

TOWN OF SAN ANSELMO
STAFF REPORT
May 22, 2012

For the Meeting of June 12, 2012

TO: Town Council

FROM: Megan Acevedo, Deputy Town Attorney
Diane Henderson, Interim Director of Planning

SUBJECT: Consideration of Possible Changes to the Municipal Code With
Regard to Chain Stores

RECOMMENDATION:

That Council provide direction to staff regarding possible changes to the Municipal Code regarding regulating chain stores.¹

BACKGROUND:

At the Town Council meeting on May 8, 2012, Council directed staff to prepare a report about the Town's options for regulating chain stores in San Anselmo. Legal research indicates that it is within the Town's police power to regulate these businesses. Such regulations must bear a reasonable relationship to the general welfare and cannot conflict with State law or the Town's General Plan. Additionally, the restrictions cannot be so onerous that they deny an owner all economically viable use of her/his land. Several local jurisdictions have adopted ordinances limiting chains and they could provide models for a Town ordinance. However, the Council should carefully consider the practical implications of restricting chain stores to determine if it is appropriate for the Town.

DISCUSSION:

Recent changes at Red Hill Shopping Center have resulted in concerns regarding local stores and restaurants leaving the center and in some cases being replaced by larger, nationally-recognized stores and restaurants Red Hill

¹ Although we refer to chain stores in this memo, most cities refer to these types of establishments as "formula retail". Formula retail is generally defined as, retail stores, restaurants, hotels and other establishments that are required by contract to adopt standardized services, methods of operation, decor, uniforms, architecture or other features virtually identical to businesses located in other communities.

Shopping Center is zoned Specific Planned Development (SPD), meaning that it is governed by specific rules and regulations approved by the Town for that site and use. Pursuant to the San Anselmo Municipal Code, a property with a planned district designation may only be developed pursuant to standards specifically adopted by the Town for that particular property. This differs from other commercially zoned properties located in the Town (Downtown, Greenfield Avenue and Red Hill Avenue and Sir Francis Drake Boulevard), which have standard commercial zoning subject to the zoning parameters for the district as detailed in the Town Zoning Ordinance.

If the Town seeks to regulate chains within the Red Hill Shopping Center it must consider the current land use designation for the property. As described above, the Center is zoned Specific Planned Development (SPD). Pursuant to the San Anselmo Municipal Code, properties with special characteristics have been zoned SPD to accommodate a flexible approach to the development of these lots to allow various types of development including neighborhood and district shopping centers. The SPD District for the Red Hill Shopping Center was established in 1973 with Safeway and Longs Drugs Store as the major tenants. The existing businesses at Red Hill will not be affected by any forthcoming regulation, so public resistance to the chain businesses that are already part of the Center will not be addressed through chain store restrictions. Also, Red Hill recently received Design Review approval for proposed exterior improvements including two new plazas, building façade improvements, landscaping, exterior lighting, signage, wooden benches and accessible pathways with the assumption that it would continue operating without chain store restrictions. As part of that approval, the Center has agreed to make a substantial investment in the property, including improvements to public facilities, such as signal improvements, the installation of ADA ramps at the sidewalks along Sir Francis Drake Boulevard and ADA push buttons for the blind at sidewalk crossings.

Aside from the Red Hill Shopping Center SPD, the Town could adopt a land use restriction that would limit chain stores and/or restaurants. An ordinance could restrict these establishments to certain zones within the Town and/or require a conditional use permit to operate in San Anselmo. The approach taken in Fairfax and Sausalito is described below; both jurisdictions allow chain stores only as a conditional use where findings can be made and only within certain zones. Other cities have limited chain restaurants, but allowed chain stores.² If the Town chooses to adopt an ordinance, it could carve out existing businesses so that they are “grandfathered” in.

As discussed in detail below, the Town has the legal authority under its police power to impose zoning regulations on chain stores; however, the practical implications of such restrictions should be taken into account before any limits are established. First, given the current economic situation and the number of vacant storefronts in Town, limiting the types of businesses that are permitted in

² Carmel by the Sea Municipal Code § 17.14.040 (I)(3)(b), (I)(4)(d);

Town could result in continued vacancies. Second, if restrictions are desired, should they be imposed throughout Town, or just in specific areas? (Much of Downtown is zoned C-2 Downtown Commercial or C-3 General Commercial; properties along Greenfield Avenue and Red Hill Avenue are primarily zoned C-3 General Commercial; and properties along Sir Francis Drake Boulevard west of the Hub are C-L Limited Commercial, with the exception of Red Hill Shopping Center which is zoned SPD Specific Planned District). Finally, defining a “chain store” may be problematic: many chains already exist in Town: TCBY, CVS Pharmacy, Walgreens, Safeway, etc.; are banks and similar businesses subject to the same chain store restrictions; does a local business with multiple locations (i.e. High Tech Burrito) constitute a chain?

Legal Background:

The legal basis for all land use regulation is a city’s police power, which includes protecting the public health, safety, and welfare of its residents.³ A land use regulation lies within the police power if it is reasonably related to the public welfare.⁴ A city’s actions must meet constitutional principles of due process: they must be reasonable, nondiscriminatory, and not arbitrary or capricious.⁵ Courts give cities substantial deference when considering the validity of land use restrictions. The California Supreme Court explained:

[It is a] well settled rule that the determination of the necessity and form of such regulations, as is true with all exercises of the police power, is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity?⁶

As a result of this deference, if “it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare,” a land use regulation should withstand constitutional attack.⁷

A city’s general welfare has been broadly defined in relation to a city’s ability to implement land use regulations. For example, preserving a city’s “character” and “stability” has served to justify a city’s use of its police power to implement zoning

³ Cal. Const. art. XI, § 7; *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

⁴ *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 601.

⁵ *G & D Holland Constr. Co. v. City of Marysville* (1970) 12 Cal. App. 3d 989, 994.

⁶ *Consolidated Rock Prods. Co. v. City of Los Angeles*, (1962) 57 Cal. 2d 515, 522.

⁷ *Associated Home Builders, Inc. v. City of Livermore*, *supra*, 18 Cal. 3d at 601; see also, Daniel J. Curtin, Jr. *Regulating Big Box Stores: The Proper Use of the City or County’s Police Power and its Comprehensive Plan* 6 *Vt. J. Envtl. L.* 31 (2005) at p. 40.

regulations.⁸ A city's concern about the appearance of a project is also considered to be part of the general welfare.⁹

The California Constitution specifies, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*."¹⁰ Accordingly, local legislation in conflict with the general law of the state is void. "Conflicts exist if the ordinance duplicates [citations], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citations]."¹¹ For example, in *Bank of the Orient v. Town of Tiburon*, a town's ordinance imposing an interim moratorium on construction that lasted more than three years was invalid because it was in conflict with state law providing that no moratorium can exceed two years.¹²

In addition to being constitutional and consistent with state law, zoning regulations must also be consistent with the Town's general plan.¹³ "A zoning ordinance is consistent with the city's general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment."¹⁴ A zoning ordinance that is not consistent with a city's general plan is invalid at the time it is passed.

Finally, land use regulations must not deprive a property owner of economically viable use of her/his land. As long as an ordinance leaves property owners with economically viable uses of their property, it will not be considered a taking.¹⁵ "A zoning ordinance does not constitute a taking simply because it narrows a property owner's options."¹⁶

A city's ability to enact land use restrictions on specific types of retailers has been upheld by California courts. For example, in *Hernandez v. City of Hanford*

⁸ *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal. App. 3d 1579 (A city ordinance limiting private property owners in a residential zone from renting their properties for less than 30 days was a legal exercise of the city's police power because it protected the city's residential character).

⁹ *Novi v. City of Pacifica* (1985) 169 Cal. App. 3d 678, 682 (The City's ordinance prohibiting "monotonous" development was valid. The court explained, "The legislative intent is obvious: the Pacifica city council wishes to avoid "ticky-tacky" development of the sort described by songwriter Malvina Reynolds in the song, "Little Boxes." No further objective criteria are required...")

¹⁰ Cal. Const., art. XI, § 7 (emphasis added).

¹¹ *People ex rel. Deukmejian v. County of Mendocino* (1986) 36 Cal.3d 476, 484.

¹² *Bank of the Orient v. Town of Tiburon* (1990) 220 Cal.App.3d 992, 1001; overruled on other grounds by *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 747.

¹³ Cal. Gov. Code, § 65860 (a); see also *Citizens of Goleta Valley v. Board of Supervisors of the County of Santa Barbara* (1990) 52 Cal. 3d 553,

¹⁴ *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal. App. 4th 1604, 1621, quoting *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879.

¹⁵ *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal. App. 3d 1579, 1592.

¹⁶ *Ibid.*

(2007) 41 Cal.4th 279, the California Supreme Court reviewed case law addressing zoning restrictions that impact commercial competition, including a case limiting big box retailers from locating in certain zones within a city.¹⁷ The Court concluded:

[E]ven when the regulation of economic competition reasonably can be viewed as a direct and intended effect of a zoning ordinance or action, so long as the primary purpose of the ordinance or action—that is, its principal and ultimate objective—is not the impermissible private anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate public purpose—such as the preservation of a municipality's downtown business district for the benefit of the municipality as a whole—the ordinance reasonably relates to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power.¹⁸

Among the public interests discussed in *Hanford* as being legitimate are the need to control the pace and location of growth in a city and preservation of a municipality's downtown business district.¹⁹

In sum, if the Town Council wishes to implement a regulation limiting chain stores, it may do so under its police power. The ordinance must bear a reasonable relationship to the general welfare and it must be consistent with State law and the Town's General Plan. Additionally, the restrictions cannot be so onerous that they deny an owner all economically viable use of her/his land.

Chain Store Restrictions in Other Cities

A number of cities, including some in Marin County, have placed restrictions on chain stores. These enactments provide examples of possible approaches that the Town could take, if the Council determines that it would like to adopt similar restrictions.

Fairfax has imposed restrictions on "formula" businesses and restaurants in its central commercial zones. The enacting ordinance states: "It is the purpose of this article to limit the number of formula businesses in the CC zone to those that are compatible with the needs of area residents, to preserve and encourage the

¹⁷ The ordinance at issue in *Hernandez* prohibited the sale of furniture in a specific district, but at the same time created a limited exception permitting a large department store within the same district to display and sell furniture within a single location in the store measuring no more than 2,500 square feet. (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 290.)

¹⁸ *Id.* at 296, 297.

¹⁹ Similarly, an unpublished opinion from another California Appellate Court upheld a formula retail whose purpose "is to regulate the location and operation of formula retail establishments in order to maintain the City's unique village character, the diversity and vitality of the community's commercial districts, and the quality of life of Coronado. . . ." (*Organized v. City of Coronado*, 2003 Cal.App.Unpub. Lexis 5769 (Cal.App. 4th Dist. June 13, 2003).)

owner-operator character of the town's business and to promote the local economy."²⁰ Formula businesses and stores are those that are required by headquarters or a franchise to maintain standardized services, décor, uniforms, menus, etc.²¹ Such businesses and restaurants are permitted as conditional uses in the CC zone if the town can make a number of required findings, such as: the business is pedestrian oriented; it will provide services that satisfy the day-to-day needs of area residents; it is a "smaller scale" business, it is consistent with the unique character of Fairfax, it is likely the business will not cause one or more existing businesses in town to fail.²²

Sausalito does not allow formula retailers in the Caledonia Street commercial area, but permits them on Bridgeway Boulevard. Sausalito's Municipal Code states that the purpose of the restriction is to "maintain the City's unique village character, the diversity of economic vitality of the community's commercial districts and the quality of life of Sausalito residents."²³ Formula retail is defined under the Code as "a type of retail sales activity or retail sales establishment, including food service, which is required to maintain any of the following: standardized ("formula") array of services and/or merchandise, trademark, logo, service mark, symbol, sign, décor, architecture, layout, uniform, or similar standardized feature."²⁴ A Conditional Use Permit is required for any formula retail, as long as the City can make specific findings. The requisite findings include: the formula retail establishment will be compatible with existing surrounding uses and will operate in a non-obtrusive manner to preserve the community's distinct character and ambiance; the formula retailer will contribute to an appropriate balance of local, regional and national-based businesses in the community; and the use and design of the formula retailer will preserve the distinctive visual appearance of Sausalito for residents and visitors.²⁵

Mill Valley does not have formula retail restrictions, but recently turned down Subway's application to go into a space previously occupied by Baskin Robbins. The City Council unanimously rejected an appeal by the applicant, stating that the chain did not fit with the city's downtown character and the General Plan's commitment to that character, local business and economic vitality. Following the Subway denial, Orchard Supply Hardware pulled its application to fill a vacant grocery store space in the Mill Valley.

²⁰ Fairfax Municipal Code § 17.100.150.

²¹ Fairfax Municipal Code § 17.100.160.

²² Fairfax Municipal Code § 17.100.170.

²³ Sausalito Municipal Code § 10.44.240 (A).

²⁴ Sausalito Municipal Code § 10.44.240 (B).

²⁵ Sausalito Municipal Code § 10.44.240 (D).

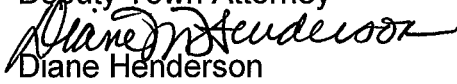
Conclusion

If the Council desires to restrict chain stores in San Anselmo, staff will bring back a draft ordinance for consideration.

Respectfully submitted,


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