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LAND USE ORDINANCE COULD BROADLY IMPACT WHERE 'FORMULA RETAIL' BUSINESSES CAN OPERATE

By Chase Scheinbaum
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In Malibu, a city where multimillion-dollar beachfront homes rub shoulders with a mishmash of mom-and-pop eateries, galleries and quaint inns, officials are weighing whether to adopt the type of standard playing out in a small but growing number of municipalities across the state struggling to hold onto their unique charm - a ban or limit on so-called "formula retail," or chain stores with familiar names such as Levi's, CVS or Starbucks.

If the beachside community does adopt the restrictions, it could become something else, too: a battleground for what attorneys say are unsettled questions about the constitutionality of such laws.

"It raises issues pertaining to the dormant commerce clause and whether there is a legitimate purpose behind these ordinances that are discriminatory against national chains," said David P. Waite of Cox Castle & Nicholson LLP. Waite represents the owners of retail space in Malibu in the controversy that has touched off a divisive debate with potentially statewide implications.

A handful of other municipalities across California, including San Francisco, Coronado, Carmel-by-the-Sea and Calistoga, have adopted limits or prohibitions on formula retailers or restaurants. Limiting chain stores, proponents of the measures say, is a means to preserve the artsy, historic or Western charm of cities. But favoring some types of commerce over others could lead to an inadvertent violation of businesses' right to operate, some legal observers say.



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Cox Castle & Nicholson attorney David Waite says bans on so-called "formula retail" stores unfairly discriminate against national chains.

"The problem with formula retail ordinances is they clearly apply to national chains, so you have the claim that all you're doing is protecting local businesses from national competition," said Loyola Law School professor Daniel P. Selmi, whose specialties include land use and environmental law.

California cities first began adopting formula retail bans in the 1980s, and they have withstood the few challenges they've encountered over the years. The state Supreme Court has ruled in favor of one ban, as has an appeals court in a strikingly on-point - but unpublished - opinion. Both lawsuits made constitutional claims.

Attorneys say the relative dearth of caselaw has left an expansive gray area. "This remains an open question," said Michael G. Colantuono, a municipal law attorney with Colantuono & Levin PC.

Malibu could host a showdown proving to be the most serious legal test yet. "If ever there were a marketplace where there was enough money at stake, I would imagine it's Malibu," Colantuono said.

Last year, Malibu officials considered various versions of an ordinance limiting formula retailers in the city's civic center area, off of Pacific Coast Highway and Cross Creek Road.

"There was a growing worry that the remaining commercial areas were going to be taken over by national retailers," said Christi Hogin, Malibu's city attorney and a partner with Manhattan Beach-based Jenkins & Hogin LLP.

Next month, the newest version of the proposal will go before the city council, which is "likely" to pass it, Hogin said. The ordinance will block new formula retailers of more than 2,500 square feet and limit to 40 percent the amount of formula retail, Hogin said.

But city officials were thrown a curveball in late February. A group led by film director Rob Reiner and his wife, Michelle, submitted their own formula retail statute, which they want Malibu's 13,000 residents to pass in November. The "Your Malibu, Your Decision Act" would limit formula retail to 30 percent and require a citywide vote for retail development of more than 20,000 square feet. Its aim is "to preserve our community's unique small-town, rural character," according to the act.

Most ordinances rest on the intent to preserve the city's local character, as the ballot initiative does. This is not exactly the case, however, with the city council's proposals.

Hogin said that while officials want to retain Malibu's "rural-residential, beach-town feeling," the city's not trying to preserve an "existing characteristic."

"We're trying to prevent a future characteristic. This is not a historic district; it's something I think is more universal to small cities in California," she said.

Without drawing a line, Malibu's civic center, now a mix of formula retail businesses like J. Crew, and Ralph Lauren as well as local merchants, will end up looking like so many other commercial areas, she said. "We all know how this story ends unregulated."

It's this distinction that Waite finds particularly novel and troubling. "It's bleeding into retail environments that you wouldn't normally expect would be worthy of some preservation objective," he said.

Hogin said city officials have taken pains to accept public input and that although it would prefer to avoid litigation, "Malibu has never shied from a land use fight."

Legal definitions of formula retailers vary but often delineate them as having standardized merchandise, signage or apparel in 10 or more stores across the U.S. or world.

Many municipal lawyers, such as Kate H. Stacy, San Francisco deputy city attorney, view formula retail bans as well within broad police powers granted to municipalities. San Francisco's laws prohibit formula retailers in areas such as North Beach, Hayes Valley, Cole Valley and Chinatown unless they obtain special permits.

"It's a typical land use authority to regulate uses that have different effects on neighborhoods and neighborhood characteristics," Stacy said. "A government can also think about aesthetics: What do you want your neighborhood to look like? What are the character-defining aspects of a neighborhood you want to protect?"

The nonprofit lobbying group League of California Cities articulated a municipality's zoning right in an amicus brief to the Supreme Court this way: "The equal protection clause does not allow a court to sit as a 'super zoning' board to address the complaints of 'every disappointed property owner.'"

That suit challenged a Hanford ordinance prohibiting furniture sales in a certain district to insulate furniture shops in the city's downtown area, which has many furniture stores. The justices upheld the statute's constitutionality. *Hernandez v. Hanford*, S143287 Cal.5d (Cal. 2006).

Cities can avoid hot water by ensuring that ordinances further a city's planning goals, said Selmi. "That shows a nondiscriminatory purpose," he said.

That was a key feature of an unpublished 2003 appeals court ruling in a suit alleging that a formula retail ban in Coronado violated the federal Constitution's commerce clause and state and federal equal protection clauses.

Upholding the statute, the justices wrote that the ordinance "does not impose different regulations on interstate as opposed to intrastate businesses, nor does it distinguish between those businesses that are locally owned and those that are owned by out-of-state interests."

Coronado, the court added later in the 12-page opinion, "has a legitimate interest in seeking to maintain the village ambiance of its commercial district." *Coronadians Organized for Retail Enhancement v. Coronado*, D040293 (Cal. App. 4th Dist., filed June 13, 2002).

In a letter dated Sept. 23 and sent to Malibu city officials, Waite described why he believes the *Coronado* decision does not apply. Coronado's retail space is smaller and less developed than Malibu's, but "most importantly, the record before the Coronado court contained very little evidence of the discriminatory impact of Coronado's ordinance," he wrote. "In contrast, the record concerning Malibu's ordinance is replete with documentation, studies, testimony and analysis of the discriminatory and burdensome nature of the ordinance."

In a letter of her own to city officials sent in October 2012, much earlier in the city's drafting process, Hogin acknowledged potential pitfalls of earlier proposals. In it, she wrote that "the land use regulation may slop over the line between promoting community character and regulating secondary impacts of business uses and affecting specific businesses and the local economy."

But later, clarifying for her lay audience their legal powers, she added that "the city may enact regulations that serve municipal purpose as long as those regulations treat similarly situated businesses equally ... and assure that property owners may make economically viable use of their property."

Attorneys said that caution with the language of ordinances like those Malibu is considering is paramount. "If the city does its homework and carefully crafts it to be consistent with its general plan and its goals and how those goals link with its planning, it has a high possibility of being upheld," Selmi said.

Patrick Whitnell, the League of California Cities' general counsel, agreed that the wording of a formula retail ban or limitation would be critical. "It really depends on the ordinance, the way it's drafted, the reason the city is adopting the ordinance."

Colantuono sees a viable possibility for a challenge but believes Waite faces significant hurdles. "His client has a political hill to climb, and he has a legal hill to climb," he said.

Whatever happens in Malibu, Waite said, if retail ordinances continue pushing into uncharted territory, litigation is inevitable. "There's no question that when the ordinance becomes too restrictive to property owners, it will give rise to disputes," he said. "I think you will see more litigation of this kind going on."

For his part, Selmi believes there is a good reason why such lawsuits have been scarce so far: "They're hard to win," he said.