AGENDA
CITY OF GLENWOOD SPRINGS
Planning and Zoning Commission
Special Meeting
AUGUST 17, 2021
Council Chambers, First Floor
101 W. 8TH STREET
6:00 PM

1 Roll Call

2 New Items

A. Formula Retail Standards

3 Continued Items

A. Planning File 18-21 - Consideration of Planning and Zoning Commission by-laws

4 Commissioner Comments

5 Director Comments

6 Adjournment

Planning and Zoning Commission

Work Session

Date: August 17, 2021
To: Planning and Zoning Commission
From: Hannah Klausman,
Assistant Director, Economic and Community Development
Subject: Formula Retail Standards Discussion

Formula Retail is defined differently by municipalities however generally refers to a type of retail or personal service establishment with multiple locations and standardized features such as merchandise, façade, signage, and décor, or a recognizable appearance.

Numerous Cities have chosen to implement formula retail standards or regulations in order to protect a certain zoning district's character or other unique local features of an area. Common retail businesses that are included in Formula Retail designations include, but are not limited to:

1. Restaurant
2. Bar
3. Entertainment
4. Service, Financial
5. Service, Personal
6. Sales and Service, Retail
7. Gym
8. Drive Up Facility
9. Movie Theater
10. Lodging

Staff has minimally reviewed other municipal examples of these standards and included them as attachments to this report. Attachments include information from the City of San Francisco, CA, the City of Port Townsend, WA and locally the City of Aspen, CO and Crested Butte, CO. Staff has also included a Legal Guide from New York Zoning Law and Practice Report Newsletter, Volume 7, No. 4 (2007), that discusses the practice and application of formula retail standards.

<u>Considerations for drafting Formula Retail Standards</u>

For the purposes of this work session discussion, Commissioners should think about the following questions related to drafting regulations and intent of implementation. These are for discussion purposes only and will help staff to understand Commission's direction.

1. Where will the regulations apply?
2. What types of businesses will be included?
3. Will Formula Retail establishments be banned outright, capped, or reviewed case by case in a Special Use Permit format?
4. What is the public purpose these regulations will serve and how will the restrictions fulfill those purposes?
5. What Comprehensive Plan goals would be helped by a formula business restriction?

NEW YORK
ZONING LAW AND PRACTICE REPORT

January/February 2007 Vol. 7, No. 4

In This Issue

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Electronic Composition
Specialty Composition/Rochester DTP

Published six times a year by West

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A GUIDE TO REGULATING BIG BOX STORES, FRANCHISE ARCHITECTURE, AND FORMULA BUSINESSES

Daniel A. Spitzer and Jill L. Yonkers

Introduction

Generations of travelers have marveled at the multi-hued wonders of the red rock country surrounding Sedona, Arizona. But a journey through Sedona does not include the stark reminder of one of America's most common travel symbols. That is because in Sedona, the trademark arches of McDonald's are teal green, not bright yellow, a concession made to local demand for a more aesthetic complement to the community's southwestern architecture.[1]

The Sedona restriction is not unique. From a Starbucks in Cleveland, Ohio which resembles a lighthouse on nearby Lake Erie,[2] to an art-deco Wal-Mart in Baldwin Park, California,[3] communities across the country are requiring national corporations to drop signature-style motifs to accommodate local aesthetic tastes. Nor do these regulations stop with issues of appearance; more and more, communities are also limiting the size of so-called "big box" retailers and discount stores. Although allegedly enacted to counteract the environmental impacts that these large, 100,000 square-foot-plus stores create in terms of traffic, pollution, parking requirements, drainage, and loss of open space, in many instances the true goal is local economic protection. These neutralizing provisions, largely in response to the perceived negative impacts of Wal-Mart, have led to some communities prohibiting these businesses from certain districts or even from their entire community.

This article examines municipal efforts through local zoning and design standards to regulate big box retailers, "franchise architecture," where all stores have a similar look to create a nationally recognized brand, and "formula businesses," national or regional enterprises with similar building styles, appearances, product offerings, and/or modes of operation (think of McDonald's, Starbucks, or Subway). The three categories are not mutually exclusive, as often the objection to a Wal-Mart or K-Mart is to its aesthetics, not its size,

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New York Zoning Law and Practice Report is published by Thomson/West, 50 Broad Street East, Rochester, NY 14694.

while other efforts to control or eliminate big box retailers are specifically aimed at the large "super centers" or "power centers," where discount retailers are combined with supermarkets. Similarly, concern over the proliferation of formula businesses is often at the neighborhood-sized level of McDonald's and concerns both the architecture and impact on the local economy.

We will consider the reasons for these enactments, the tools available to New York municipalities for regulating these businesses, and the types of regulations used across the country. Finally, the legal validity of these laws will be examined, including the counter-attacks that these businesses have launched against the regulating communities. We offer no opinion on whether such regulations should be adopted; that debate would be almost endless given that for every study alleging harm from these businesses, there seems to be another showing the benefits. Our goal is to explain the issues and create the mechanism for educated decision-making and action by the community's hand.

Reasons for Regulation

Concern over competition from large retailers and their secondary impacts on the local landscape and economy is almost as old as department-type stores and chain stores themselves. As early as 1899, the City of Chicago—in an effort that presages current efforts to regulate super centers—enacted two ordinances against department stores, "the object of each is to prohibit the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold."[4] Throughout the 1920s and 1930s, there was a strong anti-chain store movement in reaction to their explosive growth:

> Chain stores were in the American consciousness, and for good reason. Led by the Great Atlantic and Pacific Tea Company (known throughout the country then and since as A&P), chain groceries, drug stores, cigar shops, gas stations, and variety stores revolutionized retailing in the first quarter of the twentieth century. During the 1920s, chains increased their share of overall national retail sales from 4% to 20%, and their total share of grocery sales to 40%. By 1930, A&P was the fifth largest industrial corporation in the United States, and was running more stores than any other chain store company had or has since.[5]

While earlier regulatory measures were motivated almost solely by economic protectionism, opposition today focuses on a wider range of values. To be sure, local economic pressures form the core values of significant opposition to Wal-Mart and other national chains. Many of the cases discussed in this article, for example, arise from Wal-Mart's and its competitors' expansions into grocery sales and the opposition from both supermarket chains and their unions.[6]

Although the constitutionality of land use controls, particularly zoning, has been recognized for over eighty years,[7] and its incidental impacts on commerce recognized and accepted, regulations and planning decisions constituting pure local economic protection will still be struck down.[8] Similarly, while ordinances discriminating against an unpopular company with no legitimate rationale for them will not stand, it remains the "fundamental rule that zoning" concerns land use, "not the person who owns or occupies it."[9] Accordingly, we start our discussion with the recognition that all regulations must have a valid legislative purpose within the police powers granted to municipalities; our search thus starts with an exploration of the ills each of our targets allegedly present.

1. Big Box Retailers

Generally, when people hear the term "big box," uniform visions of boxy, large-square-footage, plain-faced buildings with boastful, colorful signs come to mind, but the same consistency does not necessarily follow in the municipal codes. The result is a hodge-podge of rules attempting to define them, to restrict them by size, to trigger a heightened level of review, or to prevent them altogether.

There are a number of factors prompting municipalities to enact provisions regulating these businesses, and not all impacts are considered negative. Big box proponents tout the benefits of competitive or reduced prices, convenience, and variety,[10] with the economic benefits of increased employment and sales tax revenues.[11] Supporters also assert that the one-stop shopping super centers offer can actually reduce the number of car trips and therefore, related traffic impacts. In at least one case, a village used a new big box store as the centerpiece of its revitalization efforts.[12]

On the other hand, to some, they mar the landscape and defile the local viewshed with their large, featureless construction and acres of parking lots, eliminate longstanding "Mom and Pop" stores, are inaccessible to pedestrians, and generate increased traffic and related pollution while placing unacceptable demands on existing infrastructure.[13] Significant concerns have also been raised about the inability to reuse the large empty structures (and their parking lots) should the store close, or if an existing big box is abandoned as part of an upgrade to a super center. For the most part, residents advance regulation (if not prohibition) of these businesses to protect local economies, to ensure no negative impacts to home values, and to guard the community against increased traffic, visual, air, and water pollution, and other perceived or actual impacts. Many communities also oppose Wal-Mart, in particular, based on its supposed employment practices, lack of unions, and impact upon and attitude toward the proposed host community.

New York Zoning Law and Practice Report (USPS# pending) is issued bimonthly, six times per year; published and copyrighted by Thomson/West, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN. POSTMASTER: Send address changes to **New York Zoning Law and Practice Report**, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

2. Franchise Architecture

Franchise architecture is usually defined broadly as a building design that is trademarked or identified with a particular chain or corporation and is generic in nature. Complaints about franchise architecture range from the aesthetic impact of the featureless big boxes, to the garish colors and designs national and regional chains use to brand their product. As one planner explained the problem,

> Architecture has traditionally reflected the unique culture, climate, and topography of different regions, as well as the aesthetic preferences of local inhabitants. Over the last fifty years, these regional differences have been steadily disappearing, as national and global franchises develop standardized architectural prototypes and replicate these buildings everywhere, with little regard for local variations. The impact of franchises on the character of the built environment should not be underestimated, as the market share of corporate chains continues to expand around the world at a rapid pace.
>
> Architectural variety enriches communities and celebrates the distinctions between different people and places. The quality of the built environment influences the ability to attract and retain businesses, residents, and tourists. Increased architectural standardization leads to barren city landscapes and communities devoid of authenticity and charm.[14]

Other concerns with franchise architecture are:

- Large logos and/or colors used over large expanses of a building.
- Branded buildings are difficult to reuse if vacated by the primary business, promoting vacancies and blight.
- Buildings lack architectural elements and design consistent with the local community's architectural composition, character, vernacular, and historic context.[15]

Unlike big boxes, where the potential impacts touch upon many sources of municipal power, control over franchise architecture, as discussed below, is almost completely dependent on a community's ability to regulate on the basis of aesthetics.

3. Formula Businesses

If the big box stores raise wide issues of environmental and economic concern, while franchise architecture focuses on aesthetic impacts, formula businesses raise both sets of issues. Formula businesses include national and regional chains of retail stores, restaurants, and other establishments which employ standardized architecture, product lines, operating procedures, similar services, methods of operation, staff uniforms, architecture, and in some cases, even floor plans, so that each place of business is virtually identical to the company's other operations in other areas. Proponents of formula regulation are those who believe the proliferation of chains as diverse as Starbucks, McDonald's, or Barnes & Noble have harmed the local environment and/or economy.

No matter which side of the issue your community falls, the general trend in New York towns, villages, and cities is to have at least some type of minimal regulations and approval process applicable to these types of businesses. We examine below the ways that a municipality may choose to govern these entities.

The Tools of Regulation

A. Statutory Authority for Regulations

It is now well accepted that that the State and its localities have "a legitimate interest in local neighborhood preservation, continuity, and stability."[16] Varying statutes provide authority for regulating these businesses, particularly the zoning enabling statutes;[17] in addition, the State Environmental Quality Review Act ("SEQRA") provides a mechanism for full review of specific proposals. Used together, the various statutes provide a full range of authority for local action.

Two different regulatory approaches have been utilized to deal with big boxes, franchise architecture, and formula businesses. The first calls for banning the offending structures and uses altogether from the community or parts of the community—i.e., specific districts. The second employs the use of special use permits and site plans to regulate their appearance and location, and to minimize impacts through the imposition of conditions.

While the favored approach to regulate these businesses is to use a municipality's zoning code or ordinance to define and limit them, it is recommended that the powers of the Municipal Home Rule Law be used rather than mere reliance on the zoning enabling statutes. The Municipal Home Rule Law stretches the community's powers to their maximum, even allowing supersession of state law in some land use contexts.[18] The Municipal Home Rule Law contains a very important direct grant of power, by authorizing local laws for the "protection and enhancement of its physical and visual environment;"[19] it provides a specific source for aesthetic-based regulations.

Similar authority is provided by General Municipal Law § 96-a's grant of power to "to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value . . . [including] appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both."[20]

In regard to banning facilities completely or certain uses from certain districts, the law has been settled since *Euclid* that communities have the right to segregate uses for the public benefit.[21] That power has been read to permit, when supported by the record, complete exclusion of certain uses from the community; in fact the New York Court of Appeals has rejected claims that New York law prohibits exclusionary zoning in the commercial context.[22]

There are some communities that take the step of attempting to define these businesses, or to specifically regulate them. Others have a typical zoning code that allows commercial or retail uses within certain districts as-of-right, with little to no way to review or modify the proposal. The question for communities to consider is whether to specifically define them—which often leaves little or no room for flexibility for the next evolution of businesses and may even allow the regulation to be construed against them—or to create regulations to target size, perhaps precluding any structure over certain preset dimensions.

Within specific local statutes, defining big box stores can be difficult. A Columbia University study describes them as follows:

> The exterior designs of the buildings are standardized so that every location looks the same and is easily recognizable, and acres of parking surround the entire structure. The above features lend to "big box" retail stores an anti-community feel. They cater to the auto-borne shopper and are usually located just off of highway exits or along major traffic corridors. They do not support pedestrian amenities nor do they attempt to make any connections with the neighboring community—they are large, isolated boxes in seas of parking lots.[23]

Most regulation has focused on store size, such as requiring special use permits for stores over 100,000 square feet, but with mixed results because of the different type of large retail operators. As noted in a California study:

> There is no single definition of big box retail, but most definitions tend to focus on the square footage of retail outlets rather than the items sold inside the stores. For example, the state of California defines big box retail as a "store of greater than 75,000 square feet of gross buildable area that will generate sales or use tax." The Maryland Department of Planning defines big box retail facilities as "large, industrial-style buildings or stores with footprints that generally range from 20,000 square feet to 200,000 square feet." In October 2003, the City of Los Angeles commissioned a study to identify potential impacts of big box retailers in the city's neighborhoods ("the Rodino report"). The Rodino report defined big box stores as "[a]ny large store format that is larger than a specified threshold of square footage in size. Generally this threshold ranges from as low as 60,000 sq. ft. to 130,000 sq. ft."
>
> The wide variance of size used to define big box stores is a reflection of the weakness of a size-based indicator itself. A Hawaii Legislative Reference Bureau study noted, "[b]ecause of product category, 'big' is relative. For example a book retailer occupying 25,000 square feet would qualify as a 'big box.' On the other hand, a 'big box' warehouse outlet like Costco may occupy 120,000 square feet or more."[24]

In addition to these classifications, recent controversies have focused on "super centers," where discount retailers also sell groceries. An example (and home to one of the most contentious disputes) is the zoning ordinance of Turlock, California.[25] Turlock prohibits discount superstores that exceed 100,000 square feet of gross floor area and that devote at least five percent of the total sales floor area to the sale of non-taxable merchandise, such as groceries.[26] It describes further:

> These stores usually offer a variety of customer services, centralized cashing, and a wide range of products. They usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual cooperation with a related or unrelated garden center or service station. Discount superstores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.[27]

Turlock's code provision was recently upheld when challenged because the ban was a proper exercise of the city's police power to control and organize development to serve the public welfare, since the city made a legitimate policy choice when it decided to organize development using neighborhood shopping centers dispersed throughout the area, and given that the ordinance was reasonably related to protecting that legitimate choice.[28]

San Diego, California apparently followed Turlock's lead, enacting legislation that prohibits stores of more than 90,000 square feet that use ten percent of space for groceries and other merchandise that is not subject to sales tax.[29]

Not all big box regulation is aimed at megastores, however. The town of Guilford, Connecticut enacted regulations with a 25,000 square foot maximum limitation (although one 40,000 square foot facility could be allowed in the applicable zoning district, Service Center West, by special permit), effectively eliminating the prospects of big box stores in the town. Its regulations were upheld.[30]

After winning an expensive, five year battle with Wal-Mart over a Special Use Permit, the Town of North Elba amended its code to eliminate large stores by limiting single retail stores to 40,000 square feet and restricting shopping centers to 68,000 square feet:

> (22) Retail Trade Uses; Group Retail Business Uses.
>
> A. An individual Retail Trade use shall not exceed 40,000 square feet of floor area, whether in one building or more than one building.
>
> B. A Grouped Retail Business Use shall not exceed a total of 68,000 square feet of floor area, in all buildings which constitute the use.
>
> C. For the purpose of the size limits set forth in clauses A and B, floor area shall include floor area or floor space of any sort within a building as well as exterior space used for sale or storage of merchandise.[31]

That town's goal was to scale all buildings in the area to match the historical patterns of development.[32]

Even more direct was the approach the Town of Amherst took in response to a specific proposal for a new Wal-Mart. Rather than amend its zoning to eliminate big boxes (of which it has many), it simply downzoned the target property to a district which did not permit such large stores.[33]

As to franchise architecture and formula businesses, each is easier to define within local statutes, but they may well prove more problematic to regulate. For franchise architecture, the power to regulate aesthetics is essential, and has not always been strong. The Supreme Court, in opining that protecting aesthetic values was within the police powers of a community, held in 1954 that it "is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[34] While the New York Court of Appeals followed suit, it has also held that aesthetics are not as important as other police powers, cautioning that "always, the exercise of the police power must be reasonable."[35]

A typical franchise architecture definition can be found in the City of Asheboro, North Carolina's prohibition on such styles in its Central Business District:

> (a) "Franchise architecture" - Franchise architecture shall not be allowed. For purposes of this section "franchise architecture" shall be defined as a distinct architectural building style and/or elements commonly employed by a fast food or other retail franchise, that serves to enhance or promote brand identity through visual recognition.
>
> > (1) No high intensity colors (such as yellow, red, orange, etc.) metallic colors, or fluorescent colors shall be allowed on any building or architectural element. The use of such colors shall be permitted on business identification signs, provided all other sign requirements of this Ordinance are adhered to.[36]

Formula business definitions focus on the requirement of standardization of each facility. The following definition of formula retail is used in a Coronado, California statute which survived a legal challenge to its regulation of formula businesses. Formula Retail means "a type of retail sales activity or retail sales establishment (other than a formula fast food restaurant) which is required by contractual or other arrangement to maintain any of the following: standardized ('formula') array of services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature."[37]

Port Townsend, Washington enacted an ordinance targeting formula retail and restaurant establishments "to regulate the[ir] location and operation" particularly to "maintain the city's unique Victorian seaport and surrounding rural character, the diversity and vitality of the community's commercial districts, and the quality of life" of its residents.[38] Thus, it defines such businesses as:

> a type of retail sales or rental activity and retail sales or rental establishment, including restaurants, hotels and motels, which, along with 14 or more other establishments, maintains two or more of the following features:
>
> 1. Standardized array of merchandise or standardized menu.
> 2. Standardized façade.
> 3. Standardized décor and color scheme.
> 4. Uniform apparel.
> 5. Standardized signage.
> 6. Trademark or service mark.[39]

Portland Maine uses different definitions for different districts, and also excludes certain chain operations:

> "Formula Business" means:
>
> (1) If it is located in the Formula Business Overlay Zone, a restaurant or retail establishment, other than those exempted under this subsection, that stands alone as a principal use or with another use as an accessory use, and which is required by contractual or other arrangements to maintain any one or more of the following standardized features, which causes it to be substantially identical to 30 or more other businesses located within the United States, regardless of the ownership of those businesses: name; if food is served, menu, ingredients, uniforms; trademark; logo; symbol; architectural design; signage; color scheme; or any other similar standardized features.
>
> (2) If it is located in the Extended PAD Overlay Zone, a restaurant or retail establishment, other than those exempted under this subsection, that stands alone as a principal use or with another use as an accessory use, and which is required by contractual or other arrangements to maintain any one or more of the following standardized features, which causes it to be substantially identical to 10 or more other businesses located within the United States, regardless of the ownership of those businesses: name; if food is served, menu, ingredients, food preparation or presentation format; decor; employee uniforms; trademark; logo; symbol; architectural design; signage; color scheme; or any other similar standardized features.
>
> "Formula business" does not include: grocery stores; drug stores and pharmacies; convenience stores; hardware stores; gas stations; and businesses primarily providing services rather than goods for sale, including but not limited to banks and credit unions, movie theaters, entertainment and recreation services, mailing services and vehicle and equipment rental.[40]

Similarly, in Port Jefferson, New York, the village enacted provisions banning fast food restaurants from its historic commercial and waterfront zoning districts. It defined "formula fast food establishment" as:

> An establishment required by contractual or other arrangement to offer some or all of the following:
>
> (1) Standardized menus, ingredients, food preparation, décor, external façade and/or uniforms.
> (2) Preprepared food in a ready-to-consume state.
> (3) Sold over the counter in disposable containers and wrappers.
> (4) Selected from a limited menu.
> (5) For immediate consumption on or off the premises.
> (6) Where the customer pays before eating.[41]

And it prohibits such establishments altogether in its C-1 Central Commercial zoning district, its C-2 General Commercial zoning district, and in its Marina Waterfront (MW) district.[42]

Note that even as a total ban, a formula business law would not keep chains out. Rather, they "require that the incoming chain not look or operate like any other branch in the country. This has proved a significant deterrent to chains, which generally refuse to veer from their standardized, cookie-cutter approach."[43]

B. Use of Comprehensive Plans

As noted above, New York law permits exclusion or limits on particular uses, as long as the municipality "has rationally exercised its police power and determined that a change in the zoning was required for the well-being of the community."[44] As with all legislative enactments, the law will be upheld if it "substantially advance[s] legitimate state interests."[45] The comprehensive plan thus presents a mechanism to create a record demonstrating both the legitimate state interest and how a proposed ordinance will meet the community's goal.

Indeed, local zoning must be in harmony with a community's comprehensive plan.[46] These plans can develop from a single municipality's effort, or that of multiple communities acting together. Comprehensive plans complement zoning codes, providing guidelines for the community's development and future.[47] The zoning codes then give the applicable regulations, defining allowed uses and mapping out their geographic areas.

When a plan clearly expresses a policy dealing with big box franchises, for example by promoting small-town values, diversity of business, preventing blight resulting from vacant storefronts, limiting commercial impacts in downtown or historic areas, and discouraging corporate businesses from reducing aesthetic appeal of communities through their cookie-cutter designs, the municipal bodies can use the plan's goals in their decision making. Plans often recommend preserving historic or specialty areas such as waterfronts, tourist areas, and parks, and sometimes advise prohibiting these big box uses as inconsistent in such areas entirely, or just in certain districts. Having a comprehensive plan in place is thus another important step in the consideration of formula businesses.

For instance, in Skaneateles, New York, the goal of the town and village in their Joint Comprehensive Plan is to preserve the retail center in the village, preserve the area for tourism, retain the historic character of the village center, and reduce the number of commercial entrance and exit drives on major traffic routes.[48] Similarly, Warwick, New York enacted a comprehensive plan that looks to "[s]upport small locally owned businesses and retail centers which are in character with the Town's largely rural environment."[49]

It is these types of distinct, identifiable districts that are most likely to support limits on franchise architecture or formula businesses. The Plan (or the EIS under SEQRA, see below) should unequivocally document the character of the community to be protected. But it must also demonstrate how the proposed limits will protect that district or the whole community; i.e., that it will advance the stated purpose.

The typical types of problems identified with big boxes should be apparent in a properly prepared plan. For example, if traffic congestion is an issue in the community that would be exacerbated by additional large scale stores, the plan should detail those problems. If a downtown core has a diverse business base that would be negatively affected, or a unique historic or visual aspect, all should be detailed in the plan as a forerunner of protective legislation.

Proper documentation would support various nuanced approaches to regulation. Portland, Maine, for instance, limited formula businesses to 23 in total in its downtown core, while also adopting 2,000 per store square footage limits. It also adopted a "formula business overlay zone" including commercial areas adjacent to downtown, with 4,000 square feet size limits and a requirement that such businesses be at least 400 feet from other formula businesses.[50] Another city acted to limit fast food outlets by demonstrating that customers of such businesses were auto based, and thus contributed to increased traffic.[51]

New York courts have upheld reliance upon comprehensive plans as the basis for municipal decisions. For example, the Fourth Department has ruled that a special use permit was properly denied when the use (there, a mini-storage unit facility) was prohibited by the town's comprehensive plan.[52] In that case, the master plan allowed commercial uses in the area, and the court agreed that a storage facility should be construed as an allowed commercial use there.[53] Nonetheless, the court held that since the master plan restricted commercial uses to newly created business park districts to avoid negative impacts upon existing residential areas, the special use permit was properly denied.[54] In general, as long as the plan is well-considered, is adopted for a legitimate governmental purpose, and there is a reasonable relation between the end sought to be achieved and the means used to achieve that end, it will be upheld.[55]

C. SEQRA

SEQRA provides an additional mechanism for creating a record supporting regulatory measures. Through generic environmental reviews for comprehensive plans, local regulatory laws, or project specific investigations, SEQRA analysis will uncover the problems these businesses may cause, and provide valuable support for legislation. SEQRA may be especially useful for rural communities lacking zoning. Even municipalities without zoning have land use powers using the Municipal Home Rule Law, and SEQRA provides the vehicle for supporting regulatory measures.

SEQRA review of particular projects is, in many ways, like the completion of a mini-comprehensive plan. A proper "hard look" analysis focused on all impacts, including impacts on the character of the community, will delve into the issues of blight and local business dislocation often associated with big box retailers. As stated by the Court of Appeals,

> It is clear from the express terms of the statute and the regulations that environment is broadly defined and expressly includes as physical condi-

tions such considerations as "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." Thus, the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment.[56]

The particular tool that SEQRA analysis may employ where appropriate is an economic impact analysis. In upholding North Elba's denial of a permit for a Wal-Mart, for example, the Third Department stated "while the decision refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the over-all character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area--an entirely proper avenue of inquiry, even within SEQRA."[57]

D. Special Use Permits

Special use permits are another method that municipalities can employ to regulate property development generally, and formula businesses, specifically. They permit a location to be developed in a way expressly allowed by a zoning code, but with specified conditions not generally applicable to the as-of-right uses.[58] The conditions are meant to ensure that the proposed use is compatible with the neighborhood or area, assuming the zoning requirements are met.[59]

Municipalities should be warned that regulating big box franchises through a special use permit may not, by itself, be the best tool, however. That is because special uses are allowed uses—their inclusion in a zoning code is equivalent to a legislative determination that they are proper for the zone.[60] Thus, generally speaking, a town cannot deny the application on the ground that it is not in harmony with the purpose and intent of its zoning.[61] The inclusion in the zoning code of a special use belies such a claim. A reviewing board is thus required to grant the permit "unless there are reasonable grounds for denying it."[62] Where a record demonstrates that a particular use would have a significant negative impact, denials of a special use permit have been routinely upheld.[63]

Keep in mind that it is possible to approve big box establishments subject to conditions.[64] The key for imposing a reasonable condition or restriction is to make it 1) directly related to and incidental to the proposed use of the property and 2) aim to minimize the adverse impacts of that use.[65] Generally, a municipality may not impose conditions that are unrelated to the land or that regulate the details of a business's operation.[66] Planning boards should be especially mindful of their ability to condition uses, as they, unlike the primary municipal board (town board, village board, or city council) are circumscribed by statute to those factors expressly listed in the governing law.[67]

Conditions might include larger setbacks to increase the distance between the facility and neighboring residences, landscaping or other screening to block views of the building and parking, and preventing lighting from spilling onto neighboring properties by utilizing targeted light pole and lighting designs. Another condition municipalities have been increasingly likely to impose is a bond to deal with the demolition costs and/or vacancies after an establishment leaves. The concern here is the lack of recourse after-the-fact, when the municipality could be left with vacant boxes remaining empty, causing blight, and negatively affecting its community.

For example, due to its "small town atmosphere, its exceptional unique architectural characteristics and rural western community heritage," which, according to that city, big box developments do not meet, Oakdale, California requires developers to have an "abandoned building surety bond."[68] The bond must be kept in place for the life of the project in an amount sufficient to cover the cost of complete building demolition and maintenance of the vacant building site if the primary building is ever vacated or abandoned for more than twelve months.[69] Although not explicitly listed, when municipalities require bonds, it generally means the buildings and other structures, but it could also include the associated infrastructure, such as parking lots, private roadways, and utilities.

In contrast to bonds, some municipalities have attempted to prevent large abandoned boxes by insisting that vacant stores go on the market as soon as practicable following the vacancy, as in Peachtree City, Georgia,[70] or by mandating that the locations be designed for re-use, such as the ordinance in Bozeman, Montana.[71]

One of the driving forces behind the Peachtree City provision appears to be the practice of retailers continuing to pay rent on space, despite that their operations have moved elsewhere; they apparently do so to prevent competitors from assuming a prime business location. Peachtree City's ordinance is designed to forestall that practice, allowing landlords to market retail properties as soon as they become vacant.

Of course, this tool has no real effect if the property is owned, rather than leased.[72] In addition, market forces outside the municipality's control will determine whether or not there is a demand for such space.[73] These same considerations of property ownership and market demand play a part in determining whether or not reusing space upon vacancy is a feasible control mechanism.[74]

Such bonding and similar requirements could well-suit municipalities with existing special use permit regulations. For instance, in Asheville, North Carolina, the stage is already set for controlling formula businesses, as large retail structures meeting certain gross floor area proportions (more than 75,000 or 100,000 square feet) are considered conditional uses in certain zoning districts. They are required to meet supplemental development standards that "[e]mploy high quality building design," "[b]lend building design and layout with other site features," "[a]void bland and monotonous building design," and "[e]nsure that buildings contribute to the community character of the city."[75] The City also has a design criteria points system, where it requires applicants to meet a certain number of design points to be entitled to a conditional use permit. Points are awarded for incorporating different design elements in accordance with a tally sheet.

Likewise, at least one New York municipality, Warwick, enacted code provisions limiting individual retail uses to 60,000 square feet of gross floor area and any group of retail businesses to 80,000 square feet of gross floor area, in all buildings on the lot, in its site plan and special use permit review procedures.[76] These regulations form a good basis to then impose bonding conditions.

In sum, special use permit review allows a town, city, or village a heightened level of review of an allowed use. Requiring a special use permit application can permit the municipality to impose restrictions or safeguards on proposals that may, especially when combined with SEQRA mitigation, further community values or mitigate detrimental impacts. Such proper regulations include lighting, air quality, safety, population density, traffic, property values, aesthetics, and environmental factors. One other note to keep in mind, however—once issued, the special use permit runs with the land.[77]

E. Site Plan Review

Almost every development proposal in New York, even those that already meet zoning requirements, require submission of a site plan to the reviewing municipality. Reviewing an applicant's site plan allows a community to look at the scale, dimensions, location, and other features of a project that may have an unanticipated impact upon the community's planning goals. Municipalities have broad discretion to review projects in this manner.[78]

Thus, using site plan applications is another way to control big box businesses. Generally, municipalities exercise the right to have their planning boards review and analyze site plans.[79] The planning boards then review the arrangement, layout, and design of the proposed use, including factors such as parking, access (vehicle and pedestrian), screening, signs, landscaping, lighting, drainage, architectural features, location and dimension of buildings, adjacent uses, and physical features meant to protect the adjacent land uses.[80] Also note that municipalities can approve site plans, similar to special use permits, subject to reasonable conditions or restrictions that are directly related to and incidental to the site plan.[81]

Site plan review is an important step because under SEQRA, a planning board is required to review every element of potential environmental impact that could result from the proposed site plan approval.[82] SEQRA mandates that communities investigate the environmental impacts of a proposed action before allowing that action; it instructs municipalities to evaluate potential environmental impacts at the earliest stage possible.[83] In essence, this results in a second level of review. A formula business could, therefore, meet the express elements of the municipal code, but still be denied a site plan approval because of other environmental impacts or large secondary impacts.

There are several cases in New York that look at municipal site plan decisions with respect to big box stores. For example, in *Matter of Home Depot, USA, Inc. v. Town of Mount Pleasant*,[84] the Second Department upheld the town's denial of a site plan for a new retail Home Depot store. The town reasoned that the proposed development was out of character with the surrounding area, which included a significantly smaller retail store with terraced parking areas.[85] Moreover, the town relied upon the developer's admission that the building design was shoehorned to fit into the site, that it ignored the campus-style development that characterized much of the zoning district, that it involved the irretrievable loss of forested hillside, that it would leave areas of exposed bedrock, and that it involved construction of massive lengths of retaining walls up to 20 feet high on one side.[86] All of these factors led the appellate court to uphold the town's site plan denial, primarily based on the noticeable change in the visual character of the area and the irreversible nature of the changes.[87] These same criteria can be used by municipalities that are reviewing site plans from other big box franchises, formula businesses, and franchises.

At least one court in New York has upheld the denial of a site plan (and conditional use permit) to a big box store due in part to its negative aesthetic impact upon the gateway of a resort community noted for its rustic nature and striking scenery.[88] Of particular importance to the court in that case was the fact that screening efforts to block the store's and parking lot's view from the road would nonetheless cause a noticeable change in the visual character of this resort and tourist community.[89] Thus, potential visual impact is another factor that municipalities should assess, particularly if stores are to be located in special, unique, or critical visual areas.[90]

Remember that courts reviewing site plan decisions will look to see if the decision was arbitrary and capricious or not supported with substantial evidence, but they largely defer to municipal decision-making when there is a proper record for a decision.[91]

F. Other Design Review

Some communities see landmark districts, historic districts, architectural review boards, or conservation overlay zoning geared toward protecting important historical characteristics, natural features, or architectural designs and streetscapes as a viable means to regulate big box businesses. Such efforts are the most successful in areas where there has either been development controls in place early on, or in localities where there is a defined local identity. Otherwise, communities are left to attempt to create this distinctiveness, which is a much more difficult burden and increasingly susceptible to a successful challenge.[92] Most communities, however have some key feature or historic or aesthetic attribute that warrants protection and a heightened review. In New York, critical resources such as the Erie Canal, Adirondack Mountains, historic properties, and various lakes, rivers, and streams are strong frontrunners that easily lend themselves to heightened protection.

One tool that is not frequently used, but has found some success in striking a balance between protection and development is the National Trust For Historic Preservation's working cooperatively with municipalities and chain drugstores in their development, particularly where historically significant structures are involved. It has a collaborative approach for creating win-win situations with such establishments.[93] Through its efforts, four of the leading chain drugstores have agreed not to demolish sites individually listed on the National Register of Historic Places, and they have been generally receptive to overtures on plans that offend community values and architecture when the cookie-cutter design is utilized.[94] This same type of arrangement could be used with other big box franchises.

Other communities have created architectural or design review boards to take a targeted look at development proposals. Some have gone so far as to impose architectural or design standards that prohibit or limit corporate "prototypes." For example, to protect the character of its downtown area, the city of Hopkins, Minnesota prohibits franchise brands.[95] That city defines franchise architecture as a "building design that is trademarked or identified with a particular chain or corporation and is generic in nature."[96] Such chain businesses must instead create a unique building that is consistent with downtown.[97]

Some notable examples of design control come from the Sierra Business Council. It offers design guidelines to encourage development consistent with the historic character of the area for commercial and mixed-use districts containing community-level, site-level, and specific building level uses. Sample site design guidelines show the wide variety of possibilities:

- Encourage zero lot lines in all new buildings and have renovations contribute to the "outdoor public room" created by the row of historic buildings placed on the streetfront.
- Maintain pedestrian streetscape and historic character by moving parking to the rear where possible and off-site with shuttles.
- Integrate plaza areas on vacant sites with good solar exposure to create attractive public gathering spaces. Plan ahead for population increases that will require greater public space to accommodate civic events.
- Encourage outdoor restaurant space, retail areas, and pedestrian amenities such as benches and historic streetlights to bring life to the street.
- Create shared parking plans to manage retail parking during day and more restaurant/theater availability in evening.
- Provide service areas in the rear and/or consolidate among establishments so that services do not conflict with pedestrian use of the storefront.[98]

Another municipality, Georgetown, Colorado, was so concerned with national chain companies and their franchises, that it banned the "use of stock building plans or typical corporate or franchise operation designs" in its design guidelines.[99] It found the bright logo colors used over large areas of a building contrast too strongly with the established Georgetown palette, considered the blank exterior walls of such businesses to be bland, out of scale, and too discouraging of pedestrian activity, and noticed that large areas of "featureless stucco" are out of character and not of human scale in its guidelines.[100]

The fear, of course, with particular definitions and regulations is that franchises will discover ways to develop around the definitions, which are construed against the municipality that enacts them. Thus, if a definition or provision is vague, the developer gets the benefit of the doubt. In addition, courts may be hard-pressed to make determinations on what is consistent with an area or out of character. They key, as always, is to have evidence in the record that supports your municipal decision making.

This is particularly true with respect to aesthetic determinations.[101] Overall, municipalities must consider whether a proposal may cause an impairment to the character or quality of important historical, archeological, architectural, or aesthetic resources in a neighborhood or community under SEQRA.[102] This includes the potential aesthetic impacts of a project.[103]

Although a targeted design review may be helpful to your community in reviewing big box projects, decisions made in compliance with SEQRA have a better chance of being upheld when they are properly supported. Also keep in mind that although these corporations flourish on standardization, in some areas they are increasingly mindful of the local customs, policies, and preferences in their siting and development. In fact, some have gone so far as to create regional model alternatives to satisfy community concerns.[104]

Fighting Back

Targeted businesses have not, of course, gone quietly into the night. Many of the companies have worked with communities to achieve architectural and aesthetic compromises to meet the demands of the communities. Others have worked through the political process to overturn limiting regulations or decisions; indeed, it is fairly common for large stores to organize and financially support proponents for their proposed operations.[105] The regulated businesses have also turned to the courts for relief, particularly in California, mainly raising the constitutional issues of Substantive Due Process, Equal Protection, and violations of the Commerce Clause in seeking to overturn local regulations. These efforts, as detailed in this section, have largely been unsuccessful, suggesting that a properly implemented law and zoning decisions based on a documented record will be upheld.

A. Constitutional Challenges

Constitutional challenges, usually brought as claims under 42 U.S.C. § 1983 for violation of civil rights, are not often successful in the land use context. As noted by the New York Court of Appeals, "federal courts dismissing section 1983 land-use claims have repeatedly noted that they do not function as zoning boards of appeal, or substitute for state courts interpreting land-use regulations. The point is simply that denial of a permit--even an arbitrary denial redressable by an article 78 or other state law proceeding--is not tantamount to a constitutional violation under 42 U.S.C. § 1983; significantly more is required."[106] Nevertheless, violations are possible, although the record on big box and formula business regulation has so far favored the municipality.

1. Substantive Due Process

A Substantive Due Process Claim asserts that a statutory enactment is void as arbitrary and capricious because it has "substantial relation to the public health, safety, morals, or general welfare."[107] Courts apply a two-part test for these claims: "First, claimants must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction.' Second, claimants must show that the governmental action was wholly without legal justification."[108]

For our discussion, the second part is relevant, and should be relatively straightforward to satisfy if the creation of the record discussed in the prior section has preceded the enactment of the statute or denial of the permit. As the Supreme Court has held, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[109] The issues spotlighted here—traffic, air pollution, blight prevention, preservation of historic properties, and protecting viewsheds—are all legitimate state interests. Thus, a statute or land use decision furthering these interests should survive due process attacks.

2. Equal Protection

The Equal Protection Clause argument arises when an ordinance would prohibit a particular type of business but permit other forms, usually competitors. The challenge is to the classification made by the community. The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated shall be treated alike."[110] When we are talking about the regulation of a franchise or formula business, the local regulation involves social and economic policy, and does not target either a suspect class nor impinge on a fundamental right. Accordingly, the challenges under the Equal Protection Clause are reviewed according to the "rational basis" standard.[111] Under the rational basis test, a legislative classification will be upheld when the classification is rationally related to a legitimate state interest or, to put it another way, the legislative classification under rational basis review must be wholly irrational for an Equal Protection violation to occur.

Wal-Mart brought an Equal Protection challenge to a City of Turlock statute that contained very fine distinctions between discount super centers—which it totally banned from the community—and discount stores that are also often quite large boxes.[112] The City asserted the law was a valid, rational enactment designed (1) to maintain a neighborhood-level shopping area structure as set forth in the City Plan, including encouragement of pedestrian and bicycle traffic over automobile use; (2) to avoid increased traffic and related air quality impact and (3) to prevent the blight that the City alleged—based on numerous studies—would occur if a discount superstore was permitted. Noting that each of these was a legitimate state interest, and based on the City Plan and the studies, the court found there was a rational basis for the City to believe the super center ban would advance those interests, and upheld the law, specifically rejecting what it called Wal-Mart's efforts to have the court act as a "super-legislature" by evaluating the wisdom of the ban.[113]

Not discussed in the Turlock case, but of equal concern, is what would happen to efforts to regulate formula businesses such as McDonald's under an Equal Protection claim? Is McDonald's that different than a locally owned hamburger stand? If the record supports that distinction, the answer is yes. The Turlock case demonstrates that if the record underlying the law demonstrates any valid reason for treating different sized businesses differently, or on limits on certain architecture or formula businesses, it will be upheld. A California Appeals Court has, in fact, turned aside an Equal Protection challenge to a formula business regulation:

> The Ordinance's classifications (requiring only Formula Retail businesses to obtain special use permits and adhere to size limitations) are rationally related to a legitimate state interest. As discussed, Coronado has a legitimate interest in seeking to maintain the village ambiance of its commercial district and to ensure the long-term economic viability of the community. It was not irrational for the city council to decide that this objective could best be met by imposing a public permit process and frontage size limitation on "Formula Retail" businesses. The city council could reasonably conclude that this type of store requires special scrutiny because it is more likely to be inconsistent with Coronado's land use goals than would a unique one-of-a-kind business and that such "formula" businesses - by their nature - have a greater potential to conflict with the village atmosphere of the community.[114]

The Coronado challenge was a facial challenge, i.e., asserting that the law was unconstitutional in any situation. Although it rejected this claim, the court warned that an as applied challenge might succeed, if, in fact, the law was used in a discriminatory fashion:

> In asserting their equal protection arguments, Property Owners argue that an ordinance that wholly excludes a business from a local jurisdiction or that discriminates against nonresidents in the right to engage in business violates equal protection rights. However, the Ordinance, as written, does not restrict nonresident businesses in these ways. If the city's planning commission and city council in fact implement the Ordinance to per se exclude all nonresident businesses from opening or expanding in Coronado, this would be subject to an as-applied constitutional challenge.[115]

Success in showing disparate treatment among similarly situated persons will not, however, win the day for an Equal Protection claim under the rulings of both the Second Circuit and the New York Court of Appeals. These courts have held that even where similarly situated persons are treated differently, such improper treatment must have been based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or—and this is the typical claim in land use cases—malicious or bad faith intent to injure a person.[116]

In rejecting a big box store's equal protection claim, the Court of Appeals noted the community's "political" opposition to the high-traffic superstore at the City's border is not the equivalent of the "evil eye and an unequal hand" for constitutional Equal Protection purposes.[117] As stated by the Supreme Court, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[118] Similarly, the Turlock federal court found allegations of collusion with local business interests irrelevant, because "an improper motive, without more, does not affect constitutional review of legislation."[119]

3. Dormant Commerce Clause Claims

Wal-Mart has also sought to upend big box regulation under the Commerce Clause,[120] specifically, the dormant or negative Commerce Clause, which "limits the power of the States to erect barriers against interstate trade" even where Congress has not acted.[121] Generally, under the dormant Commerce Clause, a two-part test is employed.[122] First, state or local regulations that discriminate on their face against out-of-state entities are almost always deemed per se unconstitutional.[123] Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[124] The improper discrimination can take any of three different forms, first, the law may facially discriminate against interstate commerce, second, it may be facially neutral but have a discriminatory purpose, or third, it may be facially neutral but have a discriminatory effect.[125]

Unless the local ordinance is poorly drafted to favor in-state or locally based companies over out-of-state businesses, the ordinance should pass this part of the test.[126] For example, the fact that no big box stores could be built under a community-wide store size limit, thereby entirely eliminating companies like K-Mart or Lowes from the community, will not by itself constitute a violation, because in-state and out-of-state interests are treated equally, and the reasons for the law (prevention of traffic impacts, avoiding blight, etc.) are legitimate state interests. The "Commerce Clause protects the interstate market, not particular firms, from prohibitive or burdensome regulations."[127]

Under the second prong of the test, an ordinance will be evaluated to determine if the burdens it imposes on interstate trade that are "clearly excessive in relation to the putative local benefits."[128] In Turlock, the federal court ruled that since all interests were treated equally, there was little impact on interstate commerce, while providing significant local benefits. Thus, the balance clearly favored the local statute.

> The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in Turlock, with any employees or managers, offering any products, except in the legislatively defined discount superstore format. There is no constitutional right to do business in a retailer's optimally profitable store configuration, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality. There is no suggestion any out-of-state retailer cannot successfully do business marketing out-of-state goods in Turlock if it is not permitted to do so as a discount superstore.[129]

The key to the Turlock holding is that all the entities were treated equally and there were legitimate state interests in minimizing traffic and related noise and air pollution impacts, as well as prevention of blight. But what about a Commerce Clause challenge not to a big box prohibition, but to a limit on franchise architecture, where the state interest is more focused on aesthetic concerns, or a total ban on formula businesses in certain areas? The Coronado court also rejected an interstate commerce clause claim, and for the same reason—the law did not discriminate against interstate businesses and, in fact, had little impact on interstate commerce while providing significant local benefits.[130]

4. First Amendment and Lanham Act Claims

Restrictions on franchise architecture, particularly on limits on signs, have been upheld by the Courts against First Amendment challenges. In Connecticut, a federal district court denied a preliminary injunction that would have restrained a zoning board from enforcing certain zoning regulations on a Gateway computers sign.[131] The decision was based on a Lanham Act[132] case brought by a Blockbuster video store in Tempe, Arizona. The Act prohibits states or municipalities from requiring alteration of a registered mark. The Ninth Circuit upheld local restrictions prohibiting the mark altogether, but not a requirement to change the colors of the trademark, stating:

> [A] zoning ordinance may not require a change in a registered mark. A zoning ordinance may, however, preclude the display of a mark, as Tempe did when it precluded Blockbuster from constructing its awning on the exterior of its leased building in the shopping center. Precluding display of a mark for zoning purposes is permissible; requiring alteration of a mark is not.[133]

The Connecticut court, applying an intermediate level of scrutiny because it involved restrictions on commercial speech, denied the injunction. It stated that the regulation was based on aesthetic interests, and while aesthetics were not a compelling state interest, it was still a valid state interest, and therefore sufficient to survive First Amendment review. The lesson here is to be aware of limits based solely on objections to trademarked signs. The McDonald's in Sedona (which is located in the Ninth Circuit) may well have prevailed in litigation rather than compromised the color scheme if the community had no other valid reasons for turning it away.

On the Lanham Act issue, the Second Circuit has been more favorable toward municipal regulation than the Ninth. In Lisa's Party City, Inc. v. Town of Henrietta,[134] the Court upheld a statute requiring uniformity in sign colors within a shopping center, even though the plaintiff's registered sign had five colors.

> Appellants urge a reading of the statute that broadly prohibits a state or local government from restricting or interfering with the display or reproduction of a trademark in any manner that alters its appearance as exhibited in the Certificate of Registration issued by the U.S. Patent and Trademark Office. It is far from clear that the statute sweeps so broadly. It is at least as consistent with the language of the statute to understand it as allowing a local government to restrict businesses in a narrowly circumscribed location from using exterior signs in any color other than red. Such regulation does not compel a businesses to alter their trademark, since they remain free to use their trademarks without alteration in every manifestation other than the exterior sign at the covered location - on letterhead, leaflets, billboards, magazines, newspapers, television and Internet advertising, point-of-sale displays inside the store, and external signs at other locations. Under this narrower construction of § 1121(b), a restriction on external signs in a narrowly circumscribed locality would not come within the statute's prohibition on requiring businesses to alter their trademarks.[135]

The Second Circuit noted that

> appellant's position would leave localities powerless to control the color, design elements, or character of outdoor signs. It is difficult to imagine why Congress would have wished to require localities seeking to protect aesthetic harmony to employ such broad measures as forbidding signs altogether or drastically limiting their size, rather than narrower measures such as requiring color conformity or consistent design elements.[136]

B. Other State Claims

Donnelly Act. A federal court has rejected a claim that a ban on large supermarkets allegedly made at the request of existing supermarkets violates New York's Donnelly Act, Section 340 of the New York State General Business Law.[137] Patterned after the federal anti-trust laws, the "Donnelly Act makes illegal and void any contract, arrangement or agreement that restrains competition in any business, or unlawfully interferes with the free exercise of any activity in the conduct of any business."[138] Although the plaintiff there asserted that the town had conspired with existing local retailers, the court held "plaintiff alleges no fact to suggest that the Superstore Law was the product of a conspiracy or reciprocal arrangement, as opposed to a unilateral act by the Town that may have inured to the benefit of existing retailers."[139]

Conclusion

In these days of seeming endless sprawl and the inability to retain local identity, municipalities can take steps to regulate the size, shape, and appearance of those doing business in their community. If properly investigated, supported, and enacted, local regulations can deal with many of the potential negative impacts of these businesses while preserving the benefits.

NOTES

1. Terry Schwartz, Defending Regional Identity: Strategies for Reshaping Franchise Architecture at 10 (May 26, 2004)(hereinafter "Schwartz, Defending Regional Identity" available at <http://www.uic.edu/cuppa/cityfutures/papers/webpapers/cityfuturespapers/session5_1/5_1defendingregional.pdf>.
2. Schwartz, Defending Regional Identity, at 18-19.
3. See <http://www.walmartfacts.com/PhotoGallery/default.aspx?id=3>.
4. City of Chicago v. Netcher, 183 Ill. 104, 108, 55 N.E. 707 (1899) (striking the ordinances both as a violation of the owner's constitutional rights and as beyond the legitimate police powers of the City).
5. Richard C. Schragger, The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940, 90 Iowa L. Rev. 1011, 1013 (2005) (internal citations omitted).
6. See, e.g., George Lefcoe, The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers, 58 Ark. L. Rev. 833 (2006) (hereinafter "Lefcoe").
7. See, e.g., Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 392, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926). In New York, municipal power to enact zoning was upheld as early as 1920, Lincoln Trust Co. v. Williams Bldg. Corporation, 229 N.Y. 313, 128 N.E. 209 (1920). See Salkin, 1 New York Zoning Law and Practice, §§ 5.02 to 5.08 (4th ed.).
8. Lefcoe, at 861-66.
9. Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 507, 324 N.E.2d 870 (1975).
10. San Diego to Ban Wal-Mart Supercenters, USA Today, Nov. 29, 2006, available at <http://www.usatoday.com/money/industries/retail/2006-11-29-wal-mart-san-diego_x.htm> ("Opponents said the mega-retailer provides jobs and low prices and that a ban would limit consumer choice.").
11. See, e.g., Delhi, CA. City Officials Laying Groundwork for Wal-Mart Sprawl, May 1, 2005, at <http://www.sprawl-busters.com/search.php?readstory=1820>, detailing an effort to place a Wal-Mart in the local community to recover sales tax revenue lost to other counties.
12. Public Law Research Institute at Hastings College of the Law, California Responses to Supercenter Development: A Survey of Ordinances, Cases and Elections, at 55-56, Spring 2004 (herinafter "California Supercenter Study"), citing, Larry Werner, Big box paradox, Star Tribune (Minneapolis), Mar. 2, 2003, available at <http://www.startribune.com/stories/418/3725697.html>.
13. See, e.g., Wal-Mart Stores Inc. v. Planning Bd. of Town of North Elba, 238 A.D.2d 93, 668 N.Y.S.2d 774, 776-777 (3d Dep't 1998) (describing studies showing increases in downtown vacancies if Wal-Mart was permitted); East Coast Development Co. v. Kay, 174 Misc. 2d 430, 667 N.Y.S.2d 182, 185-187 (Sup 1996) (discussing visual impact of Wal-Mart store and parking lot on State Park). See also, Wal-Mart Stores, Inc. v. City of Turlock, 2006 WL 1875446 (E.D. Cal. 2006) (listing a number of studies that show the traffic and related air pollution is greater from a discount superstore than the traffic impact of a supermarket, a discount club, or a discount store and

that discount superstores cause blight through loss of business in other parts of the community).

14. Schwartz, Defending Regional Identity, at 3.
15. Sumner, Wash., Substitute Ordinance No. 2088, § 8, at 8, amending City of Sumner Urban Design Concept Plan and Design and Development Guidelines.
16. Nordlinger v. Hahn, 505 U.S. 1, 13, 112 S. Ct. 2326, 2333,120 L. Ed. 2d 1 (1992).
17. N.Y. Town Law Art. 16 (McKinney 2006); N.Y. Vill Law. Art. 7 (McKinney 2006); N.Y. Gen. City Law § 20(25) (McKinney 2006).
18. N.Y. Mun. Home Rule Law § 10 (McKinney 2006).
19. N.Y. Mun. Home Rule Law § 10(1)(ii(a)(11) (McKinney 2006).
20. N.Y. Gen. Mun. Law § 96-a (McKinney 2006).
21. City of Chicago v. Netcher, 183 Ill. 104, 108, 55 N.E. 707 (1899).
22. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 683-684, 642 N.Y.S.2d 164, 173, 664 N.E.2d 1226 (1996).
23. Columbia University Graduate School of Architecture, Planning and Preservation, A Vision for New Rochelle: Plan for Revitalizing the City Park Neighborhood, at 47, May 2001, available at <http://www.columbia.edu/itc/architecture/bass/newrochelle/report/index.html>.
24. California Supercenter Study, at 8 (citations omitted).
25. Bob Egelko, Top court turns down Wal-Mart -- cities can ban big-box stores. Justices decline to take up appeal of Turlock ordinance, San Francisco Chronicle, July 13, 2006, at B-2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/13/BAG45JU7PR1.DTL>. Wal-Mart unsuccessfully sued Turlock in both federal and state courts, Wal-Mart Stores, Inc. v. City of Turlock, 2006 WL 1875446 (E.D. Cal. 2006) (rejecting constitutional claims to ban of supercenters); Wal-Mart Stores, Inc. v. City of Turlock, 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420 (5th Dist. 2006), review denied, (July 12, 2006) (rejecting state environmental and police power claims).
26. Turlock, Cal. Municipal Code, §§ 9-1-202(cd)(2) and 9-3-302.
27. Turlock, Cal. Municipal Code, §§ 9-1-202(cd)(2).
28. Wal-Mart Stores, Inc., 41 Cal. Rptr.3d 420.
29. San Diego to Ban Wal-Mart Supercenters (visited December 18, 2006)<http://www.jonesreport.com/articles/291106_ban_wal_mart.html>. As of this writing, the ordinance was still going through the local review process and was subject to possible veto and, if vetoed, council override.
30. C&K Real Estate, LLC v. Guilford Planning and Zoning Com'n, 2003 WL 21384646 (Conn. Super. Ct. 2003).
31. The Hometown Advantage, Retail Business Size Cap - North Elba, NY (visited November 30, 2006)<http://www.newrules.org/retail/elba.html>.
32. Thanks to James Morganson, Code Enforcement Officer for North Elba, for his input.
33. Elmer Ploetz, Wal-Mart Drops Millersport Plans, The Buffalo News, available at <http://www.buffalonews.com/editorial/20061216/1063924.asp?PFVer=Story>.
34. Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 102-3, 99 L. Ed. 27, 38 (1954).
35. Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 478, 402 N.Y.S.2d 359, 366, 373 N.E.2d 255 (1977). See also People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).
36. Asheboro, N.C., Code art. 200a, Central City Planning Area, § 3.4 (2006), at 3, available at <http://www.ci.asheboro.nc.us/Zoning/Article_200A_2_9_06.pdf>.
37. Coronado, Cal. Mun. Code, § 86.04.682.
38. Port Townsend, Wash., § 17.54.010 (2005).
39. Port Townsend, Wash., § 17.54.030(A) (2005).
40. Portland Me., City Code ch. 14 (Land Use), art. 111, div. 19.7, (the "Portland Maine Code"), available at <http://www.newrules.org/retail/portland.html>.
41. Port Jefferson, N.Y., § 250-9 (2000), available at <http://www.e-codes.generalcode.com>.
42. Port Jefferson, N.Y., §§ 250-18(H), 250-19(B)(2), and 250-22(H) (2000).
43. The New Rules Project Website, http://www.newrules.org/retail/formula.html.
44. Gernatt, 87 N.Y.2d at 684, citing, Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 639 N.Y.S.2d 302, 662 N.E.2d 782 (1996); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731 (1951).
45. Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 724, 721 N.E.2d 971 (1999), quoting Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980) (abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).
46. N.Y. Gen. City Law §§ 20(25), 28-a (McKinney 2006); N.Y. Town Law §§ 263, 272-a (McKinney 2006); N.Y. Village Law §§ 7-704, 7-722 (McKinney 2006).
47. Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265 (1988) ("The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land.") (citation omitted).
48. Skaneateles, N.Y., Town and Village of Skaneateles Joint Comprehensive Plan (July 11, 2005) (available at <http://townofskaneateles.com/infoLibrary.shtml>).
49. Warwick, N.Y., Comprehensive Plan, 3.4 (1999), available at <http://www.greenplan.org/id6.htm>; see also, Warwick, N.Y., Zoning Code, § 164-11(L) (2002).
50. Portland, Me. City Code.
51. Winslow, Wash. [former name of Bainbridge] Ordinance No. 89-28 ("the City of Winslow, Washington, now finds that formula take-out food restaurants represent a type of business that is automobile-oriented . . . that expansion in number of such establishments should be disallowed entirely in order to establish at this time, an optimal mix of pedestrian-oriented and other kinds commercial and retail establishments"), available at <http://www.newrules.org/retail/bainbridge.html>. Similar arguments have been made to ban drive-thru establishments in village-type or pedestrian-friendly areas.
52. Francis Development and Management Co., Inc. v. Town of Clarence, 306 A.D.2d 880, 761 N.Y.S.2d 760 (4th Dep't 2003).
53. Francis Development and Management Co., 761 N.Y.S.2d at 761.

54. Francis Development and Management Co., 761 N.Y.S.2d at 761.
55. Asian Americans, 531 N.Y.S.2d at 787.
56. Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 503, 502 N.E.2d 176 (1986)(citations and footnotes omitted) (emphasis added).
57. Matter of Wal-Mart Stores, Inc., 668 N.Y.S.2d at 777.
58. North Shore Steak House, Inc. v. Board of Appeals of Incorporated Village of Thomaston, 30 N.Y.2d 238, 331 N.Y.S.2d 645, 649, 282 N.E.2d 606 (1972).
59. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006).
60. North Shore Steak House, Inc., 331 N.Y.S.2d at 649.
61. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006); North Shore Steakhouse, Inc., 331 N.Y.S.2d at 649.
62. Texaco Refining & Marketing, Inc. v. Valente, 174 A.D.2d 674, 571 N.Y.S.2d 328, 330 (2d Dep't 1991); see Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 226 N.Y.S.2d 374, 378, 181 N.E.2d 407 (1962).
63. See e.g., Penny Arcade, Inc. v. Town Bd. of Town of Oyster Bay, 75 A.D.2d 620, 427 N.Y.S.2d 52 (2d Dep't 1980); see also, Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535, 833 N.E.2d 1210 (2005) (upholding decision to not renew solid waste special use permit based on potential harmful effects).
64. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006).
65. N.Y. Gen. City Law § 27-b(4) (McKinney 2006); N.Y. Town Law § 274-b(4) (McKinney 2006); N.Y. Village Law § 7-725-b(4) (McKinney 2006); St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988).
66. St. Onge, 527 N.Y.S.2d at 724 (upholding condition regarding number of vehicles outside during working hours but striking condition requiring phase-out at different location; Town of Huntington v. Sudano, 42 A.D.2d 791, 346 N.Y.S.2d 582, 583-584 (2d Dep't 1973), order aff'd, 35 N.Y.2d 796, 362 N.Y.S.2d 459, 321 N.E.2d 549 (1974) (upholding limitation on number of dogs allowed in kennel but striking condition that limited dogs to those trained for use with the blind); Louhal Properties, Inc. v. Strada, 191 Misc. 2d 746, 743 N.Y.S.2d 810 (Sup 2002), aff'd and remanded, 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dep't 2003) (village could not use zoning law to regulate hours of operation).
67. N.Y. Gen. City Law § 27-b(2) (McKinney 2006); N.Y. Town Law § 274-b(2) (McKinney 2006); N.Y. Village Law § 7-725-b(2) (McKinney 2006).
68. Oakdale, Cal., City Codes § 36-23.35(R), available at <http://www.ci.oakdale.ca.us>; see also The Hometown Advantage, Preventing Vacant Boxes.
69. Oakdale, Cal., City Codes § 36-23.35(R); see also The Hometown Advantage, Preventing Vacant Boxes.
70. Peachtree, Ga., Code Of Ordinances; see also, The Hometown Advantage, Preventing Vacant Boxes.
71. Bozeman, Mont., Ordinances, available at <http://www.bozeman.net/WebLink7/DocView.aspx?id+3760>; see also The Hometown Advantage, Preventing Vacant Boxes.
72. Peachtree, Ga., Code Of Ordinances; see also, The Hometown Advantage, Preventing Vacant Boxes.
73. Peachtree, Ga., Code Of Ordinances, available at <http://peachtree-city.org>; see also, The Hometown Advantage, Preventing Vacant Boxes.
74. Bozeman, Mont., Ordinances, available at <http://www.bozeman.net/WebLink7/DocView.aspx?id+3760>; see also The Hometown Advantage, Preventing Vacant Boxes.
75. Asheville, N.C. City Ordinance, §§ 7-16-2(b)(10) and 7-16-2(d)(10)(a)(1-4).
76. Warwick, N.Y., Zoning Code, § 164-46(J)(48 and 49) (2002), available at <http://www.e-codes.generalcode.com>.
77. Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870 (1975).
78. N.Y. Gen. City Law § 27-a (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
79. N.Y. Gen. City Law § 27-a(2)(a) (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
80. N.Y. Gen. City Law § 27-a(2)(a) (McKinney 2006); N.Y. Town Law § 274-a(2)(a) (McKinney 2006); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2006).
81. N.Y. Gen. City Law § 27-a(4) (McKinney 2006); N.Y. Town Law § 274-a(4) (McKinney 2006); N.Y. Village Law § 7-725-a(4) (McKinney 2006).
82. Di Veronica v. Arsenault, 124 A.D.2d 442, 507 N.Y.S.2d 541, 543-44 (3d Dep't 1986) (holding that compliance with SEQRA is required before decision on site plan can be made).
83. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 2006).
84. Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 A.D.2d 677, 741 N.Y.S.2d 274 (2d Dep't 2002).
85. Home Depot, 741 N.Y.S.2d at 275.
86. Home Depot, 741 N.Y.S.2d at 275.
87. Home Depot, 741 N.Y.S.2d at 276.
88. Wal-Mart Stores, Inc., 668 N.Y.S.2d at 776-77.
89. Wal-Mart Stores, Inc., 668 N.Y.S.2d at 777.
90. See also, East Coast Development Co., 667 N.Y.S.2d at 185-87 (holding visual impact of Wal-Mart store and parking lot on State Park warranted denial of site plan application).
91. Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304-305, 494 N.E.2d 429 (1986).
92. Schwartz, Defending Regional Identity.
93. The National Trust for Historic Preservation (visited December 20, 2006) <http://www.nationaltrust.org>.
94. The National Trust for Historic Preservation.
95. Hopkins, Minn., Downtown Design Guidelines (2006), available at <http://www.hopkinsmn.com/planning/design.html>.
96. Hopkins, Minn., Downtown Design Guidelines (2006).
97. Hopkins, Minn., Downtown Design Guidelines (2006).
98. Sierra Business Council, Building Vibrant Sierra Communities: A Commercial And Mixed Use Handbook,

Appendix A (2005), available at <http://sbcouncil.org/documents/MixedUseHandbook/AppendixA.pdf>.

99. Georgetown, Colo., Design Guidelines, Ch. 6(8) (2006), available at <http://www.town.georgetown.co.us/drc/drcbk3ch6.html#corpfran>.

100. Georgetown, Colo., Design Guidelines, Ch. 6(8) (2006).

101. See, e.g., Greenlawn CVS, Inc. v. Planning Bd. of Town of Huntington, 280 A.D.2d 601, 720 N.Y.S.2d 800, 801 (2d Dep't 2001) (overturning planning board's approval of a store limited to 6,000 square feet due to aesthetics based on lack of support in record).

102. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.7(c)(v) (2006).

103. See Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 524 N.Y.S.2d 492, 494 (2d Dep't 1988) (annulling and remitting matter back to municipality to review impacts of 25 acre shopping mall may have on air pollution, noise level, drainage and flooding, aesthetics and the existing community).

104. Schwartz, Defending Regional Identity.

105. In California, where referendums are permitted, voters in Contra Costa County overturned an ordinance limiting the size of big box retailers. Wal-Mart, for example, regularly funds election groups and officials supportive of its interests. California Supercenter Study at 38.

106. Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617, 627, 781 N.Y.S.2d 240, 245, 814 N.E.2d 410 (2004).

107. Euclid, 272 U.S. at 395.

108. Bower Associates, 2 N.Y.3d at 627, quoting Town of Orangetown v. Magee, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996).

109. City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003).

110. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

111. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

112. Wal-Mart Stores, Inc., 2006 WL 1875446.

113. Wal-Mart Stores, Inc., 2006 WL 1875446.

114. Coronadans Organized for Retail Enhancement v. City Coronado, 2003 WL 21363665 (Cal. App. 4th Dist. 2003), unpublished/noncitable.

115. Coronadans Organized for Retail Enhancement, 2003 WL 21363665.

116. Harlen Associates v. Incorporated Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001); Bower Associates, 2 N.Y.3d 617.

117. Bower Associates, 2 N.Y.3d at 632.

118. Beach Communications, 508 U.S. 307.

119. Wal-Mart Stores, Inc., 2006 WL 1875446.

120. U.S. Const. art I, § 8, cl. 3.

121. Dennis v. Higgins, 498 U.S. 439, 446, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).

122. Dormant Commerce Clause jurisprudence is not as clear cut as presented here for our limited purposes as it relates to land use restrictions. See concurring opinions of Justice Scalia, commenting on the "various tests from our wardrobe of ever-changing negative Commerce Clause fashions," and Justice Thomas, asserting "'[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute," in American Trucking Associations, Inc. v. Michigan Public Service Com'n, 545 U.S. 429, 439, 125 S. Ct. 2419, 2426, 162 L. Ed. 2d 407, 416-417 (2005) (internal citations omitted). On the history of the dormant Commerce Clause, see Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

123. See City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978) (striking ban on imports of out-of-state garbage).

124. Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Oregon, 511 U.S. 93, 128 L. Ed. 2d 113, 114 S. Ct. 1345 (1994).

125. Oregon Waste Systems, Inc., 511 U.S. 93. See also Wyoming v. Oklahoma, 502 U.S. 437, 455, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992) (holding that a statute may be subject to strict scrutiny if it discriminates against interstate commerce in effect).

126. Laws equally banning out-of-town interests as well as out-of-state entities are similarly deemed invalid, see Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 361, 112 S. Ct. 2019, 2024, 119 L. Ed. 2d 139, 148 (1992) ("a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.").

127. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28, 98 S. Ct. 2207, 2214-15, 57 L. Ed. 2d 91 (1978).

128. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

129. Wal-Mart Stores, Inc., 2006 WL 1875446.

130. Coronadans Organized for Retail Enhancement, 2003 WL 21363665.

131. Gateway 2000 Country Stores, Inc. v. Norwalk Zoning Bd. of Appeals, 13 F. Supp. 2d 247 (D. Conn. 1998).

132. 15 U.S.C. § 1121(b).

133. Blockbuster Videos, Inc. v. City of Tempe, 141 F.3d 1295, 1300 (9th Cir. 1998).

134. Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12 (2d Cir. 1999).

135. Lisa's Party City, Inc., 185 F.3d 12.

136. Lisa's Party City, Inc., 185 F.3d 12. See also Akila Sankar McConnell, Note, Making Wal-Mart Pretty: Trademarks And Aesthetic Restrictions On Big-Box Retailers, 53 Duke L.J. 1537 (2004); Jeffrey W. Strouse, Note, Redefining Trademark Alteration Within the Context of Aesthetic-Based Zoning Laws: A Blockbuster Dilemma, 53 Vand. L. Rev. 717 (2000); Roberta Rosenthal Kwall, Regulating Trademarks on Exterior Signs: Should Local Law Trump the Lanham Act and the Constitution?, 71 S. Cal. L. Rev. 1105, 1119 (1998).

137. Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, 997 F. Supp. 340 (E.D. N.Y. 1998).

138. Great Atlantic & Pacific Tea Co., Inc., 997 F. Supp. 340.

139. Great Atlantic & Pacific Tea Co., Inc., 997 F. Supp. 340.

ORDINANCE NO. 30,

SERIES 2018

AN ORDINANCE OF THE CRESTED BUTTE TOWN COUNCIL AMENDING CHAPTER 16, ARTICLES 1, 5 AND 8 OF THE CRESTED BUTTE MUNICIPAL CODE TO INCLUDE DEFINITIONS AND REQUIREMENTS FOR FORMULA BUSINESSES IN THE "T" TOURIST AND "C" COMMERCIAL ZONE DISTRICTS.

WHEREAS, the Town of Crested Butte, Colorado ("Town") is a home rule municipality duly and regularly organized and existing as a body corporate and public under the Colorado Constitution and laws of the State of Colorado; and

WHEREAS, the Town has authority to enact and enforce land use regulations pursuant to Article XX of the Colorado Constitution, as implemented through the Town of Crested Butte Charter and Code; and Title 31, Article 23, and Title 20, Article 29, C.R.S.; and

WHEREAS, the Town is an uncommon, tightly-knit community with qualities that need to be respected and nurtured so that it can continue to thrive and prosper without the threat of unregulated commercial uniformity and predictability; and

WHEREAS, in 1972, the Crested Butte Town Council ("Town Council") enacted an ordinance designating the entire town as a historic district; and

WHEREAS, the Town adopted Design Guidelines to preserve the integrity of individual historic structures found throughout the Town; to protect the sense of time and place conveyed by the collection of historic buildings in the historic district; to enhance livability; to protect property values and investments; to retain a small town image and atmosphere; to minimize negative impacts on adjacent properties from drainage and snow shedding; to encourage pedestrian activity; to convey a sense of human scale; to protect significant views; and to protect the existing sense of community; and

WHEREAS, the National Register of Historic Places has listed a portion of the Town as the "Town of Crested Butte" historic district comprising approximately 189 residential buildings, 217 outbuildings, 44 commercial buildings, and 15 public/social buildings, that together reflect the economic, social, and political dynamics of the Town from the late nineteenth through the mid-twentieth centuries; and

WHEREAS, in 2005, the Colorado Historical Society (now History Colorado) awarded the Town the Stephen H. Hart Award in recognition of Town's firm commitment to historic preservation; and in 2008, the National Trust for Historic Preservation selected the Town as one of its Dozen Distinctive Destinations, specifically noting that "Crested Butte is an authentic community rich in character that has re-invented itself through the preservation-based revitalization and well-managed growth. The Town is a model for other communities across the nation; and

WHEREAS, Town Council approved Ordinance No. 25, Series of 2018, declaring a moratorium on the issuance of new business occupation licenses under Chapter 6, Article 2 of the Crested Butte Municipal Code for formula restaurant and retail businesses in all Business and Commercial Districts to provide the Town with time and opportunity to study the impacts of new formula businesses upon the Town's established historic character, quality of life, economic health and vitality, and the interests and needs of the community; and to engage in a public process to determine whether any additional regulations should be included in the Town Code; and

WHEREAS, the Town's distinctive character and aesthetics, historical relevance and economic vitality are threatened by the "homogenizing effect" of formula businesses that are reliant upon brand recognition, consistent visual appearances and standardized features; and

WHEREAS, the Town wishes to allow, as conditional uses, formula restaurants and formula motels/hotels in the "T" Tourist zone and formula retail businesses in the "C" Commercial district to provide a broader range of local, regional and national goods and services to residents and visitors while maintaining unique retail, dining and lodging experiences by preserving the integrity and ambience of the historic downtown business district along Elk Avenue and Sixth Street in the B1-B4 Business zones; and

WHEREAS, on November 15, 2018, the Town held a Community Discussion concerning formula businesses and whether such uses should be regulated in Town that was publicly noticed and additional public outreach, education and citizen engagement that included E-blasts by the Chamber of Crested Butte/Mt. Crested Butte; Town posting on its Facebook page; a front page article in the Crested Butte News on November 23, 2018, reporting on the formula business Community Discussion; and

WHEREAS, the Crested Butte Board of Zoning and Architectural Review (BOZAR) at a regular, publicly-noticed meeting on November 27, 2018 discussed and voted 7-0 in favor of forwarding to Town Council its recommendation of approval concerning the proposed text amendment to the Crested Butte Municipal Code (the "Code") that defines and regulates formula businesses within the "T" Tourist and "C" Commercial Zone Districts; and

WHEREAS, Town Council held a properly noticed public hearing to review the BOZAR's recommendation, take public comment, discuss and make findings that the Municipal Code be amended to define and regulate formula businesses within the "T" Tourist and "C" Commercial Zone Districts to preserve the Town's historic and authentic, small mountain town character; to maintain the Town's unique neighborhood shopping, dining and lodging experiences and ambience; to enhances the vitality and sustainability of the local economy; and to serve the health, safety and welfare of the Town, its residents, property/business owners, workers and visitors.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF CRESTED BUTTE, COLORADO, THAT,

Section 1. Amendments to Chapter 16, Article 1, Section 16-1-20 Definitions. **Sec. 16-1-20** of the Code is hereby amended to add the following definitions:

Business, Formula means formula retail business, formula restaurant and formula motel and hotel.

Business, Formula Motel and Hotel means a motel and hotel that is required by contractual or other arrangement to maintain and offer a standardized ("formula") array of services that includes two or more of the following systemized features: room plans, lobbies, on-site amenities, façade treatments, décor, color schemes, uniform apparel, signs, servicemarks/trademarks or other standardized features; and that causes it to be substantially identical to seven (7)* or more other businesses worldwide regardless of ownership.

Business, Formula Restaurant means a restaurant that is required by contractual or other arrangement to prepare and offer a standardized ("formula") array of food and beverages for sale to the public for consumption on or off premises that includes two or more of the following systemized features: substantially common food and/or drink menus, ingredients, food preparation, façade treatments, décor, color schemes, uniform apparel, signs, servicemarks/ trademarks or other standardized features; and that causes it to be substantially identical to seven (7)* or more other businesses worldwide, regardless of ownership. Regulated formula restaurants shall not be co-located within an exempt formula business.

Business, Formula Retail means a business that is required by contractual or other arrangement to maintain a standardized ("formula") array of merchandise and/or an array of services that includes two or more of the following systematized features: façade treatments, décor, color schemes, uniform apparel, signs, servicemarks/trademarks or other standardized features; and that causes it to be substantially identical to seven (7)* or more other businesses worldwide, regardless of ownership.

Section 2. Amendments to Chapter 16, Article 5.

a. **Sec. 16-5-30** is hereby amended to add the following conditional uses:

(24) Formula motel and hotel businesses.
(25) Formula restaurant businesses.

b. **Sec. 16-5-530** is hereby amended to add the following conditional uses to the "C" District

(20) Formula retail businesses.

Section 3. Amendments to Chapter 16, Article 8 adding Sec. 16-8-130 Formula businesses-Additional requirements. Chapter 16, Article 8 is hereby amended to add a new Sec. 16-8-130 to read as follows:

(a) Intent. The purpose of these formula business requirements is to maintain and protect Crested Butte's authentic historic character and small town ambience; ensure the vitality and diversity of the Town's commercial districts; and enhance the quality of life of residents and visitors.

(b) Applicability. These regulations shall apply to Formula Businesses.

(c) Related definitions. For purposes of this section, the following definitions apply:

(1) *Color scheme* means the selection of colors used throughout the business, such as on the walls, furnishings, permanent fixtures or on the building façade.

(2) *Décor* means the interior design and furnishings that may include style of furnishings, shelving, display shelving/racks, wall coverings or other permanent fixtures.

(3) *Façade* means the principal exterior face or front of a building including awnings, overhangs, porte-cocheres that is oriented towards a street, alley or open space.

(4) *Servicemark* means a word, phrase, symbol or design or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of a service from one party from those of others.

(5) *Signage* means a sign as defined under Sec. 16-1-20.

(6) *Standardized array of merchandize* means fifty percent (50%) or more of the in-stock merchandise is from a single manufacturer or distributor bearing uniform markings.

(7) *Standardized array of services* means a substantially similar set of services or food and beverage menus that are priced, prepared and performed in a consistent manner.

(8) *Trademark* means a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs legally registered or established by use that distinguishes the source of the product from one party from those of others.

(9) *Uniform apparel* means standardized items of clothing including but not limited to standardized aprons, pants, shirts, vests, smocks or dresses, hat and pins (other than name tags) with standardized colors and fabrics.

(d) Exemptions. The following formula businesses are exempt from these formula business requirements:

(1) Lumberyards, hardware, automotive, gas stations, grocers, banks/ATMs, financial services, health care, insurance, real estate, medical marijuana centers and retail marijuana stores.

(2) Formula businesses for which a business license was issued prior to the effective date of these regulations.

(3) Construction work on a pre-existing, approved or exempt formula business that is required to comply with fire and/or life safety standards.

(4) Disability access improvements to a pre-existing, approved or exempt formula business.

(e) Formula Business Location Requirements.

(1) Formula motels and hotels, and formula restaurants may be permitted as Conditional uses in the T-Tourist District.

(2) Formula retail businesses may be permitted as Conditional uses in the C-Commercial District.

(3) Formula businesses that are legally in existence as of February 6, 2019 [the effective date of these Regulations] may remain in their current location as a non-conforming use. The same or substantially similar type of use may be transferrable upon sale or transfer of the commercial space or ownership of the business and/or building.

(4) Formula businesses that are legally in existence as of February 6, 2019 [the effective date of these Regulations] may be renovated and/or expanded up to fifteen percent (15%) of the existing gross floor area or a maximum of 1,500 square feet, whichever is less.

(5) Formula business shall comply with all applicable standards of the underlying zone district and the applicable regulations of the Municipal Code including but not limited to Sec. 16-8-30 Criteria for decision and the Crested Butte Town Design Guidelines.

(f) Formula business additional criteria. No Conditional use permit for a formula business shall be approved unless the following criteria are met:

(1) The formula business complements existing businesses and promotes quality, diversity and variety to assure a balanced mix of commercial uses and range of local, regional and national goods and services for residents and visitors.

(2) The formula business has submitted plans, drawings, renderings, visual simulations or other examples that illustrate how it will be consistent with the historic and authentic character of Crested Butte including but not limited to exterior design treatments to appropriately minimize the appearance of "formula" architecture, signage and other treatments to enhance Crested Butte's authentic historic visual appearance and unique, small town shopping, dining and lodging experiences.

(3) The location and amenities of the formula business are compatible with the Town's pedestrian, bicycle and transit-oriented environment.

(4) The formula business does not include any drive-through facilities.

Section 4. Severability. If any section, sentence, clause, phrase, word or other provision of this ordinance is for any reason held to be unconstitutional or otherwise invalid, such holding shall not affect the validity of the remaining sections, sentences, clauses, phrases, words or other provisions of this ordinance, or the validity of this ordinance as an entirety, it being the legislative intent that this ordinance shall stand notwithstanding the invalidity of any section, sentence, clause, phrase, word or other provision.

Section 5. Savings Clause. Except as amended hereby, the Crested Butte Municipal Code shall remain valid and in full force and effect. Any provision of the Code that is in conflict with this ordinance is hereby repealed as of the effective date hereof.

INTRODUCED, READ AND SET FOR PUBLIC HEARING THIS 17th DAY OF DECEMBER, 2018.

ADOPTED BY THE TOWN COUNCIL UPON SECOND READING IN PUBLIC HEARING THIS 7th DAY OF January, 2019.

TOWN OF CRESTED BUTTE

James A. Schmidt, Mayor

ATTEST:

Lynelle Stanford, Town Clerk

[SEAL]

TOWN OF CRESTED BUTTE CORPORATE SEAL JULY 2, 1880 GUNNISON COUNTY, CO

Sec. 26.425.045. Standards applicable to formula uses; exemptions; determination of formula uses.

(a) *Purpose.* This section provides for the case-by-case review of formula uses, as defined in Section 26.104.110(c), in order to encourage a commercial mix that is balanced, diverse and vital, and meets the needs of year-round residents and visitors, maintain the unique character of Aspen's downtown, and to provide regulatory flexibility that meets the City's evolving and unique market demands.

(b) *Applicability.*

(1) *Generally.*

a. No business license shall be issued pursuant to Chapter 14.08 for any formula use subject to this Section unless and until the Planning and Zoning Commission approves a conditional use permit authorizing that use.

b. The Community Development Director may establish forms to document exemptions, current uses, and other material information reasonably necessary for the effective administration of this Section.

(2) *Exemptions.*

a. *Exemptions.* This Section shall not apply to commercial and mixed-use buildings and structures within the CC zone district, C-1 zone district, and the Main Street Historic District (MU zone district) that meet any one (1) or more of the following characteristics:

1. Buildings or structures constructed or under construction prior to the effective date of Ordinance 6, Series 2017.

2. Buildings or structures which will be constructed pursuant to any approval for development granted prior to the effective date of Ordinance 6, Series 2017.

3. Buildings or structures which will be constructed pursuant to any development application submitted for approval prior to the effective date of Ordinance 6, Series 2017.

b. *Loss of Exemption.* Any building or structure exempted by this Section will become subject to this Section upon the occurrence of one (1) of the following activities, provided that they were not caused by the occurrence of fire, flood, or acts of nature:

1. demolition, as defined in Title 26; or

2. renovation or construction of an existing building or structure (i.e. addition to an existing building or structure) that results in an increase of more than five-hundred (500) square feet of net leasable space, and more than two-hundred-fifty (250) square feet of Floor Area, pursuant to Section 26.470.090(c), Minor expansion of a commercial, lodge, or mixed-use development.

c. Notwithstanding the foregoing, the following activities shall not cause a loss of exemption:

1. rehabilitation and other construction necessary to comply with the law (e.g. ADA compliance);

2. reconfiguration of leased areas; or

3. improvements reasonably necessary for tenant to occupy a leased space.

(c) *Standards.* When considering a development application for a formula retail and restaurant use as part of a conditional use review, the Planning and Zoning Commission shall be required to determine that, in addition to the standards set forth in Section 26.425.040, the proposed use complies with at least five (5) of the following thirteen (13) standards, and complies with at least one (1) standard relating to at least three (3) of the following four (4) objectives, as provided below:

AACP Objective	**Review Standard**
Aspen desires to maintain a balanced and diversified retail experience in its downtown area for both residents and visitors.	(1) The formula business will not result in an overconcentration of similar uses within the block or along the street frontage of the proposed project. (2) The proposed use will help to diversify the mixture of uses present in the downtown area, and will not result in a duplication or over-abundance of the types of goods and services already sold in the City of Aspen. (3) The formula business will contribute to the adequate availability and diverse existing mix of retail and restaurant businesses providing basic necessities, serving city-wide customers, and providing for the daily needs of residents and visitors within the zone district and within the immediate vicinity of the proposed project. (4) The formula business will be mutually beneficial to and enhance the economic health of the surrounding uses in the zone district.
The City of Aspen has a long tradition as a community that has welcomed innovation and enabled new ideas to flourish. The City desires to provide opportunities for its next generation of young entrepreneurs to pursue their own dreams and innovations.	(5) The proposed use represents or encourages an innovative or creative business idea. (6) The proposed use provides an opportunity for an entrepreneur to offer new services or explore new products. (7) The proposed use helps to place Aspen in a leadership position as a place of innovation and creativity.
The City seeks to ensure that within its limited commercial areas, the daily or frequently needed goods and services of its residents and visitors can be met.	(8) The proposed use offers goods and services that meet the daily or frequent needs of Aspen's resident and visitor populations. (9) The proposed use offers goods and services that are affordable to and needed by a broad range of Aspen's residents and visitors. (10) The formula business, together with its design and improvements, is consistent with the unique and historic character of the zone district;
Aspen has a unique image in the international resort market as a place where residents and visitors can not only enjoy a recreational experience in an unspoiled natural environment, but also can be entertained or be culturally or artistically enriched in a community whose entertainment opportunities compliment the natural beauty of the Upper Roaring Fork Valley.	(11) The proposed use provides opportunities for residents and visitors to enjoy one-of-a-kind recreational, cultural or entertainment experiences while they are in the Aspen Area. (12) The proposed use, together with its design and improvements, will preserve, and be compatible with, the distinct visual appearance and shopping/dining experience of the zone district for its residents and visitors. (13) The formula business will be compatible with existing uses in the zone district and promote the zone district's economic vitality and long-term sustainability

	as the commercial, cultural, and civic center of the community.

(d) *Determination of Formula Use.* Any development application determined by the Community Development Director to be for a formula use, as defined in Section 26.104.110(c), that does not identify the use as a formula use is incomplete and cannot be processed until the omission is corrected. Any development approval or determination that is determined by the Community Development Director to have been, at the time of application, for a formula use that did not identify the use as a formula use is subject to revocation at any time. If the Community Development Director determines that a development application or approval is for a formula use, the applicant or holder of the entitlement bears the burden of proving to the Community Development Director that the proposed or existing use is not a formula use.

(Ord. No. 6, 2017, § 11)

Commission Guide for Formula Retail

DETERMINING LOCATIONAL APPROPRIATENESS AND PERFORMANCE-BASED DESIGN GUIDELINES

SAN FRANCISCO PLANNING DEPARTMENT | UPDATED: AUGUST 2018

Originally Published: July 2014

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In addition to the project team, this work was informed by the formula retail stake-holder group and the project consultant, Strategic Economics.

Cover Photograph: GGP Inc.

The purpose of this document is to evaluate the appropriateness of each individual formula retail establishment's use, design, and necessity, to help preserve the character of the City's neighborhoods.

Photos by Matthew Dito

PURPOSE

The Commission Guide to Formula Retail is intended to maintain the character and aesthetic qualities of San Francisco neighborhoods. It is designed to encourage harmony between retailers and the districts they reside in.

This document seeks to promote such harmony in two ways. First, the document establishes the methodology the Department will use in evaluating the appropriateness of the formula retail use in the neighborhood. Second, this document articulates Performance-Based Design Guidelines to ensure that the proposed formula retail use is aesthetically compatible with the neighborhood.

RELEVANT CODE SECTIONS

Section 303.1: Formula Retail Uses

Section 703.4: Conditional Use Authorization for Formula Retail Uses

Section 803.6: Formula Retail Uses in Article 8 Districts

Article 6: Signs

Article 11: Preservation of Buildings and Districts of Architectural, Historical, and Aesthetic Importance in the C-3 Districts

INTRODUCTION

Formula retail can act as a homogenizing force in neighborhoods if its presence overwhelms neighborhood character. Formula retail, by nature, is repetitive. If not properly regulated, this repetition can detract from San Francisco's vibrant neighborhoods by inundating them with familiar brands that lack the uniqueness the City strives to maintain.

San Francisco is a city of surprises. Its diverse and distinct neighborhoods are identified in large part by the character of their commercial areas. This feeling of surprise invites both residents and visitors alike to explore the City.

Urban neighborhood streets should invite walking and bicycling. The City's mix of architecture contributes to a strong sense of neighborhood community within the larger City. Many formula retail concepts are developed and refined in suburban locations. Standard store design that primarily accommodates automobile traffic may not work in dense, transit-oriented cities.

The Performance-Based Design Guidelines can improve pedestrian walkability and encourage more walking in neighborhoods by helping to preserve a safe, aesthetically pleasing area that feels connected from beginning to end. This is achieved by improving pedestrian accessibility and by creating stores with unique visual identities that also don't overpower one another.

The increase of formula retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail

While any one formula retail establishment may fit well in a neighborhood, overconcentration of formula retail can degrade the character of a street.

Illustration by Raven Keller for The Bold Italic

base with distinct neighborhood retailing personalities comprised of a mix of businesses.

These standards are intended to lessen the visual impacts that the repetitiveness of formula retail brings by first evaluating whether the formula retail use is either necessary or desirable in the neighborhood. See a discussion of this topic in Part I: Determining Locational Appropriateness. Once the use is deemed appropriate, the next step is to ensure aesthetic compatibility. For more information on this topic, see "Part II: Performance-Based Design Guidelines."

While a factor in the homogenization of neighborhoods, formula retail does provide lower-cost goods and services, and is generally recognized to provide more employment opportunities to minorities and low-income workers. Formula retail is neither good nor bad – and it plays an irrefutable role in the City. To best accentuate the benefits of formula retail, the City should regulate it with care, helping to reduce its standardized features.

San Francisco needs to protect its vibrant small business sector and create a supportive environment for new business innovations. One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhances."

The Planning Department recognizes the benefits formula retail can bring to the City. Where the use would provide a necessary or desireable addition to the neighborhood, staff will work with applicants to improve their aesthetics, including signage, storefront design, transparency, and pedestrian accessibility, to help them successfully integrate into San Francisco's neighborhoods.

I. Determining Locational Appropriateness

For every conditional use authorization the Planning Commission must determine if the proposed use is necessary or desirable for the community and compatible with the neighborhood, per Planning Code Sec. 303(c)(1). Beyond the general consideration of "necessary or desirable," the Commission reviews five more specific criteria in consideration of conditional use authorization for formula retail. This document establishes the methodology the department will use in assessing these five determining criteria, as required by Planning Code Sec. 303.1.

Determining location appropriateness should be by informed quantitative and qualitative analysis. In general, professional discretion should be used to identify factors not specifically required in this document. For example, if a daily need use is located immediately outside the selected appropriate vicinity, it should still be discussed in the case report. In addition to analyzing the five Planning Code required criteria, professional analysis of locational appropriateness should include the following:

A characterization of the district as a whole, based on the stated intent of the district as well as how the district has evolved since it was created. Describe the scale and massing of buildings and uses. Discuss the dominant design orientation people vs. auto-orientation. Consider if the district can be described in other ways: family oriented, entertainment district, culturally-specific, for example. Determine whether there are capital improvements or large development projects in the pipeline.

A characterization of the immediate vicinity of the proposed establishment location. A characterization of of the immediate vicinity within 300' of the subject property is a standard distance that would generally be appropriate. For projects that require conditional use authorization for use size, or occupy a tenant space larger than 10,000 square feet, a one-quarter mile vicinity is more appropariate and should be used. The vicinity concentration should include all commercial uses, not just those within the same Zoning District.

A description of the commercial nature of the district. Are there retail anchors or clusters present or developing? Are there retail or other trends emerging?

Identification of long term vacancies and/or any commercial use related issues and concerns.

Identification of the unique characteristics of the District and/or neighborhood, where appropriate.

CRITERIA AND METHODOLOGY

The five criteria and methodology for analyzing locational appropriateness should be examined as described below:

Existing concentrations of formula retail uses within general vicinity of the proposed project.

- The concentration of formula retail uses is the percentage (%) of formula retail ground floor commercial uses amongst all ground floor commercial uses within the vicinity.
- Generally, the appropriate "vicinity" when determining a concentration is 300'. However, if the proposed use requires conditional use authorization for use size, or proposes to occupy a tenant space that is equal to or greater than 10,000 square feet, a one-quarter mile vicinity should be used.
- Calculation shall include all parcels that are wholly or partially located within the selected radius that are also zoned commercial or contain commercial uses.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity shall be done.
- An evaluation of the linear frontage concentration of formula retail establishments within the selected vicinity. Concentration is based on Planning Commission Resolution No. 18843, adoped on April 11, 2013 and summarized below. Staff will calculate the concentration of formula retail linear frontage within the selected vicinity of the subject property. Corner parcels are more heavily weighted when counting linear frontage due to their greater aesthetic impacts.
- The methodology is as follows: for each property, including the subject property, the total linear frontage of the lot facing a public right-of-way is divided by the number of storefronts. Formula retail storefronts and their linear frontage are separated from the non-formula retail establishments and their linear frontage. The final calculations are the percentages (%) of formula retail and non-formula retail frontages (half of a percentage shall be rounded up).
- An evaluation of the number of formula retail uses as a percentage (%) of all commercial uses within the selected vicinity. This calculation will count all ground floor storefronts as a commercial use.
- The Department does not identify an ideal concentration threshold because it varies significantly by zoning district. This variation is based on pre-existing uses, vacancy rates, massing and use sizes, and neighborhood needs. Comparisons of the formula retail concentration to citywide numbers and to comparable neighborhoods are encouraged.
- Concentration thresholds may also vary significantly based on proximity to a zoning district more favorable to formula retail, or to a Commercial District that principally permits formula retail.

The availability of other similar uses within the vicinity of the proposed project.

- An evaluation of similar retail uses within the district requires a concentration calculation of retail sales and/or service uses that offer the similar products or services to those being proposed. This concentration shall be based on the number of available uses as a percentage of all commercial uses.
- Using the same selected appropriate vicinity as identified in criterion 1B, an evaluation and accompanying map shall be produced showing the location of similar uses throughout the vicinity. If no similar uses are available within the vicinity or district, the closest offerings may be identified.

The compatibility of the proposed formula retail use with the existing architectural and aesthetic character of the district.

- Use the Performance-Based Design Guidelines to ensure compatibility with the signage, storefront design, storefront transparency, and pedestrian accessibility.
- Identify the business' place in the District (corner, anchor, recessed from street) and whether it is in a protected viewshed in the General Plan.

The existing retail vacancy rates within the district.

- Identify current vacancy rates in district and compared to historic vacancy rates, if this information is available.

→ Identify vacancies within the selected vicinity and discuss the conditions and potential impacts of vacant buildings within the selected vicinity.

The existing mix of Citywide-serving retail uses and daily needs serving retail uses within the appropriate vicinity of the proposed location. Neighborhood Commercial Districts are intended to serve the daily needs of the neighborhood residents. As such, daily needs service retailers are those that provide goods and services that residents want within walking distance of their residence or workplace.

It is important to note that formula retail uses can also be daily needs serving uses; the terms are not mutually exclusive. For example, banks and other financial institutions are subject to formula retail controls; however, having a bank within walking distance is a valuable amenity to a neighborhood.

→ Evaluate the provision of daily needs for the immediate vicinity in relation to the district's defined intent. Some districts are intended to only support residents. Conversely, the district may be intended to meet resident needs and wider shopping or tourist needs.

→ The following uses are considered "Daily Needs" uses:

- Limited Restaurant, as defined by Planning Code Sec. 102

- Specific Other Retail, Sales, and Services, as defined by the following subsections of Planning Code Sec. 102:
(a) General Grocery
(b) Specialty Grocery
(c) Pharmaceutical drugs and personal toiletries
(e) Self-service Laundromats and dry cleaning
(f) Household goods and services
(g) Variety merchandise, pet supply stores, and pet grooming services
(l) Books, music, sporting goods, etc.

- Personal services, as defined by Planning Code Sec. 102

- Limited Financial Service, as defined by Planning Code Sec. 102, and/or Financial Service, as defined by Planning Code Sec. 102

- Trade Shops as defined by the following subsections of Planning Code Sec. 102
(1) Repair of personal apparel, accessories, household goods, appliances, furniture and similar items, but excluding repair of motor vehicles and structures
(6) Tailoring

II. Performance-Based Design Guidelines

FORMULA RETAIL SIGNAGE

This section establishes design guidelines to ensure the aesthetic compatibility of formula retail uses.

Signage creates visual impacts which affect how residents feel about their neighborhood and play a role in the attraction of visitors who are important to the City's economy. Signs serve as markers and create individual identities for businesses that add to the greater identity of a neighborhood and district, hence the need for guidelines to ensure compatibility between businesses and their surroundings.

Formula retail uses can have a homogenizing effect on neighborhood character. This is largely due to standardized signage and branded features that promote recognition. These Performance-Based Design Guidelines seek to minimize the uniform aspects of formula retail signage.

Business signs are generally regulated to ensure an appropriate and equitable degree of commercial communication without contributing to visual clutter.

Photos by Matthew Dito

NOT RECOMMENDED

Scale of sign is inappropriate and extends beyond the storefront entrance.

RECOMMENDED

Sign does not extend out and beyond the width of the storefront opening.

Signage guidelines for formula retail business signs[1] are as follows:

- One sign per tenant shall be permitted. A ground floor establishment with a corner storefront may have one sign on each building façade. Signs should not extend beyond with width of the storefront opening.
- Signage, painted on glass doors, windows, and transoms, where the sign does not exceed 25% of the glazed area, is permitted.
- Sign depth should be reduced by placing the transformer in a remote location and not housed within the sign itself.
- Signs that are located on the inside of a storefront should be setback a minimum of 6" from the display glass.
- Scale of signs and placement on the building should be appropriate to the elements of the building and the character of the neighborhood.
- Upper story establishments with a corner storefront may have one sign adjacent to the building entrance. It should be a small identification sign or plaque, installed adjacent to the ground floor entrances.
- Signs should be constructed of durable high-quality materials that retain their characteristics within a high-traffic area over time. Acryllic and vinyl signs are discouraged.
- Signage is to be scaled and placed primarily for pedestrian legibility, and secondarily for vehicular visibility.
- Materials should be compatible with the craftsmanship, and finishes associated with the District. Glossy or highly reflective surfaces will not be approved.
- Signs should be attached in a manner that avoids damaging or obscuring any of the character-defining features associated with the subject building. Signs should be attached in a manner that allows for their removal without adversely impacting the exterior of the building, ideally pin-mounted.

1 A business sign is defined as a sign which directs attention to a business, commodity, service, industry, or other activity which is sold, offered, or conducted, other than incidentally, on the premises upon which such sign is located, or to which it is affixed.

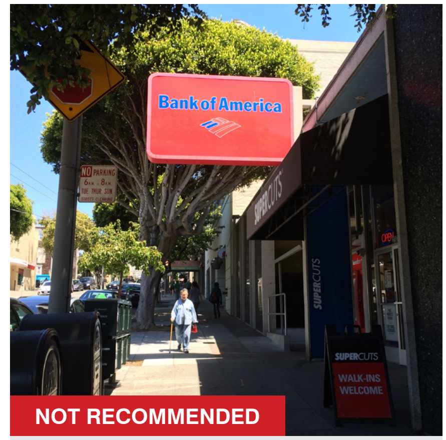
Photos by Matthew Dito

NOT RECOMMENDED

There is an excessive number of wall signs attached to the building facade, and the windows are covered, preventing visibility.

NOT RECOMMENDED

Sign is directly lit with visible lighting conduits.



NOT RECOMMENDED

Scale, placement, and design of sign are inappropriate to the building and its surroundings.

RECOMMENDED

A corner storefront with one sign on each building facade, as permitted.

RECOMMENDED

Sign is indirectly lit with a reduced profile due to a light emitting diode (LED) method of illumination.

RECOMMENDED

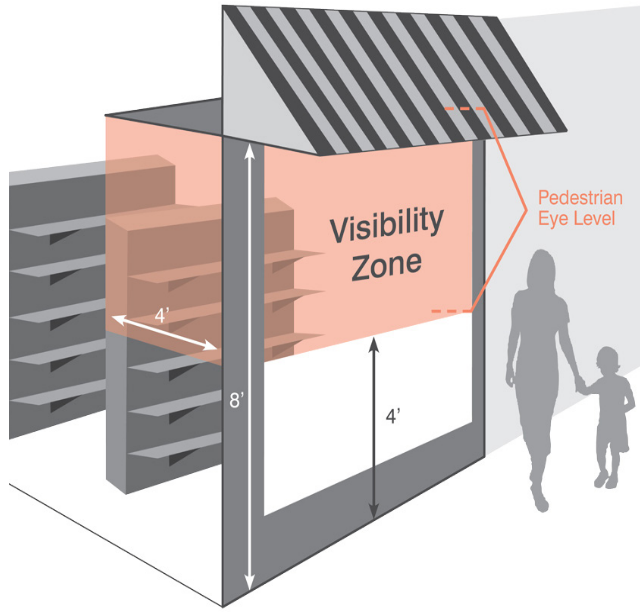
Sign is attached above the entrance bay, and does not detract from the buildings aesthetic qualities.

- Signs should be externally illuminated, or appear to be indirectly illuminated, such as by installing an external fixture to illuminate the sign or by using a reverse channel halo-lit means of illumination.
- Signs should have an opaque background that does not transmit light and text.
- Signs should be minimized in profile or depth, for example, by using a light emitting diode method of illumination.
- Sign legibility shall be of minimum appropriate intensity to be visible while not being visually dominating.
- Signage lights should be dimmed or off when business is closed.
- Businesses should not use exterior digital or LED screens to amplify branding beyond the signage limits.

FORMULA RETAIL TRANSPARENCY

A transparent storefront welcomes customers inside with products and services on display, discourages crime with more "eyes on the street", reduces energy consumption by allowing natural light into stores, and enhances the curb appeal and value of the store, as well as the entire neighborhood. As mentioned earlier, successful city living depends on surprise to maintain interest. Even if the formula retailer is familiar, a view into the store may spur interest in the people and products inside.

The City strives to ensure that tenant spaces remain transparent to the exterior, contribute to the activity of the public realm and do not devolve into de facto sign boards for tenants.



Visibility Requirements

To ensure visibility into active spaces, any fenestration provided at eye level must have visibility beyond a window display and into the store.

The following definitions apply:

- Pedestrian Eye Level: the space between 4-feet and 8-feet in height above the adjacent sidewalk level, following the slope if applicable.
- Visibility to the Inside of the Building: the area inside the building within 4-feet of the window surface at pedestrian eye level must be 75 percent (%) open to perpendicular view.

Therefore, any fenestration of frontages with active uses must have visibility to the inside of the building with at least 75 percent (%) open to perpendicular view with a 4-foot by 4-foot "visibility zone" at pedestrian eye level. In addition, 60 percent (%) of all street frontages must be transparent windows, while any railings or grillwork placed in front of or behind storefront windows must be at least 75 percent (%) transparent at a perpendicular view.

To ensure visibility, business signs may not exceed one-third the area of the window in which the sign is located. The Department will work with applicants to improve visibility wherever possible.

The Performance-Based Design Guidelines require formula retail applicants to work with staff to determine what transparency improvements can be made. Changes required may include converting windows to transparent glazing, relocating shelving and displays away from windows, or removing security grilles and other window coverings.

Photos by Matthew Dito

NOT RECOMMENDED

Views through the frontage fenestration are obstructed by advertising signs and business identifiers.

NOT RECOMMENDED

The 4-foot by 4-foot visibility zone inside the establishment is obstructed by excessive signage.


NOT RECOMMENDED

The security grille does not have at least 75% transparency at a perpendicular view.

RECOMMENDED

The space between 4 feet and 8 feet above the sidewalk has at least 75% of its frontage fenestrations open to perpendicular view.

RECOMMENDED

Limited window signage maximizes visibility inside the store.


RECOMMENDED

The security grille allows for visibility of at least 75% at a perpendicular view.

What This Means For Formula Retail Uses

1. Windows that have been covered over with boards, film, or paint must be restored to transparency.
2. Security gates or grillwork on the inside or outside of the window glass must be primarily transparent (at least 75 percent (%) open to perpendicular view).
3. Shelving, display cases, appliances, and other items placed within four feet of the window glass must be no taller than four feet or be primarily transparent (at least 75 percent [%] open to perpendicular view).
4. All exterior signs must have a sign permit or must be removed.
5. Business signs affixed to the window (painted or adhered to the glass) can be no larger than one-third the size of the window on which they are placed.

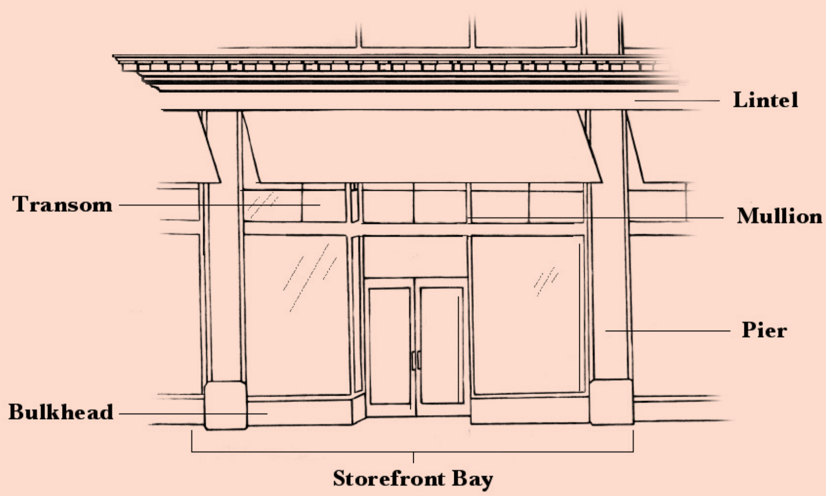
FORMULA RETAIL STOREFRONT DESIGN

Storefront design can be used to extend branding beyond the dimensions of signage. To maintain emphasis on architecture and to prevent formula retail from overwhelming neighborhood character, it's important to prevent facades from becoming defacto branding opportunities.

Historic qualities present in a storefront should be preserved and maintained, as well as integrated into additions or modifications made to the storefront. The most successful storefronts combine contemporary design with sensitivity to the character defining storefront components.

Storefront Components

The components of Performance-Based Design Guidelines for Storefront Design are: facades and street walls, corner lots, storefront bays, entrances, bulkheads, and display windows.



TYPICAL FEATURES INCLUDE:

Bulkhead: The low paneled base of a storefront bay that supports the glazing and elevates merchandise for pedestrian viewing.

Façade Materials: Original exterior cladding, typically brick, wood or stone provide a sense of permanence, scale and texture and often convey the work of skilled craftsmen.

Lintel: The horizontal structural element that spans above the storefront bays to support the weight of the upper façade.

Mullion: The vertical element that separates window units or storefront glazing; typically not a structural support for the building.

Pier: The vertical structural or decorative elements, also know as a column, which supports and/or frames the glazing.

Storefront Bay: Defined by the height of the lintel and separated by piers, a storefront bay is composed of bulkhead, glazing, transom, and entry.

Transom: The small, operable or inoperable framed windows above the glazing and below the lintel that filter light into the ground floor space; sometimes sheltered by awnings.

Photos by Matthew Dito

NOT RECOMMENDED

Design, including colors, finish, and texture, is inconsistent with the surrounding buildings.

RECOMMENDED

Storefront design is consistent with surrounding buildings, and the setback creates a continuous street wall and edge.

Façades and Street Walls

The façade is the exterior wall of the building, or frontage, and should utilize traditional building materials such as terra cotta, brick, stone, and scored stucco. The color should be limited to different tones of one color, and said color should be similar in profile to the surrounding buildings. Buildings should have a finished texture that is smooth and painted with a satin or light finish. Color washing an entire storefront to extend branding detracts from the character of a neighborhood and will not be permitted.

The design should remain consistent with surrounding buildings in the neighborhood. As such, the setback should be as such that it creates a consistent, continuous street wall and edge.

Corner Lots

Many buildings on corner lots exhibit special features that emphasize the corner and add accent to both intersecting streets, providing visual interest to pedestrians. Corner entrances, storefront windows, and displays that extend along both street facades emphasize corner lots are encouraged.

Where entrances are not located at the corner, storefront windows should turn the corner, in addition to windows on each side of the building.

Storefront Bays

Appropriate alignment and proportions of the storefront bay are critical in creating a unified appearance within the district.

Windows should be consistent in height and design with storefront doors to create a cohesive appearance, however, slight variations in alignment can add visual interest. Piers and lintels should be treated and designed as a single component. The lintel establishes the top of the storefront bay, visually separating it from upper floors. Proper proportions must be maintained between windows and the lintel. Elements such as signs and awnings that obscure the spacing of the bays or other elements that define those bays should be avoided. Colors should be similar in profile to the surrounding buildings, and limited to different tones of one color.

Entrances

Typically, entrances are recessed by about two to six feet from the sidewalk, allowing for protection from the rain, providing additional display frontage, and creating a rhythm of defined commercial spaces. Together, these features can establish a sense of scale and identify business entrances. In San Francisco, entrances for people should be emphasized and entrances for cars should be minimized.

A service door may also exist for access to building systems.

Bulkhead

The bulkhead is the one to two foot high based of the building, upon which the storefront display window is placed. Traditionally, bulkheads are made of painted wood, decorative metal, small ceramic tiles, or masonry. Replacements should match or be compatible with original materials. Bulkheads should be consistent with surrounding buildings in the neighborhood, and are typically between 18 inches and 24 inches.

Storefront Displays

Storefront display windows typically consist of large panes of plate glass set in metal or wood frames, with the primary purpose of allowing passerby to see goods or services available inside. Individual panes of a window are separated by mullions, which should be as narrow and as limited in number as possible. This maximizes visibility into interior activity and merchandising.

NOT RECOMMENDED

Colorwashing a building facade in branded color serves as oversized signage and is not permitted.

RECOMMENDED

Transparent display with simple, effective signage on the bulkhead.

NOT RECOMMENDED

While the establishment utilizes the corner lot with its entrance, the facade and bulkhead are incompatible with the surrounding buildings.

Photos by Matthew Dito

PEDESTRIAN ACCESSIBILITY

Ensuring that businesses are easily accessible creates a more inviting environment in commercial neighborhoods. For smaller formula retail establishments, pedestrian acessibility is usally not a problem. Larger formula retail establishments, however, tend to limit and control entrances. A suburban design may cater to those who arrive by car. In order to preserve the City's walkable character, formula retail in particular must be designed for pedestrians. Entrances that are distinguishable from the façade of a building invite and allow pedestrian access. Entrances should be located in a manner that keeps with the rhythm established by surrounding buildings. This consistency creates a familiarity that draws the attention of pedestrians.

Requirements for pedestrian accessibility are as follows:

- All businesses must have an ADA compliant entrance
- Corner lot locations should have at least an entrance on the corner, or one on each street
- Improve the pedestrian environment with clearly visible, easy, safe routes to business entries, including through parking lots and to the public sidewalk and transit stops.
- Provide pedestrian access onto the site from the main street on which the business is located.
- All existing street-facing doors, with the exception of emergency and service entrances, shall remain unlocked and open to the public during regular business hours.

The business entrance is not distinguishable from the corner lot window, and is located in a manner that does not utilize or promote pedestrian access to the building.

Business entrances are distinguishable from the building facade with a consistent rhythm that creates a familiarty to draw attention of pedestrians. Entrances are also visually compatible with the entrances to upper residencies.

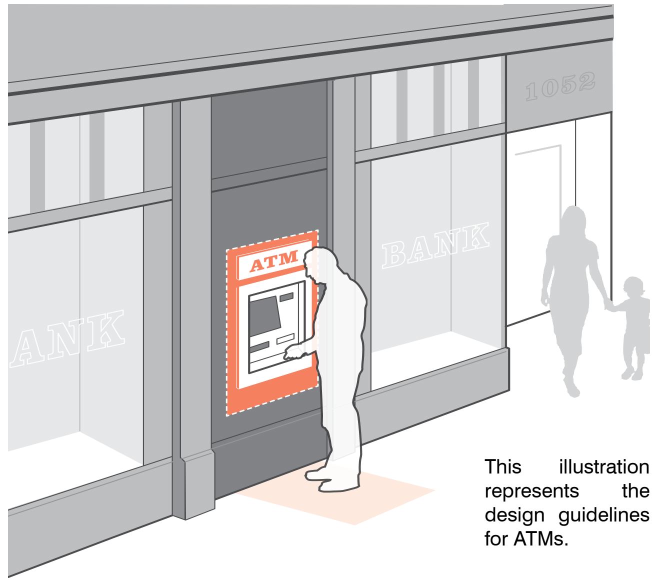
Photos by Matthew Dito

LIMITED FINANCIAL SERVICES

Limited Financial Services are defined in Planning Code Sections 102 as a retail use which provides banking services, when not occupying more than 15 feet of linear frontage or 200 square feet of gross floor area. Automated teller machines (ATM), if installed within such a facility or on an exterior wall as a walk-up facility, are included in this category. A Conditional Use authorization is required for all Limited Financial Services that are also a formula retail use, with the exception of single automated teller machines located within another use that are not visible from the street [Sec. 303.1(b)(13)].

When placing an ATM, the feature should be integrated into the overall composition of the storefront, so as to not detract from the architecture of the quality of the pedestrian experience.

A single ATM at a street façade may be permitted without conditional use authorization if the machine meets the Performance-Based Design Guidelines in this document. A single automated teller machine may not be permitted at the street front if it compromises the storefronts ability to meet other Performance-Based Design Guidelines, including visibility and transparency goals.



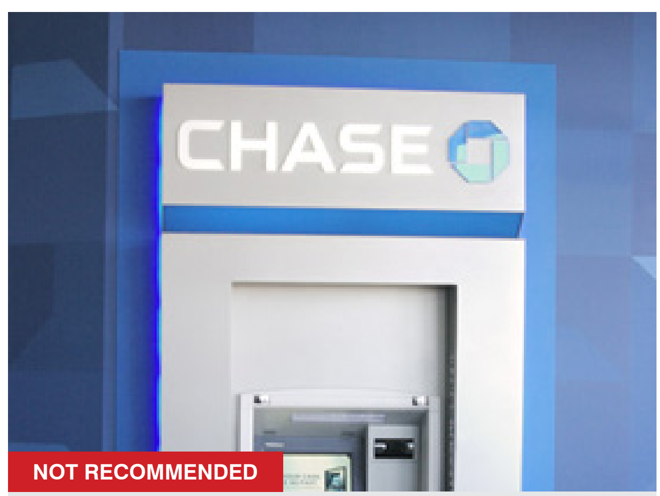
This illustration represents the design guidelines for ATMs.

General guidelines for ATMs are as follows:

- Minimize lighting elements and brightness intensity.
- Areas using materials that need to be lit, or backlit, should be minimized.
- ATMs should be proportionate to the storefront or building facade.
- Framing elements should be used, as appropriate, to integrate ATMs into the facade composition.
- Architectural quality should be maximized.

Photos by Matthew Dito

This requires a conditional use permit because there is more than one ATM at the street front.



Colorwashing a building facade in branded color serves as oversized signage and is not permitted.

FOR MORE INFORMATION:
Contact the San Francisco Planning Department

Central Reception
49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103

TEL: **628.652.7600**
WEB: **www.sfplanning.org**

Planning counter at the Permit Center
49 South Van Ness Avenue, 2nd Floor
San Francisco, CA 94103

EMAIL: **pic@sfgov.org**
TEL: **628.652.7300**

Ordinance No. 2896

AN ORDINANCE OF THE CITY OF PORT TOWNSEND AMENDING THE PORT TOWNSEND MUNICIPAL CODE ADDING CHAPTER 17.05, DEFINING AND REGULATING FORMULA RETAIL ESTABLISHMENTS TO TITLE 17, ZONING

WHEREAS, Port Townsend is a Victorian Seaport that harbors a National Historic District and a wealth of superb Victorian era Homes recognized on the National Historic Register; and

WHEREAS, Port Townsend is a community with a very special environment, both natural and man-made and the qualities of both must be respected so that the uniqueness of Port Townsend can flourish without inappropriate changes; and

WHEREAS, Port Townsend is a vital and active City that retains a small town atmosphere and a strong sense of community; and

WHEREAS, Port Townsend is both a destination resort town and a residential village, and the creation of a desirable living, working, and business environment that is responsive to residents will automatically provide destination of interest to visitors; and

WHEREAS, as stated in the Comprehensive Plan at p.147: "[E]conomic development in Port Townsend should balance economic vitality with stability, environmental protection, and preservation of our small town atmosphere," and " The responsibility of local government is to assure that economic development activities are carried out in a manner that is consistent with defined community and environmental values;" and

WHEREAS, one of the major emphases of the Comprehensive Plan is to address the "jobs/housing imbalance" in Port Townsend; and

WHEREAS, the City's Comprehensive Development Plan at p.14 " . . . contains an economic development strategy that is designed to encourage businesses which provide 'family wage' jobs: Jobs that pay a wage or salary which allows an individual or family to purchase a home, feed and clothe a family, pay for medical care, take a vacation, save for retirement, and send the kids to college." p.174.]; and

WHEREAS, Goal 4 of the Diversified Manufacturing & Small Business component of the Economic Development Element of the Comprehensive Plan at p. 150 calls for the City: "To support current commercial and manufacturing enterprises, and encourage the formation of small businesses and relocation to Port Townsend of small scale locally managed businesses as a vital part of Port Townsend's economy" by "[e]ncourag[ing] the formation and expansion of cottage industries and light manufacturing" and " the development of a diversity of local businesses which serve the needs of residents and visitors;" and

WHEREAS, Goal 5 of the Community Retail component of the Economic Development Element of the Comprehensive Plan at p. 151 calls for the City to "To enhance and attract small and medium sized retail businesses which serve the community's needs for goods and services;" and

WHEREAS, the addition of formula retail businesses in the commercial areas, if not monitored and regulated could serve to frustrate the Comprehensive Development Plan goal of a diverse retail base with a unique retailing personality comprised of a mix of businesses ranging from small to medium to large and from local to regional to national; and

WHEREAS, the Historic Commercial District is a special and unique asset within the City, which could be impacted by the presence of formula establishments that are out of harmony with the Historic District and which do not contribute to the City's small town atmosphere; and

WHEREAS, in light of the foregoing considerations, the City Council has determined that the public welfare of the City's residential, retail, business and tourist based community, as articulated by the principles upon which the Comprehensive Development Plan is premised, will be best served and advanced by adopting interim regulations_monitoring, regulating and restricting the establishment of formula retail stores to the C-II commercial zone; and

WHEREAS, the City needs time to consider properly and carefully the potential effects of formula stores on the City's comprehensive plan and zoning code, and other development regulations; and

WHEREAS, the City Council finds it is appropriate to preserve the status quo and to prevent the vesting of any new applications for development or land use approvals that are or may be inconsistent with the City's comprehensive plan, pending review of City codes to make sure that regulations are in place that are consistent with the comprehensive plan; and

WHEREAS, RCW 35A.63.220 relating to Code cities like Port Townsend and 36.70A.390, a section of the Growth Management Act (Ch. 36.70), authorize the City to adopt interim regulations to preserve the status quo while new plans or regulations are considered and prepared; and

WHEREAS, there are no new or pending applications that would be affected by this ordinance,

NOW, THEREFORE, the City Council of the City of Port Townsend ordains as follows:

SECTION 1. Chapter 17, Zoning, of the Port Townsend Municipal Code is hereby amended to add a new Section 17.05 , Formula Retail and Formula Restaurants, and shall read as follows:

Section 17.05 , Formula Retail and Formula Restaurants

These regulations apply in addition to the regulations set forth elsewhere in Title 17. Where there is a conflict in regulations in this Chapter and other Chapters of Title 17, the provisions of this Chapter shall apply.

1. Definitions:

A. "Formula Retail" means a type of retail sales activity or retail sales establishment, including restaurant which, along with ten or more other retail sales establishments, maintains two or more of the following features: a standardized array of merchandise, a standardized façade, a standardized décor and color scheme, a uniform apparel, standardized signage, a trademark or service mark.

(1) Standardized array of merchandise shall be defined as 50% or more of in-stock merchandise from a single distributor bearing uniform markings.

(2) Trademark shall be defined as a word, phrase, symbol or design, or a combination or words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others.

(3) Servicemark shall be defined as word, phrase, symbol or design, or a combination or words, phrases, symbols or designs that identifies and distinguishes the source of a service from one party from those of others.

(4) Décor shall be defined as the style of interior finishings, which may include but is not limited to, style of furniture, wallcoverings or permanent fixtures.

(5) Color Scheme shall be defined as selection of colors used throughout, such as on the furnishings, permanent fixtures, and wallcoverings, or as used on the façade.

(6) Façade shall be defined as the face or front of a building, including awnings, looking onto a street or an open space.

(7) Uniform Apparel shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hat, and pins (other than name tags) as well as standardized colors of clothing.

(8) Signage shall be defined as business sign pursuant to Section 602.3 of the Planning Code.

(9) "Standardized" does not mean identical, but means "substantially the same."

B. Full service restaurant

"Full service restaurant" means any establishment wherein food is regularly prepared for and to customers primarily for consumption on the premises and whose design or operation includes three or more of the following characteristics:
(1) The establishment is not specifically designed to accommodate high customer volume.

(2) Facilities, such as tables, seats and benches, for on-premises consumption of food are provided and are sufficient for the volume of food sold and customers services.

(3) Customers predominately order and receive food while seated in tables on the premises.

(4) Food is paid for after consumption on site.

(5) Food is not typically packaged for transport off-site.

2. The purpose of the standards in the Formula Retail chapter is to regulate the location and operation of formula retail establishments in order to maintain the City's unique Victorian Seaport and surrounding rural character, the diversity and vitality of the community's commercial districts, and the quality of life of Port Townsend residents.

3. The following regulations shall apply to all formula retail establishments and shall be used by all city departments and commissions in reviewing an application or amendment for a business license, a building permit application, a conditional use permit, an application for occupancy or a design review concerning all formula retail establishments:

A. A formula retail establishment may be located only in the C-II General Commercial District.

B. A formula retail establishment (except for grocery stores, banks, saving and loans, full service restaurants and theaters) shall not have a street level frontage of greater than 50 linear feet on any street or have its retail space occupy more than two stories.

C. A formula retail establishment may not exceed 3,000 square feet.

4. Formula restaurants: the number, location and operation of formula restaurants shall be regulated in order to maintain the City's unique character, the vitality of the C-II commercial district, and the quality of life of Port Townsend residents.

5. Formula restaurants shall fully comply with regulations pertaining to formula retail establishments as well as the additional regulations that follow.

6. The regulations in this section shall be used by all city departments and advisory bodies in reviewing an application or amendment for a business license, a building permit application, a conditional use permit, an application for occupancy or a design review concerning a formula restaurant.

A. A formula restaurant may only be established on a site after obtaining a conditional use permit from the city for the operation of that use on said site. Similarly, a formula restaurant may only relocate or physically expand in a manner to increase its seating capacity after obtaining a conditional use permit.

B. Change of ownership shall not, by itself, require obtaining a conditional use permit.

C. An existing formula restaurant may only be physically expanded in a manner to increase seating capacity:

D. Establishment or Relocation. A formula restaurant may only be established or relocated:

1. On a site that is not located on a street corner except such a restaurant may be located on a street corner where the immediate prior use was a formula restaurant.

2. Where it would not result in two or more formula retail establishments of any type operating on a parcel, lot or tract on which all or a portion of a building is located (i.e., two or more formula retail business entities requiring separate business licenses, or displaying in a manner visible from public property separate business trademarks, logos, service marks or other mutually identifying names or symbols, for the daily or weekly conducting of business on the same site).

3. Any formula restaurant may not exceed 3000 square feet and must be in a building that is shared with at least one other business that is not a formula retail establishment of any type. No drive-through facilities are allowed.

4. Establishing or relocating the formula restaurant will not increase the intensity of use on the site to a level that will adversely impact land uses in the area, pedestrian or motor vehicle traffic or the public welfare.

7. In the event an applicant for any business license, a building permit application, a conditional use permit, an application for occupancy or a design review concerning a formula retail establishment believes that, due to extraordinary circumstances and unique attributes of the site, it is impracticable or impossible to comply with the provisions of this ordinance, the applicant may apply for a variance. The variance application shall be processed according to the procedures for Type III land use decisions established in Chapter 20.01 PTMC, Land Development Administrative Procedures.

SECTION 2. Exemption. This ordinance shall not apply to vested permit applications.

SECTION 3. Public Hearing on Ordinance. Pursuant to RCW 36.70A.390, the City County shall hold a public hearing on this ordinance within 60 days of the passage of this ordinance. At or immediately after the public hearing, the City Council shall adopt findings of fact on the subject of these interim regulations either justifying their continued effect, or cancel the regulations, or take other appropriate action

SECTION 4. Severability. If any sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase or work of this ordinance.

SECTION 5. Effective Date. This Ordinance shall take effect immediately after passage if adopted by a majority plus one of the City Council. Otherwise this ordinance shall take effect and be in force five days after the date of its publication in the manner provided by law. Publication of this ordinance shall be by summary thereof consisting of the title.

Adopted by the City Council of the City of Port Townsend, Washington, at a regular meeting thereof, held this eighteenth day of April, 2005.

Catharine Robinson

Catharine Robinson, Mayor

Attest:

Sheila Spears, for

Pamela Kolacy, CMC, City Clerk

Approved as to Form:

John P. Watts, City Attorney

Planning and Zoning Commission Report

Date: August 17, 2021
To: Planning and Zoning Commission
From:
Subject: Planning File 18-21 - Consideration of Planning and Zoning Commission by-laws

REQUEST	Review and update Planning & Zoning Commission By-laws
APPLICANT	NA
OWNER	NA
LOCATION	NA
ZONE	NA
SURROUNDING LAND USES	NA
LOT SIZE	NA

ACTION ITEMS

Consideration of Planning and Zoning Commission by-laws.

BACKGROUND

Attached are a copy of the Commission's current by-laws. The document needs to be updated to ensure that they accurately reflect current processes and procedures.

PROJECT SUMMARY

NA

REVIEW CRITERIA AND STAFF ANALYSIS

NA

REVIEWING AGENCY COMMENTS

NA

ACTION ITEMS & STAFF RECOMMENDATIONS

Staff requests that the Planning & Zoning Commission adopt the updated bylaws with changes suggested at the previous meeting.

Suggested Findings:
NA

RULES, REGULATIONS AND PROCEDURES

GLENWOOD SPRINGS PLANNING AND ZONING COMMISSION

The Glenwood Springs Planning and Zoning Commission ("Commission") was created by ordinance pursuant to the authority provided in the Home Rule Charter (Section 7.1). Section 020.020.030 (L) sets forth the powers and duties of this Commission. The purpose of these Rules, Regulations and Procedures ("Rules") is to provide an orderly set of rules and procedures for the Commission to carry out the functions set forth in the Municipal Code.

I. MEETINGS.

A. Time Limit. Meetings shall not continue past 11:00 p.m. No agenda item shall be taken up after 10:00 p.m., unless approved by a unanimous vote of the Commission. When the agenda is being prepared, the Community Development Director shall consult with the Chairperson to ensure that the agenda conforms to this rule.

B. Regular Meetings. The Commission shall meet once a month on the Tuesday which is three weeks before the second City Council meeting of the following month. Meetings shall be held in the City Council Chambers unless the Commission deems it necessary to use other facilities. Meetings shall commence at 6:00 p.m. In the event that the proposed number of agenda items appears to require two meetings to complete such business, two meetings shall be scheduled at the discretion of the Community Development Director, upon consultation with the Chairperson and such other members of the Commission necessary to ensure a quorum at such additional meeting.

C. Continuation of Regular Meeting. In the event that an agenda item scheduled for the regular meeting has not been taken up due to the provisions of I.(A) above, the Commission shall have the option of meeting on the following evening commencing at 6:00 p.m. or continuing such agenda item until a regular meeting or at a special meeting. Agenda items may be continued as addressed in the Glenwood Springs Municipal Code.

D. Work Sessions. The Commission may meet once a month for a work session. Work sessions shall generally be held one week before the regular meeting date, unless another date has been designated by the staff based on room availability. All work sessions shall be held in the City Council Chambers unless the Commission deems it necessary to use other facilities. Work sessions shall commence at 6:30 p.m. and shall not extend past 8:30 p.m. unless approved by a unanimous vote of the Commission.

E. Special Meetings. Special meetings are discouraged. A special meeting shall be held only in those circumstances in which there is a matter of pressing business which requires action by the Commission prior to the next regular meeting. Prior to calling a special meeting, the Chairperson shall consult with the Community Development Director and such other members of the Commission which are necessary to form a quorum. The decision to call a special meeting shall be at the sole discretion of the Chairperson. Such meeting shall be called upon twenty-four hours notice.

F. Notice. In the event that a special meeting is called, all notices required by the Municipal Code shall be followed. In the event that a continued regular meeting is held, all notices published in compliance with the Municipal Code shall be deemed automatically continued until the date of the continued regular meeting.

II MEMBERSHIP/OFFICERS.

A. Election of Officers.

1. Chairperson. The Commission, at its regular meeting in February shall elect a Chairperson who shall serve in such capacity for a twelve month period. In the event a Chairperson vacates the Commission, for whatever reason, the Vice-Chairperson shall act in the role of Chairperson to serve out the Chairperson's term.

2. Vice-Chairperson. The Commission, at its regular meeting in February, shall elect a Vice-Chairperson who shall serve in such capacity for a twelve month period. In the event a Vice-Chairperson vacates the Commission, for whatever reason, the Commission shall elect a Vice-Chairperson at its next regular meeting.

3. Election of Chairperson in the event of absence of the Chairperson and Vice-Chairperson. In the event the Chairperson and Vice-Chairperson are both absent from any meeting, any members of the Commission present shall vote to elect a Chairperson to preside over such meeting.

4. Recording Secretary. The Recording Secretary shall be a non-elected position and shall be a member of the Community Development Department, or shall be designated by the Community Development Director.

B. Duties of Officers. The duties and powers of the officers of the Commission shall be as follows:

1. Chairperson.

   (a) Preside at all meeting of the Commission.

   (b) Call special meetings in conformance with Rules I.(F).

   (c) Sign all documents of the Commission.

   (d) Oversee compliance with all rules set forth herein and Municipal Code provisions pertinent to the actions of the Commission.

2. Vice-Chairperson. During the absence, disability, or disqualification of the Chairperson, the Vice-Chairperson shall exercise or perform all duties and be subject to all the responsibility of the Chairperson.

3. Recording Secretary.

   (a) Keep the minutes of all meetings of the Commission by recording such meetings by cassette tape.

   (b) Prepare summaries of such meetings.

   (c) Arrange for a verbatim transcription upon written request. A fee for the actual cost of such verbatim transcription may be charged.

   (d) Prepare the agenda upon consultation with the Chairperson and Community Development Director.

   (e) Act as the official custodian of all Commission records.

   (f) Publish notices of appeals and City actions as required by the Municipal Code.

III QUORUM.

A quorum shall be met if at least four (4) members of the Commission are present for any meeting. The Commission shall not act on any matter unless there is at least a quorum of its members present.

IV ALTERNATE.

A Commissioner appointed as an alternate shall be authorized to participate in a meeting when substituting for an absent member. An alternate may attend any meeting of the Commission. An alternate shall not be authorized to participate in a meeting when not substituting for an absent member, except in cases where the alternate is speaking as a citizen on his own behalf and not as a representative of the Commission. Alternate members shall be required to participate in work sessions.

V. DEADLINE FOR AGENDA.

The deadline for filing applications or other items on an agenda shall be twenty-one (21) days prior to the public hearing, unless otherwise provided by the Municipal Code. Requests for continuances of any application for a particular agenda shall be filed with the Community Development Director no later than fifteen (15) days preceding the meeting so that the printed agenda will reflect the requested continuance. In the event a request for continuance is not made in a timely manner in strict compliance with these Rules, an application must be presented at the meeting.

VI CORRESPONDENCE/APPLICATIONS.

All correspondence or any application shall be addressed to the "Planning and Zoning Commission, Attention: Chairperson," and shall be filed with the Recording Secretary.

VII PROCEDURE FOR PUBLIC HEARINGS.

The following procedure shall normally be followed. It may be re-arranged by the Chairperson upon consultation with the Community Development Director, if necessary, for the expeditious conduct of business:

A. Community Development Director, or designated representative, shall present the staff report and make recommendations.

B. Commission members may ask questions regarding the staff presentation, report and recommendations.

C. Applicant or applicant's representative shall make their presentation.

D. Commission members may ask questions pertaining to the applicant's presentation.

E. Comments shall be taken from the public.

F. Applicant makes rebuttal of any points not previously covered. Public may respond to rebuttal only. The Chairperson shall limit the time for applicant and public to make such rebuttal.

G. The public hearing is then closed. No further statements may be made by anyone who is not a Commissioner, subject to clarification questions directed to staff by the Commissioners (see "J" below).

H. A Commissioner makes a motion on the application per the actions allowed in the Glenwood Springs Municipal Code.

I. Discussion among Commissioners on the findings for the public hearing.

J. Discussion among Commissioners on the motion. Commissioners may ask clarification questions of staff. No one from the public is allowed to make further statements or provide additional evidence.

K. The Chairperson shall call for the vote when discussion ends.

L. A vote is then taken.

M. A majority vote is necessary to carry any motion.

VIII <u>CONFLICT OF INTEREST.</u>

Any member who shall feel that he or she has a conflict of interest on any matter that is on the agenda shall voluntarily excuse himself or herself, temporarily vacate the Commission seat, and refrain from discussing and voting on said matter. Commissioners who have business or financial interest that would stand to profit from a decision should absent themselves from the hearing.

IX <u>RULES TO ENSURE FAIRNESS FOR PUBLIC HEARINGS.</u>

The Commission intends to provide the following to anyone involved in a public hearing before the Commission:

A. adequate notice;

B. An impartial tribunal;

C. an opportunity to present, hear and rebut evidence; and

D. A decision based upon the law and upon evidence presented at the hearing.

In order to insure that these precepts are followed:

1. Commissioners shall never discuss any item with anyone who is to come before the Commission at a public hearing; however, the Commission is authorized to make a site visit with staff prior to the hearing. The site visit is subject to open meeting laws. In the event a site visit is taken, the Chairperson shall report on the record of what the Commission saw and did on the site visit.

2. Commissioners shall never comment on the pros and cons of an agenda item until all evidence and testimony have been presented and the public hearing is closed;

3. In the event many people wish to speak on a particular item, the Chairperson shall ration speaking time so that all may be heard in a timely manner;

4. Speakers who represent groups present at the hearing shall be given more time than individuals expressing their own views;

5. Individuals who persist in interrupting the proceedings shall be asked to leave the hearing room. A member of the Police Department shall be requested to remove anyone persisting in unruly or disruptive behavior;

6. Due to the tape recording of the proceedings, all Commissioners and speakers shall speak clearly and directly into the microphones to ensure a clear record; all speakers shall identify themselves and state their home or business address and the group they represent, if any.

7. Individuals wishing to be part of the record must be at the podium or at a microphone prior to speaking;

8. Written materials offered to the Commission shall be handed to the Recording Secretary. The materials shall then be circulated to the Commissioners;

9. No cross-examination of a witness or speaker shall be allowed. In the event a person wishes to ask a question of a witness or speaker, such question shall be addressed to the Chairperson, who may then address such witness or speaker with the question;

10. The strict rules of evidence shall not be followed;

11. No speaker shall be subject to harassment or embarrassment during the hearing;

12. The Chairperson shall determine whether offered testimony is material or relevent to the hearing;

13. The Commission shall give offered evidence whatever weight is deemed worthy by the Commission;

14. Commissioners shall base their vote only upon evidence presented during the hearing;

15. Commissioners serving as alternates who are not filling in for another absent Commissioner shall not ask questions, comment or participate in a public hearing; unless the alternate member clearly states they are speaking as a citizen and not as a representative of the Planning Commission.

16. Commissioners shall not vote on minutes of a meeting at which they were not present;

17. A Commissioner who has not participated in a hearing on an item that is continued, may not participate in discussion of the item at a future meeting unless the Commissioner has listened to the audio recording of the item from the original meeting and also has fully reviewed all written evidence presented at the previous meeting on that agenda item.

18. Commissioners and alternate members that wish to speak on items taken up by the Planning Commission, City Council or other City Boards and Commissions, shall identify himself/herself as a member of the Planning Commission and shall preface their remarks by stating they are speaking on their own behalf, not as a representative of the Planning Commission as a whole.

X. AMENDMENT OF RULES.

These rules may be amended from time to time upon the majority vote of the full Commission.

XI AVAILABILITY OF RULES.

The Recording Secretary shall see to it that anyone who requests a copy of these Rules shall have them provided at the cost of copying said Rules.

RULES, REGULATIONS AND PROCEDURES

GLENWOOD SPRINGS PLANNING AND ZONING COMMISSION

The Glenwood Springs Planning and Zoning Commission (“Commission”) was created by ordinance pursuant to the authority provided in the home rule charter section 7.1 section 020. 020. 030 parentheses LM parentheses set forth the power and duties of this Commission the purpose of these rules, regulations and procedures in parentheses rules is to provide an orderly set of rules and procedures for the Commission to carry out the function set forth in the municipal code.

I. MEETINGS.

A. **Time Limit.** Meeting shall not continue past 11:00 PM. No agenda item shall be taken up after 10:00 PM., unless approved by the unanimous vote of the Commission~~ when the agenda is being prepared, the Community Development Director shall consult with the Chairperson to ensure that the agenda conforms to this rule~~.

B. **Regular Meetings.** The Commission shall meet once a month on the fourth Tuesday~~ which is 3 weeks before the second City Council meeting of the following month~~. Meeting shall be held in the City Council Chambers unless the Commission deems it necessary to use other facilities. Meetings shall commence at 6:00 PM. In the event that the proposed number of agenda items appears to require two meetings to complete such business, two meetings shall be scheduled at the discretion of the Community Development Director, upon ~~constant ~~consultation with the Chairperson and such other members of the Commission necessary to ensure a quorum at such additional meeting.

C. **Continuation of Regular Meeting.** In the event that an agenda item scheduled for the regular meeting has not been taken up due to the provisions of I. (A) above, the Commission shall have the option of ~~meeting on the following evening commencing at 6:00 PM or ~~continuing such agenda item until a regular meeting or ~~at~~ a special meeting. Agenda items maybe continued as addressed in the Glenwood Springs Municipal Code.

D. **Work Sessions.** The Commission may meet once a month for a work session. Work sessions shall generally be held one week before the regular meeting date, unless another date has been designated by the staff based on room availability. All work session shall be in the City Council chambers unless the Commission deems it necessary to use other facilities. Work session shall commence a 6:0~~3~~0 PM and shall not extend past 8:0~~3~~0 PM unless approved by a unanimous vote of the Commission.

E. **Special Meetings.** Special meetings are discouraged. A special meeting shall be held only in those circumstances in which there is a matter of pressing business which requires action by the Commission part to the next regular meeting prior to calling a special meeting the chairperson shall consult with the community development director and such other members of the Commission which are necessary to form a quorum. The decision to call a special meeting shall be at the sole discretion of the chairperson. Such meeting shall be called ~~upon~~ with no less than twenty-four hours notice.

F. **Notice.** In the event that a special meeting is called, all notices required by the municipal code shall be followed. In the event that a continued regular meeting is held, all notices published in compliance with the Municipal Code shall be deemed automatically continued until the date of the continued regular meeting.

II MEMBERSHIP/OFFICERS

A. Election of Officers.

1. **Chairperson.** The Commission, at its regular meeting in February shall elect a Chairperson who shall serve in such capacity for a twelve month period. In the event of a Chairperson vacates the Commission, for whatever reason, the Vice-Chairperson shall act in the role of Chairperson to serve out the Chairperson's term.

2. **Vice-Chairperson.** The Commission, at its regular meeting in February, shall elect the Vice-Chairperson who shall serve in such capacity for a twelve month period. In the event a Vice-Chairperson vacates the Commission, for whatever reason, the Commission shall elect a Vice-Chairperson at its next regular meeting.

3. **Election of chairperson in the event of absence of the chairperson and vice chairperson.** In the event the Chairperson and Vice-Chairperson are both absent from any meeting any members of the Commission present shall vote to elect a Chairperson to preside over such meeting.

4. **Recording secretary.** The Recording Secretary shall be a non-elected position and shall be a member of the Community Development Department or shall be designated by the Community Development Director.

B. **Duties of Officers.** The duties and powers of the officers of the Commission shall be as follows:

1. **Chairperson.**

(a) Preside at all meetings of the Commission.
(b) Call special meetings in conformance with Rules I. (~~F~~E).

(c) Sign all documents of the Commission.

(d) Oversee compliance with ~~old north herein~~the Municipal Code provisions pertinent to the actions of the Commission.

2. **Vice-Chairperson.** During the absence, disability, or disqualification of the chairperson, the Vice-Chairperson shall exercise or perform all duties and be subject to all responsibility of the Chairperson.

3. **Recording Secretary.**

(a) Keep the minutes of all meetings of the Commission ~~by~~ and recording of such meetings per the Colorado retention schedule ~~by cassette tape~~.

(b) Prepare summaries of such meetings.

(c) Arrange for a ~~verb 8:00 AM~~verbal transcription upon written request, if the recording for the meeting has not been purged per the Colorado retention schedule. A fee for the actual cost of such verbatim transcription may be charged.

(d) Prepare the agenda upon consultation with the Chairperson and Community Development Director.

(e) Act as the official custodian of all Commission records.

(f) Publish notices of appeals in city actions as required by the Municipal Code.

III **QUORUM**

The quorum shall be met if at least four (4) members of the Commission are present for any meeting. The Commission shall not act on any matter unless there is at least a quorum of its members present.

IV **Alternate.**

A Commissioner appointed as an alternate shall be authorized to participate in a meeting when substituting for an absent member. An alternate may attend any meeting of the Commission. An alternate shall not be authorized to participate in a meeting when not substituting for an absent member, except in cases where the alternate is speaking as a citizen on his own behalf and not as a representative of the Commission. Alternate member shall be ~~required~~ allowed to participate in work sessions.

V **DEADLINE FOR AGENDA.**

The deadline for filling applications or other items on an agenda shall be eight weeks ~~twenty-one (21) days~~ prior to the public hearing, unless otherwise provided by the Municipal Code. Requests for continuance of any application for a particular agenda shall be filed with the Community Development Director as soon as is practicable with the goal of having those changes reflected on ~~no later than fifteen (15) days preceding the meeting so that~~ the printed agenda ~~will reflect the requested continuance~~. In the event a request for continuance is not made in a timely manner in strict compliance with these Rules, an application for continuance may~~ust~~ be presented by the applicant at the meeting.

VI **CORRESPONDENCE/APPLICATIONS.**

All correspondence or any application shall be provided to the Planning Commission ~~addressed to the "Planning and Zoning Commission, Attention: Chairperson" and shall be filed with the Recording Secretary~~.

VII **PROCEDURE FOR PUBLIC HEARINGS.**

The following procedure shall normally be followed. It may be re-arranged by the Chairperson upon consultation with the Community Development Director, if necessary, for the expeditious conduct of business.

A. Community Development Director, or designated representative, shall present the staff report and make recommendations.

B. Commission members may ask questions regarding the staff presentation, report and recommendations.

C. Applicant or applicant's representative shall make their presentation.

D. Commission members may ask questions pertaining to the applicant's presentation.

E. Comments shall be taken from the public.

F. Applicant makes rebuttal of any points not previously covered. Public may respond to rebuttal only. The Chairperson shall limit the time for applicant in public to make such rebuttal.

G. The public hearing is then closed. North no further statements may be made by anyone who is not a Commissioner, subject to clarification questions directed to staff by the commissioners (see “J” below).

H. A Commissioner makes a motion on the application per the actions allowed in the Glenwood Springs Municipal Code.

I. Discussion among Commissioners on the findings for the public hearing.

J. Discussion among Commissioners on the motion. Commissioners may ask clarification questions of staff. No one from the public is allowed to make further statements or provide additional evidence.

K. The Chairperson shall call for the vote when discussion ends.

L. A vote is then taken.

M. A majority vote is necessary to carry any motion.

VIII **<u>CONFLICT OF INTEREST.</u>**

Any member who shall feel that he or she has a conflict of interest on any matter that is on the agenda shall voluntarily excuse himself or herself, temporarily vacate the Commission seat, and refrain from discussing and voting on said matter. Commissioners who have business or financial interest that would stand to profit from a decision should absent themselves from the hearing.

IX **<u>RULES TO ENSURE FAIRNESS FOR PUBLIC HEARINGS.</u>**

The Commission intends to provide the following to anyone involved in a public hearing before the Commission:

A. Adequate notice;

B. An impartial tribunal;

C. An opportunity to present, hear and rebut evidence; and

D. A decision based upon the law and upon evidence presented at the hearing.

In Order to e~~i~~nsure that these precepts are followed:

1. Commissioners shall never discuss any item with anyone who is to come before the Commission at a public hearing; However, the Commission is authorized to make a site visit with staff prior to the hearing. The site visit is subject to open meeting laws. In the event the site visit is taken, the Chairperson shall report on the record on the record of what the Commission saw and did on the site visit.

2. Commissioner shall never comment on the pros and cons of an agenda item until all evidence and testimony have been presented and the public hearing is closed;

3. In the event many people wish to speak on a particular item, the chairperson shall ration speaking time so that all may be heard in a timely matter.

4. Speakers who represent groups at the hearing shall be given more time than individuals expressing their own views;

5. Individuals who persist in interrupting the proceedings shall be asked to leave the hearing room a member of the Police Department shall be requested to remove anyone persisting in unruly or disruptive behavior;

6. Due to the tape recording of the proceedings, all Commissioners and speaker shall speak clearly and directly into the microphones to ensure at clear record; All speakers shall identify themselves and state their home or business address and the group they represent, if any.

7. Individuals wishing to be part of the record must be at the podium or at the microphone prior to speaking;

8. Written materials offer to the Commission shall be handed to the recording secretary. The material shall then be circulated to the Commissioners;

9. No cross examination of a witness or speaker shall be allowed. In the event a person wishes to ask a question of a witness or speaker, such questions shall be addressed to the Chairperson, who may then address such witness or speaker with the question;

10. The strict rules of evidence shall not be followed;

11. No Speaker shall be subject to harassment or embarrassment during the hearing;

12. The Chairperson shall determine whether offered testimony is material or relevant to the hearing.

13. The Commissioners shall give offered evidence whatever weight is deemed worthy by the Commission;

14. Commissioners shall base their vote only upon evidence presented during the hearing;

15. Commissioners serving as alternates who are not filling in for another absent Commissioner shall not ask questions, comment or participate in a public hearing; unless the alternate member clearly states they are speaking as a citizen and not as a representative of the Planning Commission.

16. Commissioners shall not vote on minutes of a meeting at which they were not present;

17. A Commissioner who has not participated in a hearing on an item that is continued, may not participate in discussion of the item at a future meeting unless the Commissioner has listened to the audio recording of the item from the original meeting and also has fully reviewed all written evidence presented at the previous meeting on that agenda item.

18. Commissioners and alternate members that wish to speak on items taken up by the Planning Commission, City Council or other City Boards and Commissions, shall identify himself/herself as a member of the Planning Commission and shall preface their remarks by stating they are speaking on their own behalf, not as a representative of the Planning Commission as a whole.

X **AMENDMENT OF RULES.**

These rules may be amended from time to time upon the majority vote of the full Commission.

XI **AVAILABILITY OF RULES.**

The Recording Secretary shall see to whether anyone who requests a copy of these rules shall have them provided at the cost of copying said rules.