

## **Testimony in Support of LD 2045, “An Act Relating to the Valuation of Certain Retail Property”**

February 6, 2020

Senator Chipman, Representative Tipping, and members of the Taxation Committee,

My name’s Sarah Austin. I’m a policy analyst at the Maine Center for Economic Policy. I am the lead researcher and author of a report on the use of dark store theory and the threat it poses to property tax bases in Maine communities. I am here to testify in favor of LD 2045 because it would stop this dangerous legal scheme in its tracks and protect Mainers and small businesses from being left holding the bill for large retailers.

Big-box chains benefit from the fire and police protection and infrastructure provided by our municipalities. Their employees and their children benefit from the public education provided by our schools. The retailers who benefit from those investments should pay their fair share, not push more of the cost onto homeowners and small businesses.

But all over the country, large retailers such as Walmart, Home Depot, and Lowe’s have successfully used “dark store theory” to challenge local assessments and slash their property tax bills. Major corporations are beginning to roll out this tactic in Maine: Since 2015, six retailers (Walmart, Lowe’s, Walgreens, Sam’s Club, Best Buy, and BJ’s) have requested \$184 million in valuation reductions since 2015.<sup>i</sup>

We should start by noting that large-scale retail is big business. The top 10 large retailers nationally reported more than \$1.1 trillion in sales in 2018.<sup>ii</sup> But lawyers for big-box retailers say communities should ignore this reality on the ground. They say towns should instead assess their properties as if they were shuttered and vacant “dark stores” in economically undesirable areas.

This is like arguing that your home should be assessed as if the neighborhood had fallen on hard times and everyone had moved out, even if today you live in the most popular, vibrant part of town.

Property taxes are supposed to be based on an apples-to-apples comparison between the property in question and similar situated properties. Dark store theory instead asks local assessors to compare fresh fruit to rotten vegetables.

Part of the argument made by dark store theory is that large retail properties are unappealing to buyers when they hit the market. Large retailers argue their valuation should reflect the much lower value of these dark stores — even while they are still open for business.

Essentially, they say communities should ignore the current value of their property and tax them based on what it would be worth when market conditions at their location are no longer favorable.

Ironically, difficulty selling big-box retail properties is at least partially the result of anti-competitive practices by the retailers themselves. Big-box retailers use restrictive covenants to prevent competition, with the added effect of deflating the value of big-box stores on the open market.<sup>iii</sup>

For example, imagine a Walmart closes in one community because the parent company is opening a new Walmart Superstore in the next town over. Walmart's restrictive covenant on the original property protects it from competition by preventing another large retail business, such as Target or Costco, from opening a store there.

These tactics don't just protect big-box retailers from competition. By preventing other large retailers from buying vacant big-box stores, these anti-competitive practices drive down the prices of their property on the market. In other words, these corporations are knowingly deflating the future value of their properties, then asking for a tax cut today to reflect the conditions they've created in the future.

Dark store theory is relatively new but is gaining ground across the country. The theory was first successful in a handful of Midwestern states, where it has been used to slash local valuations by hundreds of millions of dollars. Ambiguity in state assessment laws have led to some state courts allowing dark store assessments to prevail at great costs to local communities. In Michigan, for example, dark-store appeals cost local budgets \$100 million between 2013 and 2017.<sup>iv</sup>

A 2019 MECEP survey of the largest Maine retail towns showed that large box retailers are asking for dramatically reduced assessments in line with those sought under dark store theory.<sup>v</sup> Large-scale retailers have requested at least \$184 million in reduced property value over the past four years. Those retailers are requesting valuation reductions of between 14 percent and 56 percent, with an average requested reduction of 34 percent.

In our research, we found that Maine assessors have been largely successful in defending their assessments or settling on abatements that are a fraction of what the retailers sought. When appeals did result in a reduction, the average granted reduction was about 8 percent of property value.

However, Maine should not leave assessors as the lone line of defense against corporate tax avoidance. Large retailers have proven elsewhere that they are willing to challenge local decisions if they believe a court would grant them a more favorable outcome. And once that happens, it's much harder to put the genie back in the bottle.

Dark store theory exploits a lack of clarity that exists within state assessment laws. LD 2045 would clarify the kinds of property comparisons that should be used in local assessments.

While this bill retains the right of any property taxpayer to challenge their assessment, it establishes guardrails on which comparable properties can be used to arrive at a fair assessment. That clarity will protect municipalities and other property taxpayers in the face of consistent assessment challenges by retail corporations.

I urge the committee to support legislation that promotes a fair assessment process for all businesses and households in Maine. I urge the committee to support LD 2045.

### **End Notes:**

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<sup>i</sup> Austin, Sarah and Mario Moretto. "Dark Store Theory: Big-box stores rolling out new effort to get out of Maine property taxes." October 31, 2019. <https://www.mecep.org/wp-content/uploads/2019/10/Dark-Stores-Report-Final-for-Distribution-103119.pdf>

<sup>ii</sup> National Retail Foundation. "Stores top retailers 2019." Stores. Accessed October 25, 2019. <https://stores.org/stores-top-retailers-2019/>

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<sup>v</sup> Austin and Moretto, 2019.

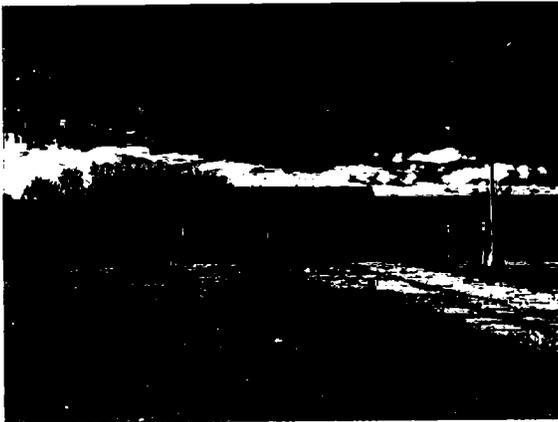


## Report: Dark Store Theory

# Big-box stores rolling out new effort to get out of Maine property taxes

by Sarah Austin, with Mario Moretto | October 31, 2019

Communities thrive when everyone pitches in to ensure reliable services, and safe, modern infrastructure. Residents and businesses each do their part by paying property taxes, which fund things like road maintenance and snow plowing, clean water systems, fire departments, parks, and schools.



**Big-box stores use “dark store theory” to argue they should pay property taxes as if they were vacant, even while they’re still open for business and raking in revenue.**

**It’s an effort by major corporations to manipulate the tax code so they pay less — leaving everyone else with the bill.**

The services and infrastructure paid for with property taxes increase the standard of living and help families and businesses plant deep roots in their communities. But across the country, large big-box retailers are increasingly turning to a dubious idea known as “dark store theory” to manipulate the tax system and get out of paying what they should.

Dark store theory was started in a handful of Midwestern states, where it has been used to slash local valuations by hundreds of millions of dollars. In Michigan, for example, dark-store appeals cost local budgets \$100 million between 2013 and 2017.

Now, corporations with hundreds of billions of dollars in combined annual revenue, such as Walmart and Lowe’s, are rolling out this tax avoidance method in Maine. If successful, it could lead to huge revenue losses for communities, where local budgets have already been stretched thin by a decade of underfunding from the state. Other property taxpayers will be left holding the bill.

Local assessors and other property tax experts report that appeals using dark store theory are on the rise in Maine. Big-box stores have had mixed success so far. But their deep pockets empower them to challenge assessments every year, pushing and prodding the system until a precedent-setting decision enshrines dark store theory in Maine, as has happened elsewhere in the country.

Several states have begun to move legislation to prevent big-box corporations from using dark store theory to win tax cuts. Maine too can protect local services and ensure the assessment process is fair for all property taxpayers.

### What is ‘dark store theory’?

Across the country, large retailers such as Walmart, Home Depot, and Lowe’s have used an argument known as “dark store theory” to get out of paying property taxes.

These corporations have secured significant property tax reductions in several Midwestern and Southern states, where state courts have agreed to reduce big-box store valuations — and thus property taxes — at a huge cost to local communities and individual property taxpayers.

Large-scale retail is big business. The top 10 large retailers reported more than \$1.1 trillion in sales in 2018.<sup>1</sup> But lawyers for big-box retailers say communities should ignore this reality on the ground and assess big-box properties as if they were shuttered and vacant “dark stores” in economically undesirable areas.

Large retailers say that their properties are unappealing to buyers when they hit the market. They argue their valuation should reflect the much lower value of a dark store, even while they are still open for business.

These corporations are essentially asking communities to ignore the current value of their property and instead consider what it would be worth if they relocate or close, a decision they'd make only when market conditions in their location are no longer favorable.

Dark store theory is like arguing that a single-family home should be assessed as if the neighborhood had fallen on hard times and everyone had moved out, even if the home today is in the most popular part of town.

Ironically, difficulty selling big-box retail properties is at least partially the result of anti-competitive practices by the retailers themselves. Big-box retailers use restrictive covenants to prevent competition, with the knock-on effect of deflating the value of big-box stores on the open market.<sup>2</sup>

For example, imagine a Walmart closes in one community because the parent company is opening a new Walmart Superstore in the next town over. Walmart's restrictive covenant on the original property protects it from competition by preventing another large retail business, such as Target or Costco, from opening a store there.

These tactics don't just protect big-box retailers from competition. By preventing other large retailers from buying vacant big-box stores, these anti-competitive

## How property valuation works in Maine

To determine property taxes owed, tax assessors must determine a property's value.

First, assessors determine a property's “highest and best use.” To determine the highest and best use, assessors consider what is legal, physically possible, financially feasible, and most productive.

For example, a building with a kitchen, bathroom, and bedrooms would have a highest and best use as a residential property, not a city storage unit.

Once the assessor has determined a property's highest and best use, they can estimate the property's value. They do this by considering three factors: cost, income, and sales.

- Cost represents the price of the land, construction, and materials of the property at the time it was built, adjusted for any loss of value over time.

- Income represents the market rate revenue the building's owner would reap if the property were rented or leased.
- Sales represents the market value of the property, or how much someone would pay for it.

In conducting these analyses, assessors compare the property in question with other similarly located properties that have the same best and highest use.

For example, to determine the value of a single-family home, the assessor would consider the recent sales prices and rents of other single-family homes in the area. After all, it wouldn't make sense to consider the recent sales price of a 22,000 square foot office building or franchise restaurant property when trying to determine the value of a three-bedroom house.

While assessment is conducted and property taxes are collected at the local level, it is the state that sets the rules governing assessment.

practices drive down the prices of their property on the market.

The takeaway? Big-box stores use dark store theory to demand tax breaks today that reflect the conditions they've created to decrease their property's value in the future.

## How corporations are using dark store theory nationwide

Big-box corporations have advanced dark store theory through property tax challenges in local appeals boards and courts.

Authorities across the country have ruled on both sides of the appeal. In some states, big-box corporations have been successful in getting out of property taxes by appealing to dark store theory. Communities have had to write huge property tax refund checks to large retailers, jeopardizing their ability to stick to local budgets and provide services that families and businesses — including big-box stores — rely on.

Other states have passed or attempted to pass legislation to protect communities and local property taxpayers from corporate tax avoidance.

Here are some noteworthy developments from across the country:

### **Walmart appeal in Arkansas could set a precedent favoring big-box stores**

Walmart was seeking a \$4.5 million property tax cut in Pulaski County, Arkansas.<sup>3</sup> The corporation used dark store approvals from across the country to argue for cutting its assessment nearly in half, from \$145 million to \$73.4 million.<sup>4</sup> A county court ruled in August 2019 that Walmart's dark store evidence was inadmissible, and the corporation is appealing the decision to the circuit court. Local observers anticipate the case will ultimately land in front of the state supreme court.

The case is noteworthy because a 2017 state law repealed a legal requirement that judges defer to assessors and place the burden of proof for property tax appeals on the property owner. With both sides now equal before the courts, the Arkansas case will deliver a

clear-cut verdict on the legitimacy of dark store theory. A victory for Walmart in Arkansas could set a precedent and embolden big-box stores to file lawsuits to get out of property taxes across the country.

### **Vague assessment laws create opportunities for tax avoidance**

Big-box corporations have been exploiting murkiness in state property tax laws for a decade. Between 2013 and 2017, an association of Michigan counties estimates that dark-store appeals cost local budgets \$100 million.<sup>5</sup>

Michigan is one of the first states where large-scale retailers found success with dark store theory in the courts. In 2010, Target successfully changed how commercial property was assessed in the state when it challenged its assessment in Novi, Michigan, allowing for the use of dark stores as benchmarks for open big-boxes.<sup>6</sup> In 2012, Lowe's successfully lowered its assessment in Marquette Township from \$5.2 million — half the cost to develop the property — to \$3.5 million. The township had to pay Lowe's \$756,000 and had to eliminate Sunday hours at its public library to cover the cost.<sup>7</sup>

The International Association of Assessing Officers report that the national average price of retail property ranges from \$45 to \$75 per square foot, but after several years of successful dark-store appeals in Michigan, the state's average price per square foot of similar property is only \$20.<sup>8</sup>

### **Big-boxes are testing the waters for dark store theory in Maine**

Large retailers are poised to bring dark store theory to Maine.

"The dark store method is being embraced," John O'Donnell, an assessment expert whose accounting firm works with 35 municipalities across the state, told the Ellsworth American in April 2019.<sup>9</sup> Large retailers "appeal most, if not all, of their assessments in every town every year. It's an indication that this is a business strategy more than it is an indication that all of these assessed values are excessive," O'Donnell told the newspaper.

In 2016, Lowe's had appealed their assessments for eight of their eleven Maine locations. A spokesperson for the company said they regularly challenge property tax as-

assessments.<sup>10</sup> Walmart is similarly engaged in a statewide campaign to lower their property taxes by challenging local assessments.<sup>11</sup>

MECEP filed records requests for valuation appeals during the past four years in the 25 municipalities with the highest retail sales, as well as every community with a Walmart — one of the most frequent appellants (see Appendix A).

The research reveals that large-scale retailers are systematically challenging property valuations. Findings include:

- Large-scale retailers have requested at least \$184 million in reduced property value over the past four years.
- Those retailers are requesting valuation reductions of between 14 percent and 56 percent, with an average requested reduction of 34 percent.
- When they are successful, valuations have been reduced between 2 and 30 percent, with an average settlement of 8 percent reduction.

Valuation challenges are not unusual. However, dark store theory is used to justify much larger abatement requests than would be possible with a normal appeal. Simply put, a 50 percent reduction in property value would not be achievable by using the same valuation model as a local assessor.

In many instances, large retailers operating in Maine have made no argument in writing as to *why* such large abatement requests are justified. But the scale of reductions sought in recent years mirrors the kind demanded by corporations using dark store theory in other states. Interviews with assessors in many of the surveyed communities similarly suggest that big-box retailers are testing the water for dark store theory in Maine.

So far, retailers have had limited success in Maine. While several cases are still pending, only \$8.4 million in abatements were issued during the surveyed period.

However, large retailers appear to be ramping up their appeal efforts. In 2011, Good Jobs First estimated that one in three Walmart stores and 40 percent of Walmart distribution centers challenged their assessments.<sup>12</sup> MECEP's survey of Walmart stores in 2019 revealed that three out of four locations in Maine has appealed their assessments in the past four years.

While appeals can cost municipalities thousands of dollars, especially if outside lawyers are required, big box stores with huge profits can afford to constantly test their case. After all, their experience in the Midwest has proven that one successful court case can tip the scales in their favor for years.

- In Rockland, Walmart closed its store and placed restrictive covenants on future use of the property, which barred any future grocery sales and limited the square footage of future retailers. The building ultimately sold to Ocean State Job Lot, another retailer, for half of the assessed value. Walmart then appealed the prior year's property tax assessment based on the lower sale price of their building, but the city successfully fought off the appeal because market assessments in Maine cannot be based on a single sale price.
- In Bangor, a records request showed that Lowe's, Best Buy, Walmart, Sam's Club, and Walgreens had all submitted appeals to the city during the past four years, requesting valuation reductions that totaled \$33 million. The appeals resulted in a \$6.8 million reduction in valuation over the four years. The lower assessments mean a long-term loss of property tax revenue for the city.
- Next door in Brewer, Walmart didn't have the same luck as it did in Bangor. The company appealed to the city to reduce its assessment by 27 percent, from \$15 million to \$11 million. The city denied the appeal. Walmart then appealed the decision to the Brewer Board of Assessment Review which upheld the city's decision to deny the appeal.
- In some towns such as Oxford and Falmouth, assessors have taken no action on appeals by Walmart, which result in a de facto denial of the appeal. Walmart has not pursued the appeals further.

## Elected officials and residents fight back across the country

In several states where large retailers have used dark store theory to escape property taxes, residents and lawmakers alike have begun to fight back. But after years of successful appeals by big-box stores, advocates for tax fairness have found it hard to put the genie back in the bottle.

**Simple revisions to the laws governing property tax valuations could protect Maine communities and other property taxpayers from large retailers' attempts at tax avoidance.**

In 2017, the Michigan Supreme Court overturned a successful dark-store appeal by the home improvement store Menard's, a potential sign that the tide is turning in that state.<sup>13</sup> But a Michigan law limiting valuation increases to no more than 5 percent each year means the reduction in local revenue will take decades to recover.<sup>14</sup> Even if valuation cuts won via dark store theory are overturned, it will take years for the properties that have already won deep cuts to return to their prior assessment values.

A study commissioned by the League of Wisconsin Municipalities estimates homeowners and nonretail businesses could see a property tax increase of between 4 percent and 17 percent if big-box corporations continue to win dark-store appeals.<sup>15</sup>

The situation prompted lawmakers to consider Assembly Bill 386 to ban most applications of dark store theory, and state voters have passed advisory referendums across the state asking lawmakers to end the practice. Governor Tony Evers proposed closing the dark store loophole in 2019.

Despite the momentum, proponents of dark store theory aren't giving up without a fight and have blocked efforts to curb the use of dark store theory in Wisconsin.

Dark-store appeals by Kohl's and other large retailers

in the early 2010s prompted the Association of Indiana Counties to commission a study on dark store theory. The study estimated that dark store appeals could cost municipalities an estimated \$68 million reduction in local revenue.<sup>16</sup>

In 2015, Indiana lawmakers unanimously approved Senate Bill 436, which prohibited the use of dark stores as comparisons in property assessment, eliminated local tax breaks for businesses that appealed local property tax assessments, and minimized the harm to municipal budgets from successful appeals by allowing municipalities to refund property tax payments over a five-year period.

The Indiana Legislature watered down the language of Senate Bill 436 one year later, citing constitutional concerns.

## Conclusion: Maine can act before dark store theory takes hold

So far, big-box stores have had mixed success using dark store theory to seek tax cuts in Maine. But MECEP's survey and interviews with local assessors suggest Maine communities will face a steady and growing stream of appeals in the coming years. Action at the state level could protect municipal property tax bases, local budgets, and basic fairness for other residential and business property taxpayers.

While Maine's constitution requires the same procedure to be used in all property valuation, there is room for state policymakers to strengthen statutory guidelines for assessing big-box stores to protect Maine towns and cities from dark store theory.

The efforts by states such as Indiana, Wisconsin, Michigan, and Texas could inform action in the Maine Legislature. Simple legislative language to clarify which properties can be used in the price analysis during assessment will ensure that these large retail corporations can't game the system at the expense of communities and other property taxpayers.

# Appendix A

## Summary of MECEP's survey of property tax valuation appeals

Town	Store	Property Tax Year	Assessment	Requested Reduction	Settled reduction
Auburn	Lowe's	2015-2016	\$12,491,600	\$3,844,352	\$511,000
	Lowe's	2016-2017	\$12,491,600	\$3,741,600	\$511,000
	Walmart	2017-2018	\$16,162,600	\$4,162,600	—
Augusta	Lowe's	2015-2016	\$14,420,400	\$6,060,400	\$288,400
	Lowe's	2016-2017	\$14,420,400	\$6,060,400	\$288,400
	Walmart	2018-2019	\$19,046,900	\$5,546,900	Pending
Bangor	Best Buy	2015-2016	\$3,602,300	\$1,214,389	—
	BJ's	2015-2016	\$6,206,000	\$2,656,000	\$1,856,000
	Lowe's	2015-2016	\$12,257,500	\$4,524,217	\$657,500
	Lowe's	2016-2017	\$12,216,100	\$4,536,100	\$766,100
	Walgreens	2016-2017	\$2,235,600	\$699,800	—
	Walgreens	2016-2017	\$1,723,300	\$249,100	—
	Sam's Club	2017-2018	\$9,961,100	\$2,961,100	—
	Walmart	2017-2018	\$19,189,200	\$6,689,200	\$2,189,200
	Sam's Club	2018-2019	\$9,949,900	\$2,949,900	—
	Walmart	2018-2019	\$19,027,400	\$6,527,400	\$1,327,400
Biddeford	Walmart	2017-2018	\$15,648,700	\$5,648,700	—
	Walmart	2018-2019	\$15,648,700	\$5,648,700	—
Brewer	Lowe's	2015-2016	\$12,489,600	\$3,534,203	—
	Walgreens	2015-2016	\$1,974,400	\$449,400	—
	Walmart	2018-2019	\$15,084,200	\$4,084,200	—
Brunswick	Walmart	2017-2018	\$16,957,700	\$6,957,700	Pending
	Walmart	2018-2019	\$16,957,700	\$5,757,700	Pending
Ellsworth	Walmart	2017-2018	\$20,110,900	\$10,110,900	Pending
	Walmart	2018-2019	\$20,276,900	\$10,276,900	Pending
Farmington	Walmart	2016-2017	\$12,000,000	\$3,000,000	—
Houlton	Walmart	2016-2017	\$5,449,700	\$1,949,700	—
Lewiston	Walmart Warehouse	2018-2019	\$47,290,600	\$7,290,600	Pending
Oxford	Walmart	2017-2018	\$11,502,500	\$3,502,500	—
Portland*	Lowe's	2015-2016		\$2,593,989	—
Sanford	Walmart	2017-2018	\$12,786,300	\$2,786,300	—

# Appendix A

Summary, continued

Town	Store	Property Tax Year	Assessment	Requested Reduction	Settled reduction
Scarborough	Sam's Club	2016-2017	\$13,208,200	\$6,208,200	Pending
	Walmart	2016-2017	\$20,465,200	\$6,465,200	Pending
	Sam's Club	2017-2018	\$14,837,200	\$7,837,200	Pending
	Walmart	2017-2018	\$23,170,600	\$9,170,600	Pending
Thomaston	Walmart	2017-2018	\$15,889,373	\$8,889,373	—
Waterville	Walmart	2017-2018	\$12,758,000	\$2,758,000	—
Windham	Lowe's	2015-2016	\$11,958,700	\$2,830,203	—
	Walmart	2017-2018	\$14,050,600	\$4,050,600	—

Source: MECEP survey of property valuation appeals filed in the top 25 municipalities by retail sales, 2015-2019, plus all communities with a Walmart. "—" indicates that the appeal was settled without a valuation reduction.

\* Portland's assessment of this property was unobtainable because of record retention laws. The requested reduction and settled reduction was sourced from news reporting.

## About MECEP

The Maine Center for Economic Policy is a nonprofit research and policy organization dedicated to economic justice and shared prosperity by improving the well-being of low- and moderate-income Mainers. Since its founding in 1994, MECEP has provided policymakers, advocates, media organizations, and the public with credible, rigorous research and analysis. MECEP is an independent, nonpartisan organization.

## About the authors

Sarah Austin is MECEP's lead policy analyst on tax and budget. She holds a master's degree in public affairs from the University of Wisconsin-Madison's La Follette School of Public Affairs and a bachelor's degree in environmental policy from Unity College. Mario Moretto is MECEP's communications director. His professional background is in journalism and political communications, and he holds a bachelor's degree in international affairs and anthropology from the University of Maine.

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