumford**

I. INTRODUCTION AND BACKGROUND

In the first quarter of 2017, nine major retailers—as many as in all of 2016—declared bankruptcy, sparking widespread concern that America was in the midst of a “retail apocalypse.”¹ The United States has been overstored for decades,² but the issue reached a tipping point last year, when retail chains announced almost 7000 store closings.³ The trend continued in 2018, with over 3800 store closures announced in the first quarter alone.⁴ Although there may be uncertainty surrounding what the future of the retail industry will look like, one thing is clear: the communities from which retailers are departing will bear the burden of the shells that have been left behind.

A. *The Greyfield Problem*

The vacant retail properties that are the central focus of this Note include former malls, strip malls, anchor stores, and “big box stores.”⁵ These

* Candidate for Juris Doctor, Notre Dame Law School, 2020; Master of Education, University of Notre Dame, 2016; Bachelor of Arts in Medieval Studies and Irish Language and Literature, University of Notre Dame, 2014. I would like to thank Professor Jim Kelly for his guidance and expertise, the staff of the *Notre Dame Law Review* for their diligent editing and encouragement, and my family for their endless love and support. All errors are my own.

1 Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/>.

2 *See id.*

3 Matt Townsend et al., *America’s ‘Retail Apocalypse’ Is Really Just Beginning*, BLOOMBERG (Nov. 8, 2017), <https://www.bloomberg.com/graphics/2017-retail-debt/>.

4 Hayley Peterson, *More than 3,800 Stores Will Close in 2018—Here’s the Full List*, BUS. INSIDER (Apr. 7, 2018), <https://www.businessinsider.com/stores-closing-in-2018-2017-12> (listing store closures announced as of April 7, 2018).

5 *See, e.g.*, Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 474 n.5 (2012) (explaining that

empty structures go by many names: “ghostboxes,”⁶ “greyfields,”⁷ retail “shells,”⁸ and “dark stores,”⁹ to name a few. The reasons for these vacancies are myriad, but not mysterious: retail chains regularly make the decision to close underperforming store locations;¹⁰ companies go bankrupt;¹¹ or—most infuriatingly for many residents—companies leave a perfectly fine store empty and, like a hermit crab, move into another slightly larger store just down the road.¹² The structures often remain empty for years, and they are hard to miss.¹³ They were “gut-wrenchingly ugly”¹⁴ to begin with, and the faded outlines of neon signs and empty parking lots littered with plastic-bag tumbleweed quickly turn ghostboxes into depressing eyesores.

Appearance aside, these vacant stores pose serious problems for the public’s health, safety, and welfare. They are magnets for crime, particularly arson, theft, drug crimes, and vandalism.¹⁵ Although there is an argument that the distance between such stores and suburban and rural residential areas mitigates the danger to neighbors, the fact remains that ghostboxes

there is no precise definition for big box stores, but that the typical model is a single-story building of 20,000–300,000 square feet, which can be a stand-alone store or may be located in a strip mall or shopping center).

6 See, e.g., Jessica LeVein Fair, *The Ghost-Box Dilemma: Communities Cope with Vacant Retail Property*, PARTNERS COMMUNITY & ECON. DEV., Fall 2005.

7 See, e.g., Schindler, *supra* note 5, at 484–85.

8 See, e.g., *id.* at 481.

9 See, e.g., INST. FOR LOCAL SELF-RELIANCE, BIG-BOX BLIGHT: THE SPREAD OF DARK STORES (2007), <https://ilsf.org/wp-content/uploads/2008/12/bbtk-factsheet-blight.pdf>.

10 See LEE HOLMAN & GREG BUZEK, DEBUNKING THE RETAIL APOCALYPSE 7 (2017).

11 See Townsend et al., *supra* note 3.

12 See, e.g., Christopher Peak, *When Walmart Leaves*, MEDIUM (Jan. 12, 2015), <https://medium.com/@peak/the-ghost-stores-of-walmart-47f918f99f9d>.

13 INST. FOR LOCAL SELF-RELIANCE, *supra* note 9.

14 Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L. 7, 17 (2005).

15 See, e.g., *Police Find Meth Evidence in Vacant Store Where Dead Woman Discovered*, NEWS-SENTINEL (Fort Wayne, Indiana), Jan. 25, 2013 (squatting, manufacturing methamphetamine); Tom Y. Chang & Mireille Jacobson, *Research: When a Retail Store Closes, Crime Increases Around It*, HARV. BUS. REV. (June 29, 2017), <https://hbr.org/2017/06/research-when-a-retail-store-closes-crime-increases-around-it> (discussing increase in crime in area surrounding closed retail businesses and attributing it, at least in part, to decrease in foot traffic and informal surveillance); Stephanie Farr, *Cops: Squatter at 69th St. Payless Started Fire*, PHILA. INQUIRER (July 9, 2015), <http://www2.philly.com/philly/blogs/delco/Cops-Squatter-at-69th-St-Payless-started-fire.html> (squatting, theft, fire); Ashley Lutz & Mary Hanbury, *Haunting Photos of an Ohio Mall That Became a Hotbed of Crime Before It Was Demolished*, BUS. INSIDER (Feb. 8, 2018), <https://www.businessinsider.com/deserted-mall-now-covered-in-snow-2015-2> (squatting, theft, suspected murder); Brian McCready, *Vacant Milford Store Called ‘Unsafe,’* NEW HAVEN REG. (July 13, 2011), <https://www.nhregister.com/news/article/Vacant-Milford-store-called-unsafe-11561550.php> (explaining broken windows pose threat to public health and safety); *Police Say Felon Living in Vacant Orland Park Store Had Guns, Ammo—and a Bobcat*, CHI. TRIB. (Mar. 2, 2018), <https://www.chicagotribune.com/suburbs/daily-southtown/crime/ct-sta-orland-search-warrant-st-0302-2018-0301-story.html> (squatting).

make communities less safe and put a burden on municipal services. After a retail shell is vacated, municipalities must often spend “additional public money” for “greater police service to monitor the property, greater fire services due to the likelihood of fires in abandoned structures, and the provision of cosmetic improvements meant to make the property look occupied.”¹⁶ Indeed, retail shells “disproportionately affect these public safety costs” compared to vacant residential properties.¹⁷ One study of vacant and abandoned properties revealed that “[a]lthough commercial properties make up only 3 percent of Oklahoma City’s vacancies, they account for approximately 40 percent of all police and fire calls.”¹⁸

The greatest threat that ghostboxes pose to communities is economic in nature. Municipalities compete to attract businesses, often investing millions of taxpayer dollars in constructing infrastructure and providing subsidies and tax breaks.¹⁹ When major retailers exit so-called “anchor stores” that support smaller businesses in malls, strip malls, and shopping centers, the decrease in foot traffic harms smaller businesses.²⁰ The longer these stores remain vacant—and it usually is a long vacancy, since it is notoriously difficult to find new ghostbox occupants²¹—the greater the chance that an entire retail plaza will go dark.²² Communities have long recognized that even standalone retail shells can cause devastating economic disinvestment in the area. As a spokeswoman for one Pennsylvania township, which spent in excess of eight million dollars to purchase a former Bon-Ton department store, said: “The site is highly visible . . . and a long-term vacancy could have a detrimental effect on [the township’s] economic image and tax base.”²³

B. Scope

This Note intends to address responses to retail vacancies by local governments in nonurban areas where land is relatively cheap and low-density development predominates. Its purpose is to assist these municipalities in motivating owners of vacant retail structures to return the property to productive use, thereby significantly reducing the number of empty retail shells that litter the landscapes of many communities. Alternatively, in cases where the owner is unable or unwilling to mitigate the negative externalities imposed on the community by a vacant retail structure, I propose solutions

16 Schindler, *supra* note 5, at 496.

17 U.S. Dep’t Hous. & Urban Dev., *Vacant and Abandoned Properties: Turning Liabilities into Assets*, EVIDENCE MATTERS, Winter 2014, at 1, 7.

18 *Id.* at 7.

19 Schindler, *supra* note 5, at 494; see Peak, *supra* note 12.

20 Schindler, *supra* note 5, at 494; see Peak, *supra* note 12.

21 See *infra* Section II.B.

22 Peak, *supra* note 12.

23 Jason Scott, *Local Authority Closing In on \$8.1M Deal for Former Bon-Ton Store*, CENT. PENN. BUS. J. (Sept. 20, 2018), <http://www.cpbj.com/article/20180920/CPBJ01/180929999/local-authority-closing-in-on-81m-deal-for-former-bonton-store> (quoting Erin Trone, assistant township manager for Lower Allen Township, Pennsylvania).

tailored to commercial properties²⁴ that will allow local governments to intervene in ways that will have the least amount of impact on strained municipal budgets.

My intention is to suggest a typology for categorizing retail property vacancies and to identify a few methods that local governments may employ to reduce the length of time during which such properties remain vacant. In proposing that local governments begin the analysis of vacant building situations with a determination of the highest and best use of the property, my aim is to provide a use-neutral framework, not to promote certain land uses over others.²⁵ Furthermore, this Note encourages communities not to over-

24 An extensive body of work has been done to solve the related but distinct issue of abandoned residential property in urban areas. *See generally* James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210 (2004) [hereinafter Kelly, *Refreshing the Heart*]; Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 URB. LAW. 801 (2011); Kory T. Bell, Note, *One Nail at a Time: Building Deconstruction Law as a Tool to Demolish Abandoned Housing Problems*, 45 IND. L. REV. 547 (2012).

Urban communities are characterized by higher demand for developable land than available land, and abandoned property solutions focus on freeing up underutilized property for redevelopment. U.S. Dep't of Hous. & Urban Dev., *supra* note 17, at 9–11. Suburban and rural communities, on the other hand, suffer from lack of demand: cheap land makes it more likely that newcomers will build fresh rather than redevelop. *See, e.g.*, Ann Eisenberg, *Addressing Rural Blight: Lessons from West Virginia and WV LEAP*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 513, 518 (2016) (“[L]ow population numbers inhibit [rural] communities’ ability to achieve economies of scale, limited local economies keep new businesses and job seekers away, and both issues make it more difficult to put a problem property to productive reuse.”).

Furthermore, owners of abandoned commercial property are not amenable to the same approaches as owners of abandoned residential property. The latter are frequently difficult to locate, unsophisticated, and judgment proof. *See* James J. Kelly, Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 120 (2013) [hereinafter Kelly, *A Continuum in Remedies*]. The residences are often in a state of severe disrepair due to the owner’s unwillingness or inability to invest in upkeep. Even when the state of disrepair is not so severe as to constitute blight, urban properties are more amenable to nuisance-based remedies: “Small lot sizes mean that city dwellers are more sensitive to the uses, and abuses, that occur on neighboring properties.” *Id.* at 119. The retail owners, on the other hand, are generally large corporations, easily identified and, even if bankrupt, rarely let the buildings fall into such disrepair that they would become subject to liability for nuisance and code violations.

25 For several years, there has been a strong push by some against big box stores’ entry into new communities. If a municipality wishes to reduce the number of large retail chains in the community, there is a significant body of research on the topic. *See generally* Symposium, *Small Town America in the Era of Big Box Development*, 6 VT. J. ENVTL. L. 6 (2005). A big box retailer, however, is not always an evil to be cast out. This is especially true in communities that depend on big boxes to provide access to a wide range of goods and services. For ex ante approaches that communities can use to prevent ghostboxes, see Schindler, *supra* note 5, at 499–501; Betsy H. Sochar, Comment, *Shining the Light on Greyfields: A Wal-Mart Case Study on Preventing Abandonment of Big Box Stores Through Land Use Regulations*, 71 ALB. L. REV. 697 (2008).

look temporary or unconventional uses for spaces, such as pop-up stores or seasonal stores, which can provide relief even when the prospects of full reoccupation are bleak. In the words of Professor Schindler: “Nearly any use would be more economically beneficial to a municipality and its residents than an abandoned property.”²⁶ Every community is different, and this Note encourages local governments to tailor any method to the unique present and future needs of the communities that they serve.

The menu of potential remedies contained herein is by no means exhaustive. As the voluminous body of literature regarding abandoned urban and residential properties suggests, there is ample room for creativity in this area of the law.²⁷ Furthermore, the range of solutions available depends on the specifics of the interaction between state and local law.²⁸ The options that this Note recommends intentionally represent the path of least resistance—conservative approaches that can be deployed by the shrinking or underresourced municipalities, which struggle most severely with abandoned retail real estate issues. The methods geared toward these communities are well established, relatively low cost, and unlikely to invite litigation by corporations who have far greater resources than most municipalities can dedicate to a protracted legal battle. Communities with more resources to dedicate to eliminating vacant retail property are encouraged to use this limited menu as a jumping-off point to pioneer innovative solutions and to use the full reach of local power available to them.

II. ANALYSIS AND SOLUTIONS

A. *Analytical Framework: A Postabandonment Approach*

As already established, retail property owners’ failure to put their properties to productive use imposes negative externalities and costs on the surrounding community.²⁹ Once a retailer has vacated a store, the goal should be to minimize the amount of time that the structure remains unoccupied and unproductive.

The solutions proposed in much of the existing vacant-property literature cannot be adopted wholesale into a suburban or rural context.³⁰ In major cities, demand for property is high, and land is a scarce commodity.³¹ In those communities, land use planning is focused on channeling development. Outside of urban centers, however, the opposite problem exists:

26 Schindler, *supra* note 5, at 524.

27 See *supra* note 24.

28 See, e.g., Kelly, *A Continuum in Remedies*, *supra* note 24, at 132 (noting that “a relatively unique provision in Maryland’s home rule provisions” allowed the city of Baltimore to create a super-priority receiver’s lien on vacant properties, but that “[c]reating new super-priority liens and foreclosure proceedings would be beyond the scope of most local governments’ home rule authority”).

29 See *supra* Section I.A.

30 See *supra* Eisenberg, *supra* note 24, at 515–16; Section I.B.

31 See U.S. Dep’t of Hous. & Urban Dev., *supra* note 17, at 9–11.

municipalities with sprawling, undeveloped land engage in cutthroat competition to attract development and the economic opportunities that come with it.³²

Local governments, particularly those in suburban and rural areas, are frequently underresourced as it is. The best solution in these communities is the one that requires the least amount of investment by the municipality. Rather than taking on the expensive, time- and resource-consuming task of identifying and bringing in a new occupant—what I refer to as a *proactive approach*—local governments should allow the market to do the heavy lifting whenever possible. In most cases, this does not mean that local governments should take a passive approach, sitting by and waiting for the problem to work itself out—the ubiquity of greyfields speaks loudly to the inefficacy of such tactics. Instead, municipalities must take what I call a *market-anticipatory approach*: they must first identify the path of least resistance by which a new tenant will take over the structure, and then take steps to remove barriers that would slow down or prevent such a transaction.

The first step in the market-anticipatory approach is to determine the marketability of the building in question by identifying the highest-value use of the property³³ and then assessing the suitability of the existing structure to that use. This step is diagnostic rather than prescriptive: the highest-value use is highly contextual and will depend largely on the likely economic return on a particular use of the parcel, offset by negative externalities³⁴ imposed on the community by that use. In some cases, the highest-value use will match the existing use: retail.³⁵ In other cases, it may be nonretail commercial development (e.g., incubator spaces, offices, or warehouses).³⁶ In severe cases, the highest-value use will not be commercial. Shrinking municipalities often do not have the demand for goods, services, or housing to sup-

32 See JENNIFER EVANS-COWLEY, MEETING THE BIG-BOX CHALLENGE 55 (2006) (noting that communities often engage in intense competition with one another to attract big box stores in the first place).

33 See generally Katherine Bryan Tanucci, *Highest and Best Use*, 42 APPRAISAL J. 518 (1974) (discussing factors for use by real estate appraisers in determining highest and best use of property).

34 “Negative externalities,” for this analysis, must be interpreted through a narrow lens. To be included in the highest-value use consideration, a negative externality must outweigh the burden of allowing the property to remain vacant.

35 Including pop-up or seasonal stores, which are “stores that are open for only a short time, usually a few months” and are used to “create excitement for a brand, take advantage of a busy season like Christmas, or test a store concept.” Richard Kestenbaum, *This Is What Will Happen to All the Empty Stores You’re Seeing*, FORBES (May 30, 2017), <https://www.forbes.com/sites/richardkestenbaum/2017/05/30/this-is-what-will-happen-to-all-the-empty-stores-youre-seeing/#e0850b74bb78>.

36 See, e.g., MARIA SICOLA & MARK STAPP, INT’L COUNCIL OF SHOPPING CTRS., TRANSFORMING CLASS B AND C RETAIL CENTERS: AN OVERVIEW 2 (2018), https://www.icsc.org/uploads/t07-subpage/Transforming_Class_BC_Centers.pdf (“[T]he challenges [of renovating and retenanting] become not only what retailers want for store formats but also what other types of uses—medical, education, entertainment—may make the most sense going forward.”).

port commercial use of all previously developed land.³⁷ Population changes—particularly in aging rural communities³⁸—may call for different use distributions than were previously planned, or unanticipated settlement patterns may have cut the property off from high-traffic areas. The use may not have been suited to the location in the first place.³⁹

Whatever the highest-value use of the land may be, municipalities must then make an objective determination of the suitability of the structure, as it now stands, to that use. A structure *well suited* to the highest-value use is one that requires only minor or cosmetic changes, such as switching out signs and changing floor covering and paint to match the new tenant's branding, in order to fulfill that use. An existing structure that is *moderately suited* to its highest-value use will require major renovations in order to fit that use, but the renovations will not exceed the cost of new construction on undeveloped land. Although some have raised concerns that the low cost of land in nonurban areas will frequently result in the cost of renovation exceeding the cost of new construction,⁴⁰ it is appropriate here to factor in the costs that will be saved due to the preexisting infrastructure.⁴¹ Even if a new developer would not bear the entire cost of constructing roads, the time saved by not having to wait for permitting and construction, as well as preestablished patterns of consumer behavior—citizens, after all, already are accustomed to

37 See, e.g., KIM PARKER ET AL., PEW RESEARCH CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 16 (2018), <http://www.pewsocialtrends.org/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/> (discussing population loss in rural communities); John Cromartie, *Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change*, U.S. DEP'T AGRIC.: ECON. RES. SERV. (Sept. 5, 2017), <https://www.ers.usda.gov/amber-waves/2017/september/rural-areas-show-overall-population-decline-and-shifting-regional-patterns-of-population-change/>; Frank Morris, *As Rural Towns Lose Population, They Can Learn to "Shrink Smart,"* NPR (June 19, 2018), <https://www.npr.org/2018/06/19/618848050/as-rural-towns-lose-population-they-can-learn-to-shrink-smart>. But see Tim Henderson, *Rural Counties Are Making a Comeback, Census Data Shows*, PEW CHARITABLE TR. (Mar. 22, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/22/rural-counties-are-making-a-comeback-census-data-shows> (reporting that "[r]ural areas . . . gained population between 2016 and 2017 for the first time since 2010," but noting that the increase is due in significant part to increase in populations of more populous rural counties).

38 PARKER ET AL., *supra* note 37, at 22.

39 See J.L. Cherwin Jr. & Virginia M. Harding, *New Tenants for Big Boxes*, PROB. & PROP., Jan.–Feb. 2010, at 37, 38 ("Communities most likely to consider proposals for nonretail reuses of their vacant big boxes are rural areas, particularly those that have lost crucial area employers and need an impetus for more jobs; distant suburbs that experienced substantial growth in large scale big-box retail development in anticipation of new residential developments that are now stalled or abandoned; and declining suburbs and urban areas."); see also Cromartie, *supra* note 37; John Cromartie & Timothy Parker, *What Is Rural?*, U.S. DEP'T AGRIC.: ECON. RES. SERV., <https://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural/> (last updated July 12, 2018).

40 Cherwin & Harding, *supra* note 39, at 40.

41 See Farr, *supra* note 6 ("It is . . . easier to re-lease a store located in a prime location with good parking, infrastructure, and road access, and in close proximity to other successful retailers.").

traveling to the now-vacant store—weigh in favor of renovating an existing structure. Finally, some structures will be *unsuitable* for the highest-value use, particularly in the case of buildings that were poorly constructed from the outset or have become blighted.⁴² The cost of renovating these structures exceeds the cost of developing a greenfield, and they will need to be demolished and the site redeveloped before it can be profitably used.⁴³ It is important to note that cases may be on the border between classifications, or may change from one category to another over time. This is not problematic: the solutions recommended for each classification are flexible and nonexclusive.

Based on the identified highest and best use of the property and the suitability of the existing structure, governments can assess a store's marketability. The matrix below shows what transaction will naturally result from each of the possible permutations if transaction costs are zero and if the parties know the fair market value of their property and negotiate rationally. Of course, this does not reflect reality, and one might question why a local government would waste its time with a purely theoretical model. Although it is true that real-world transactions are almost never frictionless, considering the outcome that would occur in such a market is a useful exercise because it shows the extent—and limits—of what the market can do to return the property to productive use.

42 See Eleanor Cummins, *Big Box Stores Are Dying. What Do We Do with All the Bodies?*, POPULAR SCI. (Mar. 28, 2018), <https://www.popsci.com/repurposing-big-box-stores#page-2/> (“A lot of these big box structures were very cheaply built. . . . Their lifespan was not really meant to be more than 25 or 30 years . . .”).

43 This is especially true for older buildings constructed using materials now known to be toxic. Renovation in those cases would be extremely expensive. See, e.g., Dan D'Ambrosio, *Burlington Mall Demolition Delayed Two Months for Asbestos Removal*, BURLINGTON FREE PRESS (Apr. 26, 2018), <https://www.burlingtonfreepress.com/story/news/2018/04/26/burlington-mall-demolition-delayed-two-months-asbestos-removal/554227002/>; Nick Kotsopoulos, *Union Station Repair Costs Grow by \$1.5M; Asbestos Left Behind During Previous Renovation*, TELEGRAM (Oct. 18, 2018), <https://www.telegram.com/news/20181018/union-station-repair-costs-grow-by-15m-asbestos-left-behind-during-previous-renovation>.

TABLE 1: HIGHEST-VALUE USE

		Retail	Nonretail Commercial	Noncommercial
Suitability of Existing Structure	Well Suited	Reuse	Adaptive Reuse	Adaptive Reuse
	Moderately Suited	Renovation and Reuse	Adaptive Reuse	Adaptive Reuse
	Unsuitable	No Transaction	No Transaction	No Transaction

From this matrix, certain patterns emerge. One can see that if a building is well suited or moderately suited for the highest-value use of the land on which it is situated, then the owner will be able to sell or lease it to a productive user so long as there are no intervening obstacles (e.g., zoning restrictions, lease clauses prohibiting commercial tenants, holdouts) hindering the transaction. In these situations, the controversial and expensive direct government intervention will be unnecessary if the municipality focuses on removing barriers that would prevent effective negotiation.

The matrix also makes clear that if a structure is unsuitable for its highest-value use, no transaction will occur. This is especially problematic in suburban and rural areas because undeveloped land—the starting point most developers expect—is so plentiful and so accessible to vehicle-reliant consumers that it is practically fungible.⁴⁴ No developer in this situation will pay to renovate an outdated store when a brand-new one that checks all the boxes can be obtained at a lower cost. These are the situations in which the local government must intervene if it wishes to see the property put to a new, productive use.

B. Removing Barriers to Transactions: Well-Suited and Moderately Suited Structures

Even when a retail property is amenable to retail reuse or adaptive reuse, the owner may fail to locate a new tenant within a reasonable amount of time. The reasons for long vacancies are varied and highly contextual.⁴⁵ In

⁴⁴ See Schindler, *supra* note 5, at 498.

⁴⁵ *Id.* at 488 n.67 (“There are many possible explanations for the long vacancies . . .”).

many cases, the vacating retailer owns the property and chooses not to retenant it,⁴⁶ or “the former retail tenant prefers to continue paying rent under its lease to prevent competition from moving in.”⁴⁷ In other cases, local governments and property owners disagree about the property’s marketability:

One of the inevitabilities of retail real estate now is that it will be less valuable in the future than it was in the past. You don’t need a crystal ball to see that there’s more supply than demand of retail square feet Landlords are not acting quickly to recognize that, they are not acknowledging that their asset is less valuable, they are not lowering the price of their space fast enough They are letting the space sit on the market while their thinking adjusts.⁴⁸

The owner may be waiting—perhaps in vain—“to see if the area or economy improve to get more rent or a higher purchase offer.”⁴⁹ The cost of renovating the structure for immediate nonretail use may outweigh the owner’s anticipated cost of waiting until a retail tenant can be found.⁵⁰ Even if the owner recognizes the wisdom of renovating and locating a nonretail tenant, necessary funding and internal approvals for the project may simply be unavailable.⁵¹ Luckily for local governments, the barrier to transacting is occasionally within their control: “Zoning restrictions can make or break projects and orchestrating changes in them can delay [the] timetable, adding significant costs.”⁵²

In order for a transaction to take place, a willing buyer (the tenant) and a willing seller (the owner) must meet at the bargaining table. This Section focuses on ways in which local governments can attack both sides of the equation—reducing the incentive for owners to hold out for higher prices and increasing the pool of prospective tenants—to create an environment that encourages transactions.

46 This Note uses the word “retenancing” as a general term to include any productive use of property by a new occupant, regardless of whether that occupation occurs through lease or sale.

47 Schindler, *supra* note 5, at 488 n.67.

48 Kestenbaum, *supra* note 35.

49 Schindler, *supra* note 5, at 488 n.67; see also J. Brian Charles, *Cities Now Use Taxes to Fight Blight. Is It Working?*, GOVERNING (May 14, 2018), <http://www.governing.com/topics/urban/gov-cities-blight-taxes-lc.html>.

50 See Cherwin & Harding, *supra* note 39, at 40 (“Tenants have no incentive to incur significant costs for capital improvements unless the owner is willing to enter into a long-term lease (15 to 20 years); however, entering into a long-term lease with a nonretail tenant hinders the owner’s ability to merely ‘park or bank’ the property for the short term. The owner will be forced to decide whether to tie up the property with a nonretail user generating a lower investment return for a long term, or to keep the property vacant, waiting for the opportunity of receiving greater returns in the future from a new retail tenant.”).

51 SICOLA & STAPP, *supra* note 36, at 3 (explaining that shopping “[c]enters that have been foreclosed and managed by third-party asset managers often cannot make the needed changes due to lack of funds, lack of local knowledge or misaligned incentives”).

52 *Id.* at 2.

1. Increasing Inaction Costs

In order to successfully promote the return of well-suited and moderately suited structures to productive use, it is necessary to put pressure on owners to retenant property before it becomes a burden on the community. In the midst of the housing foreclosure crisis, communities searched for a way to monitor abandoned and foreclosed residences.⁵³ Well over one thousand municipalities have instituted vacant property registration (VPR) ordinances,⁵⁴ which have proven to be extremely effective in dealing with vacant residential property. Their widespread and relatively uncontroversial application makes them an easily implemented fix for struggling communities. The specific features of vacant building ordinances vary widely.⁵⁵ They generally require owners to register vacant properties and pay a registration fee within a certain time period after the building becomes “vacant.”⁵⁶ In many municipalities, the fee is charged annually, often with escalating fee schedules based on the length of the vacancy period.⁵⁷ The VPR ordinances also require owners to submit “a detailed plan and timeline for reoccupying, rehabbing or demolishing the building.”⁵⁸ Only a few key elements, already present in many such ordinances, are necessary for VPR ordinances to reach the ghostbox problem.

Most critically, the scope of a VPR ordinance must be broad enough to capture all retail property vacancies. The ordinance should be drafted or amended to explicitly apply to commercial properties.⁵⁹ Some jurisdictions have chosen to draft property ordinances that cover both residential and

53 See BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST ET AL., HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE?: A TOOLKIT 2 (2010).

54 See *Vacant Property Registration*, SAFEGUARD PROPS., <https://safeguardproperties.com/vacant-property-registration/> (last visited Nov. 25, 2018).

55 See *id.* Compare NEW CASTLE, DEL., CITY CODE § 141-19 (2018) (\$0 registration fee for first year, annual escalating fee schedule beginning at \$500 thereafter), COOPER CITY, FLA., CODE OF ORDINANCES § 13-94 (2019) (\$50 annual registration fee), ORMOND BEACH, FLA., CODE OF ORDINANCES § 14-74.04 (2018) (\$250 annual registration fee), and HARRISONVILLE, MO., MUNICIPAL CODE § 500.370 (2019) (no registration fee), with VACANT PROPERTY REGISTRATION APPLICATION, CITY OF ST. CLOUD, MINN., HEALTH & INSPECTIONS DEP'T, <https://www.ci.stcloud.mn.us/DocumentCenter/View/10950/Vacant-Property-Registration-Application> (last updated Oct. 2016) (\$2000 annually).

56 See, e.g., BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST & METRO. MAYORS CAUCUS, VACANT BUILDING ORDINANCES: STRATEGIES FOR CONFRONTING VACANT BUILDING CHALLENGES 4 (2016) [hereinafter VACANT BUILDING ORDINANCE STRATEGIES].

57 See Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL EST. L.J. 6, 17 (2010).

58 BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST ET AL., HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE?: AN APPENDIX TO THE TOOLKIT 26 (2010) [hereinafter HOW CAN MUNICIPALITIES APPENDIX] (endorsing vacant property plan requirement as a “valuable . . . tool for the municipal staff to engage with motivated property owners and help them think concretely and realistically about appropriate steps that need to be taken to identify and address problems with their properties”).

59 See Samantha N. Palma & Jason M. Santarcangelo, Note, *Rehabilitating New Jersey's Abandoned Property Legislation*, 41 SETON HALL LEGIS. J. 361, 383 (2017).

commercial properties;⁶⁰ others have enacted separate ordinances covering only vacant commercial property.⁶¹

A well-tailored VPR ordinance will define vacancy “based solely on how long the property has been vacant or unoccupied”⁶² because ghostboxes’ deleterious effects are largely attributable to a lack of productive occupation. Under some existing VPR ordinances, referred to as “Chula Vista model” ordinances, foreclosure proceedings, rather than vacancy alone, trigger the registration requirement.⁶³ This model, which was popular as a response to the housing foreclosure crisis, fails to capture properties that are vacant for reasons other than foreclosure. Other ordinances do not apply to unoccupied buildings unless at least one additional enumerated issue is present.⁶⁴ The departure of the occupant alone should trigger registration requirements. In a residential context, commonly included triggering factors are warning signs of potential impending externalities; when the same issues are present in a retail context, the damage is already done. For example, the VPR ordinance of Ashtabula, Ohio, requires that owners register properties that are unoccupied and unsecured, secured by other than normal means, illegally occupied, or that have building code violations.⁶⁵ These warning signs are relatively benign in a residential context: one can easily imagine most of these issues cropping up when an elderly owner experiences a medical emergency requiring an extended hospital stay and does not have the chance to put up plywood or fix the front porch railing.⁶⁶ Illegal occupation also does not necessarily mean that a home has been taken over by squatters—in many unfortunate cases, the “illegal occupant” is an owner whose mortgage was foreclosed.⁶⁷ On the other hand, securing a big box store is relatively straightforward, and the simple, standardized, no-frills design significantly limits the opportunity for building code violations. Because vacant retail shells are, by their nature, nonresidential, illegal occupants are always a sign of severe deterioration. A VPR ordinance that requires triggering events in addition to vacancy would fail to capture many vacant retail properties: these buildings can remain empty for years without being foreclosed on or becoming uninhabitable.⁶⁸

60 *E.g.*, CALEXICO, CAL., CODE OF ORDINANCES ch. 8.50 (2018).

61 *E.g.*, CANTON, N.C., CODE OF ORDINANCES § 9-1207 (2017).

62 VACANT BUILDING ORDINANCE STRATEGIES, *supra* note 56, at 7.

63 Timothy A. Davis, Note, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 URB. LAW. 399, 410 (2012).

64 *See* HOW CAN MUNICIPALITIES APPENDIX, *supra* note 58, at 15–16.

65 Ashtabula, Ohio, Ordinance No. 2013-44 (Mar. 18, 2013).

66 *Compare supra* Section I.A (discussing negative externalities caused by retail property vacancies), *with* Kelly, *Refreshing the Heart*, *supra* note 24, at 214–15 (discussing how absentee owners’ failure to maintain urban residential property contributes to neighborhood decline).

67 *See* Amy Loftsgordon, *Foreclosure Timeline: Getting Notice to Leave*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/foreclosure-book/chapter9-5.html> (last visited Feb. 2, 2018).

68 *See* HOW CAN MUNICIPALITIES APPENDIX, *supra* note 58, at 15–16.

Municipalities should strongly consider utilizing an escalating fee structure in order to tailor the ordinance to address long-term vacancies.⁶⁹ Low initial fees will fund the registration system without interfering with short-term vacancy which, unlike long-term vacancy,⁷⁰ “is a normal and healthy part of the real estate cycle.”⁷¹ Escalating fees will account for the increased burdens that continuing vacancies place on the community’s resources and will have the additional benefit of tailoring inactivity costs to the value the owner—or the vacating tenant who continues to pay rent—places on leaving the building unoccupied.⁷²

When determining the appropriate amount of the registration fee, it is imperative that municipalities set a fee that is sufficiently high to get corporate owners’ attention.⁷³ Many ordinances require payment of fees tailored to induce owners of vacant residential property to maintain the homes;⁷⁴ increasing fees across the board would interfere with enforcement with respect to these owners.⁷⁵ To put the issue in concrete terms, the \$500 annual fee that would induce the landlord-owner of a one-story bungalow to find a new tenant is likely an inconsequential sum to a multibillion-dollar big box retailer. One solution would be to enact separate fee schedules for com-

69 U.S. Dep’t of Hous. & Urban Dev., *supra* note 17, at 8 (“Fees that escalate the longer a property remains vacant can create a disincentive for owners to mothball properties, encouraging them to return these properties to productive use; in addition, revenue from these fees offsets the costs associated with vacant properties.”). For example, Charlotte County, Florida, imposes the following registration fee schedule:

- \$150 for first-year registration;
- \$250 for buildings that have been vacant for two years;
- \$500 for buildings that have been vacant for three years;
- \$1000 for buildings that have been vacant for four years;
- \$2000 for buildings that have been vacant for five years; and
- \$4000 for buildings that have been vacant for six or more years.

CHARLOTTE COUNTY, FLA., CODE OF LAWS AND ORDINANCES § 3-2-115(g) (2018).

70 See *supra* Section IA for a discussion of the high burden that long-term vacancies impose on communities.

71 David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1140 n.4 (1999) (“Short-term vacancy is a normal and healthy part of the real estate cycle, providing opportunities for residents and business owners to find units whose net utility gain is greater than their current unit.”).

72 See HOW CAN MUNICIPALITIES APPENDIX, *supra* note 58, at 17.

73 Admittedly, there is a trade-off, at least in the residential context, between setting low fees to encourage maximum participation in the registration program and setting fees high enough to motivate owners to maintain their vacant properties. See VACANT BUILDING ORDINANCE STRATEGIES, *supra* note 56, at 9–11. The same concern does not extend to vacant retail properties because the low information costs to municipalities of discerning whether a property is occupied and locating the owner decrease the need for voluntary compliance.

74 See Martin, *supra* note 57, at 6, 13 n.44 (noting that the housing foreclosure crisis prompted many municipalities to enact vacant property registration ordinances).

75 See VACANT BUILDING ORDINANCE STRATEGIES, *supra* note 56, at 9–11.

mercial and residential property.⁷⁶ Although this would address the problem directly and carry low administrative costs, the solution is not necessarily well tailored to inducing owners to find occupants for properties without imposing so high a burden that the fee becomes uncollectable as to smaller retailers. Under this scheme, for example, the owner of a vacant mom-and-pop hardware store would pay the same amount as the owner of a big box store formerly occupied by Home Depot. Because registration fees need to be justified by the cost of administering the program, it would be inappropriate to charge a registration fee based on the owner's financial situations.⁷⁷

A solution that would better match owners' ability to pay—and thus decrease the chance that the fees would interfere with their ability to maintain and retenant the property—is achievable through the imposition of differentiated inspection fees. “Some municipalities place the burden of property inspection on the registrant.”⁷⁸ A community with sufficient personnel, however, should strongly consider drafting an ordinance that requires owners to allow the municipality to conduct periodic inspections for code compliance, and charge both the inspection and registration fee at the time of registration or renewal. This will make it easier for the municipality to “ensure compliance with safety and maintenance requirements.”⁷⁹ It will also justify the collection of fees consistent with owners' likely financial resources: it is not uncommon for inspection fees to be calculated based on the square footage of the building.⁸⁰ For example, under such an arrangement where the registration fee was set to \$0.20 per square foot, the owner of a 2400-square-foot single-family home⁸¹ would pay \$480, while the owner of a 10,000-square-foot big box store would pay \$2000.

One potential pitfall that municipalities may encounter is that it may not be within the municipality's power to institute a vacant property registration fee. The extent of municipalities' powers covers the spectrum from low levels of autonomy (Dillon's Rule municipalities) to high levels of autonomy

76 See, e.g., *Vacant Property Registration and Inspection*, CHARTER TOWNSHIP WEST BLOOMFIELD, MICH., http://www.wbtownship.org/government/departments/building_and_zoning/vacant_property_registration_and_inspection_program.php (last visited Nov. 25, 2018) (indicating vacant property registration/inspection fees of \$425 for residential properties and \$625 for commercial properties). A municipality would be justified in imposing different fees on residential and commercial properties because vacant commercial properties impose a disproportionately high burden on municipal resources. See U.S. Dep't of Hous. & Urban Dev., *supra* note 17, at 7 (“Although commercial properties make up only 3 percent of Oklahoma City's vacancies, they account for approximately 40 percent of all police and fire calls.”).

77 See VACANT BUILDING ORDINANCE STRATEGIES, *supra* note 56, at 10.

78 HOW CAN MUNICIPALITIES APPENDIX, *supra* note 58, at 24.

79 *Id.*

80 See, e.g., *Inspection Fees*, MUSKOGEE, OKLA., www.muskogeeonline.org/departments/planning/inspection_fees.php (last visited Nov. 25, 2018).

81 The median size of a new home constructed in 2017 was 2426 square feet. U.S. CENSUS BUREAU, MEDIAN AND AVERAGE SQUARE FEET OF FLOOR AREA IN NEW SINGLE-FAMILY HOUSES COMPLETED (2017), <https://www.census.gov/construction/chars/pdf/squarefeet.pdf>.

(home rule municipalities).⁸² Even within a single state, the autonomy granted to local governments may not be uniform.⁸³ To further complicate matters, a local government's authority to require payment also depends on whether the exaction is in the nature of a fee, a tax, a special assessment, or some hybrid form.⁸⁴ In the rare cases challenging the propriety of VPR fees, courts have come to different conclusions—or have been unable to reach a conclusion altogether—as to whether the fees represent taxes, special assessments, or regulatory fees.⁸⁵ There is little doubt, luckily, that municipalities are almost universally empowered to impose reasonable building inspection requirements.⁸⁶ It is further generally accepted that the power to require inspection also authorizes municipalities to set reasonable fees for building inspections.⁸⁷ Although it is foolish to hang one's hat on broad generalizations as to the extent of municipal power, it is likely that a municipality that may otherwise lack authority to impose VPR fees could still impose a building inspection requirement and attach a reasonable inspection fee.

Some may argue that vacant property registration fees are an unnecessary administrative burden on the municipality because existing property taxes are sufficient to induce owners to put their land to productive use. This is not the case. It is true that an owner in financial distress may be unable to afford to pay property taxes if property is not put to productive use; however, a significant portion of vacant retail property owners do not need the prop-

82 See 1 SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 21.01 (2d ed. 2018).

83 See *id.*

84 In a Dillon's Rule municipality, an express grant of power from the state legislature is a prerequisite for any kind of exaction. See *id.* In a home rule municipality, the extent of the power to institute taxes, fees, and special assessments varies broadly. See 4 STEVENSON, *supra* note 82, § 64.01 (“There are a few cases which have acknowledged local government power to tax without an express constitutional, statutory or charter grant, but the overwhelming weight of authority is to the effect that local governments do not have an inherent power of taxation.” (emphasis omitted) (footnote omitted)); *id.* § 65.02 (“Local governments have no inherent power to levy special assessments. . . . Local authority to impose special assessments is regularly conferred by statutes and charters. Authority is also derived from home-rule constitutional provisions giving local governments all power over local concerns. . . . The general rule is that grants of power to local governments to impose special assessments must be strictly construed and reasonable doubt as to the extent or limitation of such authority is resolved against the locality.” (emphasis omitted) (footnote omitted)); *cf.* 2 *id.* § 27.12 (“[L]icense and permit fees will be sustained if they reasonably cover the regulatory expenses incurred by the local government and are not grossly or consistently disproportionate thereto.” (emphasis omitted)).

85 Compare *Meldahl v. City of Minneapolis*, No. A13-0275, 2013 WL 6152196, at *6 (Minn. Ct. App. Nov. 25, 2013) (fee), with *Fed. Hous. Fin. Agency v. City of Chicago*, 962 F. Supp. 2d 1044, 1063 (N.D. Ill. 2013) (tax), and *City of Wilmington v. McDermott*, No. 08T-02-057, 2008 WL 4147580, at *3 (Del. Super. Ct. Aug. 26, 2008) (finding, but not deciding whether, vacant property fees are taxes or special assessments).

86 7A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24:556, Westlaw (database updated July 2018).

87 *Id.*; *cf.* 2 STEVENSON, *supra* note 82, § 27.12.

erty to turn a profit in order to cover property taxes.⁸⁸ This is particularly true in the case of otherwise profitable corporate owners, who can reduce their taxable incomes by claiming a deduction for property taxes on their federal income tax returns.⁸⁹ In light of the widespread problem of under-assessed retail properties, municipalities with the time and resources to do so may consider a large-scale reassessment to make sure that retail owners are actually paying their fair share.

At various points in this nation's history, scholars have suggested that municipalities adopt a site value taxation method. Unlike traditional property taxes, which are based on the value of improvements, a site value (or land value) tax taxes land at a higher rate than improvements in order to create an incentive for owners to put land to productive use.⁹⁰ Despite its occasional popularity, the land value tax has never caught on in this country and is barred by uniformity clauses contained in many state constitutions.⁹¹ The system is notoriously difficult to implement—a deal breaker for under-resourced communities—and there is no guarantee that it would induce owners to put their properties to productive use.⁹² Even if land value taxation is permitted under a state's constitution, it is not the answer to municipalities' vacant retail store problem.

88 See, e.g., Kraut, *supra* note 71, at 1152–53 (describing behavior of inner-city speculators who take advantage of low property-tax burdens on vacant buildings while avoiding the expense of dealing with tenants); Philip Mattera, *Rolling Back Property Tax Payments: How Wal-Mart Short-Changes Schools and Other Public Services by Challenging Its Property Assessments*, CORP. RES. PROJECT (Sept.–Oct. 2007), <https://www.corp-research.org/e-letter/rolling-back-property-tax-payments> (describing “a large-scale effort to roll back its assessments, lower its tax payments and thereby increase its after-tax profits”); Melanie Moul, *Dark Store Tax Loophole Hits Small-Town Budgets*, HARDWARE RETAILING (Sept. 29, 2017), <http://www.hardwareretailing.com/dark-store-tax-loophole-hits-small-town-budgets/> (describing loopholes that allow big box stores, even when occupied, to be assessed as if they were vacant).

89 I.R.C. § 164(a)(1) (2012).

90 See generally Charles E. Harris, Note, *Site Value Taxation: Economic Incentives and Land Use Planning*, 9 HARV. J. ON LEGIS. 115 (1971).

91 See Donald G. Hagman, *The Single Tax and Land-Use Planning: Henry George Updated*, 12 UCLA L. REV. 762, 767–73 (1965).

92 See, e.g., Charles, *supra* note 49 (“[T]he use of [such] taxes on vacant property [is] ‘a blunt instrument’ in spurring development. Real estate markets are contextual.”); *id.* (“In a hot market, the landlord might wait for a high-end renter. If the market is soft, the vacant land tax might force the landowner to allow it to fall into disrepair.”); Elaine S. Povich, *Can Extra Taxes on Vacant Land Cure City Blight?*, PEW CHARITABLE TR. (Mar. 7, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/07/can-extra-taxes-on-vacant-land-cure-city-blight> (“Critics argue that the taxes are helpful in a city where land values are increasing . . . but not so much in cities where values are stagnant . . .”).

2. Lowering Transaction Costs

When the property in question is clearly marketable,⁹³ difficulty locating a tenant usually indicates that the total cost of purchasing or leasing the property exceeds its value to potential tenants. In the real world, the cost of occupying a new store includes more than just the proposed rental or selling price. Unlike the frictionless transactions represented in the matrix above, the cost of retenanting also includes the cost of negotiating a new lease and renovating or, even in the case of retail reuse, making cosmetic changes to the existing structure. Local governments can decrease the total cost to new tenants—and thereby increase the pool of potential tenants—by taking steps to remove obstacles to profitable occupation.

Frequently, obstacles to retenanting retail property are the result of previous tenants' deliberate actions taken to prevent competitors from entering the market.⁹⁴ Many retail chains engage in an explicit policy of continuing to pay rent for an old location after moving into a new store in the same town.⁹⁵ Others ensure the same effect by negotiating for the inclusion of noncompete lease provisions in the original lease.⁹⁶ Walmart's leases, for example, often include a clause that specifically prohibits the building owner from re-leasing the property to a Kmart or Target after Walmart has ceased occupation of the building.⁹⁷ When Walmart sells stores that it owns, the company places even broader restrictions on leasing to competitors, requiring purchasers "to sign a letter of intent that prohibits the property from being used as a large discount store, warehouse membership club, grocery store, pharmacy, large bowling alley, movie theatre, or health spa in the future."⁹⁸

Peachtree City, Georgia, is one of a handful of municipalities that has taken an *ex ante* approach to the problem by enacting ordinances that prohibit the inclusion of such clauses in commercial property leases.⁹⁹ Although such ordinances effectively prevent situations in which the vacating tenant

93 Marketability is captured by the well-suited and moderately suited designations. Keep in mind that the diagnosed highest-value use of a parcel—and, therefore, the existing structure's suitability to that use—accounts for the community's ability to support that use. See *supra* Section II.A.

94 See, e.g., Cherwin & Harding, *supra* note 39, at 39; Peak, *supra* note 12.

95 Schindler, *supra* note 5, at 488 n.67.

96 *Id.* at 502.

97 *Id.*

98 *Id.* at 508.

99 PEACHTREE CITY, GA., CODE OF ORDINANCES app. A, art. X, § 1006.3(a)(6) (2018). Peachtree City's ordinance makes the operation of a retail business occupying more than 10,000 square feet a conditional use within the general commercial district. *Id.* One condition is that the tenant engaged in such business demonstrate that the rental agreement contains a contract provision prohibiting such person or entity from voluntarily vacating such premises or otherwise ceasing to conduct its retail business on such premises while simultaneously *preventing the landlord, by continuing to pay rent or otherwise, from leasing the premises to another person or company* who will operate a permitted business on the premises.

bars the property owner from retenanting the property—and should certainly be enacted by municipalities in advance of retenanting existing greyfields—it is not clear that the provision would be effective with regard to existing leases.¹⁰⁰

It is often more expensive for a new tenant to take over an existing structure in an area where land is cheap than it is to build a new store in the same community.¹⁰¹ Even straight retail reuse of a structure moderately suited to the new tenant's purposes requires renovations to match the existing structure to the store's concept, particularly when the incoming tenant is part of a retail chain that relies on uniform store design as a central aspect of its branding.¹⁰² To decrease the cost of reuse to prospective tenants, municipalities must take steps to ensure that reusing an existing structure is more cost-effective than building a new store.

"If a prospective re-user wants to make drastic exterior modifications and structural alterations [to the existing structure], it is possible that new site requirements will be triggered, such as setback or open space requirements that were not yet in place when the original structure was built."¹⁰³ In order to make adaptive reuse, as well as retail reuse of moderately suitable structures, attractive to new tenants, municipalities must lower barriers to modification.

Structures are required to comply with the building code in effect when they were originally constructed. If an owner or tenant wishes to make significant changes later on, all requirements for new construction currently in effect must be met.¹⁰⁴ One method that is particularly well matched to encouraging reuse of moderately suitable structures is to adopt the International Existing Building Code (IEBC).¹⁰⁵ The purpose of the IEBC is to pro-

Id. (emphasis added). The ordinance also provides that any such restriction is ineffective. *Id.*

100 Courts have not yet addressed this issue. Compare Schindler, *supra* note 5, at 532 (suggesting that "an ordinance that voids such existing non-compete clauses in the leases of big box retail tenants or prohibits them from including such provisions if they are to renew their leases" would constitute a constitutional exercise of the municipality's police power), with *S. Hamilton Assocs. v. Morristown*, 493 A.2d 523 (N.J. 1985) (invalidating retroactive application of rent control ordinance to existing leases on grounds of impairment of contract, but stating that such ordinance could apply retroactively in the case of a housing emergency).

101 See Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251, 1256 (2008).

102 Farr, *supra* note 6 ("[M]ost retailers have a store prototype that is unique. Therefore they reject existing vacant space because it does not meet their store format requirements. . . . Retailers often prefer building on vacant land instead of incurring the cost to rehabilitate existing space.").

103 Schindler, *supra* note 5, at 507–08.

104 See McQUILLIN, *supra* note 86, § 24:502.

105 *Effective Use of the International Existing Building Code*, INT'L CODE COUNCIL (Aug. 2017), https://codes.iccsafe.org/content/IEBC2018/EFFECTIVE-USE-OF-THE-INTERNATIONAL-EXISTING-BUILDING-CODE?site_type=public/.

mote the reuse of existing structures.¹⁰⁶ In order to balance this objective with public safety concerns, the code “allows for options for controlled departure from full compliance with the *International Codes* dealing with new construction, while maintaining basic levels for fire prevention, structural and life safety features of the rehabilitated building.”¹⁰⁷ Adopting the IEBC will reduce the cost of modifications by eliminating the requirement that the structure, as modified, comply with provisions that are not necessary for public safety.¹⁰⁸ This is a particularly attractive, low-cost method for under-resourced communities because the IEBC is designed to work seamlessly with the International Building Code, which is administered at the state or local level in all fifty states.¹⁰⁹

Another established method for encouraging adaptive reuse is for local zoning authorities to encourage innovative use through the granting of variances.¹¹⁰ Time spent negotiating with local governments over land use changes represents a significant transaction cost for new tenants.¹¹¹ Local government actors should keep the objective of encouraging reuse of existing structures in mind throughout negotiations with potential tenants.

Offering tax incentives to prospective developers and businesses has become the norm for municipalities competing to attract economic investment.¹¹² Public servants should be careful—even hesitant—when considering this option. Retailers benefit from local resources as much as, if not more than, other residents.¹¹³ As already discussed, retailers frequently compound these incentives by taking advantage of commerce-friendly property tax provisions once they arrive.¹¹⁴ There is a fine line between negotiating for a mutually beneficial arrangement and allowing incoming businesses to become freeloaders.

The longer a building remains vacant, the greater the likely capital expenditure necessary for owners to complete necessary modifications and locate prospective tenants. Municipalities can assist owners in freeing up

106 *See id.*

107 *Id.*

108 *Id.*

109 *United States Usage of the I-Codes*, INT’L CODE COUNCIL, <https://www.iccsafe.org/about-icc/overview/international-code-adoptions/> (last visited Oct. 21, 2018).

110 *See* SICOLA & STAPP, *supra* note 36, at 2.

111 *See id.* (“A major issue in [renovation and reuse] is securing local jurisdictional approval of land-use changes, needed variances or redesign” and advising developers to allow “[a]mple time . . . for discussions and negotiations around changing regulations.”).

112 *See, e.g.*, Jonelle Marte, *10 Things Shopping Malls Won’t Tell You*, MARKETWATCH (June 26, 2011), <https://www.marketwatch.com/story/10-things-shopping-malls-wont-tell-you-1308954251095> (discussing perks offered by municipalities hoping to attract new retailers); Peter H. Milliken, *City Markets Vacant Grocery Store*, YOUNGSTOWN VINDICATOR (Dec. 22, 2015), <http://www.vindy.com/news/2015/dec/22/city-hungers-for-buyer-to-take-over-vaca/> (discussing probable expectations of prospective incoming businesses).

113 *See* Farr, *supra* note 6; Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL. L. 48, 52 (2005); Schindler, *supra* note 5, at 521.

114 *See supra* subsection II.B.1.

funding by waiving fees for those who are in the process of demolishing, rehabilitating, retenanting, or substantially repairing their buildings.¹¹⁵ This waiver will stand in for the subsidy that developers have come to expect from local governments in weaker markets, effectively increasing funds available to rehabilitate the property without requiring an expenditure of public funds. This is particularly true if the waiver is partial: the city will continue to receive funds necessary to maintain the registration system, and the discount reflects an acknowledgment that ongoing work on the site will reduce the cost of other aspects of administration, such as monitoring and securing the property.

C. If You Won't Do It, We'll Do It for You: Unsuitable Structures

Another point of departure in the greyfield context from accepted approaches to urban residential vacancies is the attractiveness of government intervention. During the Great Recession, cities like Detroit, Cleveland, and Baltimore made national headlines when widespread foreclosure and neglect by absentee property speculators produced entire city blocks of blighted vacant property.¹¹⁶ In those areas, comparatively high potential property values and the effect of vacancy on close neighbors' health, safety, and welfare make swift intervention by government or community organizations desirable and, often, profitable. Nonurban communities plagued by greyfields, however, do not have the time or money to intervene in any but the most desperate of vacancies.¹¹⁷

The main methods by which local governments obtain control of vacant properties have historically been nuisance abatement, tax foreclosure, vacant building receivership, and eminent domain.¹¹⁸ Because an extensive body of

115 See HOW CAN MUNICIPALITIES APPENDIX, *supra* note 58, at 19 (providing examples of municipalities that allow full or partial waiver or refund of registration or renewal fees to encourage owners to repair, rehabilitate, demolish, sell, or lease the property); VACANT BUILDING ORDINANCE STRATEGIES, *supra* note 56, at 11; Martin, *supra* note 57, at 15 n.51; see also *Benson v. City of Portland*, 850 P.2d 416, 418 (Or. Ct. App. 1993) (finding that ordinance providing for waiver of registration fee conditioned on demolition or reoccupation does not constitute a taking).

116 See, e.g., Kelly, *A Continuum in Remedies*, *supra* note 24; Kate Abbey-Lambertz, *Watch Detroit Neighborhoods Fall into Ruin Through Google Street View Images*, HUFFINGTON POST (March 26, 2016, 8:03 AM), https://www.huffingtonpost.com/entry/google-street-view-detroit-abandoned-homes-foreclosure_us_56f41be3e4b0c3ef52183d4b; Leila Atassi, *Cleveland's Glut of Vacant Housing Could Cost Billions to Eliminate at Current Pace*, CLEVELAND.COM (Sept. 25, 2012), https://www.cleveland.com/metro/index.ssf/2012/09/cleveland-glut_of_vacant_hous.html.

117 See Kraut, *supra* note 71, at 1140–41 (noting that while cities have the power to seize abandoned property from owners for just compensation, doing so can be prohibitively expensive).

118 See *id.*; Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 3 UTAH L. REV. 1169 (2008).

literature on this topic already exists,¹¹⁹ my purpose here is to briefly summarize their applicability to ghostbox remediation. In practice, these solutions are only effective against truly unsuitable vacant retail properties.

Tax foreclosure, a “promising method of redistribution” of underutilized property,¹²⁰ is only available if the owner fails to keep the property taxes current.¹²¹ This solution is particularly unlikely to be available when the property owner is holding out for a higher rental or sale price.¹²² In those cases, the stores’ taxes are often too low to be burdensome.¹²³ It is also unlikely that the owner of a property for which a vacating tenant continues to pay rent will allow the taxes to go unpaid.

Traditional code enforcement and its in rem counterpart, receivership, are possible solutions for an unsuitable structure that is so blighted that rehabilitation is impossible or not worth the investment.¹²⁴ Hopefully, the techniques discussed in Sections II.A and II.B will prevent the vast majority of properties from reaching this point of no return. These avenues are available only if the building has fallen into a state of relatively severe disrepair. State and local law, usually based on the International Building Code safety standards, authorizes municipal enforcement actions against vacant property nuisances. Indiana’s building code, for example, “tracks, more or less, the IBC definition,” but extends “the concept of an unsafe building” to “any vacant property not fit to be lived in to an order to repair immediately or even demolish the structure.”¹²⁵ Statutes such as this were clearly drafted with vacant residential properties in mind, and do little to address the problem of vacant commercial properties. Furthermore, such statutes often rely on traditional nuisance concepts, which are inapplicable when a ghostbox’s nearest neighbor is a quarter of a mile away.¹²⁶

Exercising the power of eminent domain, while certainly effective, should always be considered a last resort. As a practical matter, the tactic is

119 See generally John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301 (2000); Kelly, *A Continuum in Remedies*, *supra* note 24; Kelly, *Refreshing the Heart*, *supra* note 24; Bell, *supra* note 24; Kraut, *supra* note 71.

120 Kelly, *Refreshing the Heart*, *supra* note 24, at 215.

121 See *id.*

122 Cf. *id.* (noting that financially savvy owners of urban residential properties may continue to pay property taxes on vacant properties if they believe that the property may appreciate in value at some uncertain future date).

123 See *supra* note 82 and accompanying text.

124 See Kelly, *Refreshing the Heart*, *supra* note 24, at 211.

125 Kelly, *A Continuum in Remedies*, *supra* note 24, at 115–16 (citing IND. CODE § 36-7-9-4(a)(6) (2005)).

126 See *id.* at 116 (citing IND. CODE § 36-7-9-5(a) (2013)) (“The statute, however, requires that any ordered action ‘be reasonably related to the condition of the unsafe premises and the nature and use of nearby properties.’ Thus, an order to repair must focus on those deficiencies that either make a property a danger or make it unfit for occupancy and cannot extend to preventative maintenance. Likewise, a demolition order must be justified by the building’s severely deteriorated condition and its lack of prospects for prompt renovation.” (footnotes omitted)).

best “invoked to facilitate massive redevelopment”¹²⁷—an unlikely scenario for shrinking and struggling areas with plenty of untouched land. Such areas are also unlikely to have the financial ability to exercise eminent domain. The Constitution requires that the government pay just compensation to the owner of property taken for public use.¹²⁸ The fair market value of a retail shell may or may not be fairly low. “Of course, even at bargain prices, in this economy, many municipalities are unable to purchase anything.”¹²⁹ As a political matter, any government considering the use of eminent domain should proceed with extreme caution.¹³⁰ In light of the public backlash against the *Kelo v. City of New London*¹³¹ decision, it ought to be clear that citizens are tremendously uncomfortable with the idea of their government taking private property for redevelopment, no matter how economically beneficial the move may turn out to be.¹³² An injudicious attempt to utilize this approach could alarm potential developers and cause more severe economic disinvestment than the retail vacancy itself.

CONCLUSION

There is no doubt that the retail industry is undergoing a period of transformation. Technological advances and changing consumer values have prompted a shift away from the expansion-based model of the past. As was the case during the housing foreclosure crisis, local governments will be called upon by their communities to respond to the problems that result from the retail apocalypse. This Note encourages municipalities to evaluate their current ability to prevent retail shells from becoming a drain on the community. For those localities already burdened by long-vacant ghostboxes, this Note provides a clear starting point from which to attack a daunting economic challenge. Above all, local governments ought to use the foregoing methods as a baseline, exercising creativity in finding solutions tailored to the needs of those they serve.

127 *Id.* at 111.

128 U.S. CONST. amend. V.

129 Schindler, *supra* note 5, at 538 n.303.

130 See Eisenberg, *supra* note 24, at 539.

131 545 U.S. 469, 485, 490 (2005) (finding that the city’s disposition of property for economic development qualified as public use within the meaning of the Takings Clause of the Fifth Amendment).

132 See Schindler, *supra* note 5, at 538.